

EU Rights of Northern Ireland Born Irish Citizens: Case of the European Health Insurance Card

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Note: This analysis must not be treated as formal legal advice, not least because its authors are not insured to give such advice. Anyone seeking such advice should consult a solicitor.

Summary

Recent changes to the 'settled status' scheme challenge the Belfast/Good Friday Agreement provision that individuals who are NI born may choose Irish citizenship and the rights that go with it

- The rights of Irish citizens include those under EU law
- EU law rights include access to needs-arising, emergency health care during a temporary stay in another EU Member State, as if they were a patient within that Member States' health system
- But entitlement to those rights is based on *ordinary residence*, not on citizenship
- The argument that loss of EHIC rights is a breach of the Belfast/Good Friday Agreement is not a good argument

1. Introduction and Overview

In our discussions with a membership organisation (MO) a number of questions/topics were set out where they would welcome analysis from the Health Governance after Brexit (HGaB) team. One question/topic was proposed changes to European Union (EU) rights of its members who are Northern Ireland (NI) born and resident Irish citizens after the withdrawal of the United Kingdom (UK) from the EU (Brexit). The MO's broad concern arose in response to changes that came in after the law bringing in the 'settled status' scheme came into effect. This scheme will permit eligible EU/European Economic Area (EEA)¹ citizens to remain lawfully resident in the UK post-Brexit. The 'settled status' scheme is now intended to exclude dual EU/British citizens from being eligible to apply for 'settled status'. The latter is presumably because there is no need for a British citizen to also have 'settled status' in order to remain lawfully within the UK post-Brexit. The legal text bringing this change into effect appears to classify those born in NI as British, irrespective of their choice to identify as solely Irish, or Irish and British, a right that is provided for by the Belfast/Good Friday Agreement (B/GFA).² The MO's concern is that this change will effectively erase, not only the chosen status of NI born and resident Irish citizens, but also and in turn, their status as EU citizens and the related rights.

Consistent with the remit of HGaB as a research project on health governance funded and supported by the Economic and Social Research Council, this briefing note comprises a detailed response to the *health* aspects of this much broader question/topic.³ It is important to note that the extraordinary fluidity of contemporary politics makes it difficult to be certain about future legal positions. Instead of dealing in the range of possible hypotheticals, this briefing note is focused on whether NI born and resident Irish citizens will be able to rely on European Health Insurance Card (EHIC)-based rights post Brexit.

As we understand it, the MO is arguing that EHIC-based rights are affected by those recent changes in the 'settled status' scheme, and that this is contrary to the B/GFA. Loss of EHIC-based rights is one element of an argument to the effect that the reclassification of those born in NI as simply British, its erasure of their chosen status as Irish citizens, and in turn EU citizens with related rights, is unlawful. To investigate the robustness of that argument, in the following we first explain the recent legal changes that have prompted the MO's concern. Subsequently, we turn to outline the EHIC and explain that the aspect of the MO's case relating to it should be removed, as it is *not a good argument*. We explain the implications of UK withdrawal from the EU for any entitlement to EHIC to those ordinarily resident in NI (or elsewhere in the UK) under the two most likely Brexit scenarios i.e. under the Withdrawal Agreement (WA) or 'No Deal'.

¹ The EEA comprises EU Member States and also the three Members of the European Free Trade Association Iceland, Liechtenstein and Norway. The EEA unites these into the EU's Internal Market. Switzerland also participates in the EU's internal market.

² Article 1(vi) B/GFA.

³ It is not possible to provide a more wide-ranging response as that would take HGaB beyond its remit.

Removing the EHIC aspect of the case will, we submit, *strengthen* the arguments that the MO does have. Put straightforwardly, when it comes to the EHIC, the recent changes to UK domestic law relating to those born in NI but who identify as Irish (or British or both) are something of a red herring. This is because in the UK, including NI, and the Republic of Ireland (RoI) the EHIC is *issued to those who fulfil criteria relating to 'ordinary residence' rather than nationality of the Member States.*

2. Recent Legal Changes that Prompt Concern

The Home Office (HO) recently changed the definition of 'EEA citizens' for the 'settled status' scheme it is implementing to deal with Brexit. The definition applies to specific categories of applications for 'settled status'. The change to the definition takes effect on different dates for each category, with the latest date being 1 May 2019.⁴ The change to the definition will allow eligible EU/EEA citizens to remain lawfully resident in the UK post-Brexit. The new definition refers to an 'EEA citizen' as:

'a person who is a national of: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden or Switzerland, *and who (unless they are a relevant naturalised British citizen) is not also a British citizen.*⁵

The definition applies to any dual British/EU citizens, and that includes dual British/Irish citizens. To be clear, this is because 'a person who is a national of...Ireland...and who (unless they are a relevant naturalised British citizen) is not also a British citizen' is defined as an EEA citizen. The consequence of this definition is that it excludes British/EU citizens from being eligible to apply for 'settled status'. The MO joins a number of other prominent individuals, politicians and organisations, all of whom have queried the compatibility of this change to the 'settled status' scheme with the letter and spirit of the B/GFA. The central concern is that the change would effectively erase, not only the chosen status of NI born and resident Irish citizens, but also and in turn, their status as EU citizens with related rights. The concern around the change is actually far broader, and resonates with wider Brexit-prompted legal challenges, specifically, to the approach taken by the UK to those born in NI in respect of their national self-identification under the B/GFA.⁶ Such challenges will, according to Curtis and others: 'help determine what force the birthright protection in the [B/GFA] has in domestic law, and whether the people of Northern Ireland can hold only Irish citizenship, without having to renounce the British citizenship conferred upon them by the [British Nationality Act 1981]:⁷

There is good cause for concern. The B/GFA is an agreement in international law, but it has not been transposed into UK law. The B/GFA agreement is therefore, constitutionally speaking, not binding within UK law, at least not in the way that EU law is at present.⁸ The B/GFA provides that the Governments of the UK and RoI:

⁴ Under *Statement of Changes in Immigration Rules. Presented to Parliament Pursuant to Section 3(2) of the Immigration Act 1971* (7 March 2019), 2-3, the relevant changes to Appendix EU, which include Annex 1 on the definition of 'EEA citizens', come into effect on different dates for each category of application:

'(i) subject to sub-paragraph (iii), below, at 0700 on 30 March 2019 in relation to applications made under Appendix EU within the UK (at which time the Implementation provisions in the Statement of Changes in Immigration Rules presented to Parliament on 20 December 2018 in HC 1849 shall cease to have effect);

(ii) subject to sub-paragraph (iii), below, at 0700 on 9 April 2019 in relation to applications made under Appendix EU outside the UK; and

(iii) on 1 May 2019 in relation to applications made under Appendix EU which rely on sub-paragraph (a)(v) in condition 3 in the table in paragraph EU11, sub-paragraph (a)(v) in condition 1 in the table in paragraph EU14 or otherwise on the entry for 'person with a Zambrano right to reside' in the table at Annex 1.

However, in relation to the change set out in paragraph EU2 of this statement:

(i) if an application has been made under Appendix EU on or after 1 November 2018 and before 22 December 2018, the application will be decided in accordance with the Immigration Rules in force on 21 December 2018; and

(ii) if an application has been made under Appendix EU on or after 21 January 2019 and before 0700 on 30 March 2019, the application will be decided in accordance with the Immigration Rules in force before 0700 on 30 March 2019' (emphasis added).

⁵ *Ibid*, Annex 1, 45-46.

⁶ In particular, the DeSouza case, which has been heard before a tribunal and is unreported. For discussion, see: John Curtis and others, *Northern Ireland, Citizenship and the Belfast/Good Friday Agreement* (Briefing Paper Number 8571, 23 May 2019) House of Commons Library.

⁷ *Ibid*, 14-15.

⁸ Courts interpret UK legislation assuming Parliament intends to comply with international obligations.

‘recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.’⁹

Further, any assurances provided by the HO or other departments of the UK government about compliance with the B/GFA do not have the force of law. Indeed, UK law on nationality has not been amended to reflect the B/GFA and its prioritisation of individual choice in matters relating to citizenship for those born in NI. The British Nationality Act 1981 (1981 Act) provides that since 1 January 1983, British citizenship is acquired by people born in the UK or a qualifying territory provided, when they were born, either that one of their parents was a British citizen or legally settled in the UK. Also of relevance to the present matter is the definition of ‘the United Kingdom’ as ‘Great Britain, *Northern Ireland* and the Islands, taken together.’¹⁰ British citizens of full age and capacity are able to renounce their British citizenship by making a declaration in the manner prescribed by the 1981 Act. Up until this point British citizenship is bestowed. In short, the 1981 Act does not explicitly reflect and safeguard the right of people born in NI to hold both British *and* Irish citizenship.

In light of the 1981 Act, there is justified concern about the implications of the recent changes to the ‘settled status’ scheme for NI born and resident Irish citizens post-Brexit. The MO has stated: ‘It’s important to note that Irish citizens are EU citizens and therefore post Brexit could still travel under freedom of movement. However, most other EU rights and benefits are not automatically retained, such as the European Health Insurance card [sic], voting in EU elections, the rights to be joined by non-EU family members.’¹¹

The change to the ‘settled status’ scheme seems to be contrary to the Joint Report agreed between the EU and UK negotiators of the Withdrawal Agreement (which itself has been agreed between the UK and the EU, but is not ratified or in force). The Joint Report notes:

‘Both Parties acknowledge that the [B/GFA] recognises the birth right of all the people of Northern Ireland to choose to be Irish or British or both and be accepted as such. *The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland.* Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship *for such people and, in the next phase of negotiations, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits.*’¹²

Further:

‘The [B/GFA] also includes important provisions on Rights, Safeguards and Equality of Opportunity for which EU law and practice has provided a supporting framework in Northern Ireland and across the island of Ireland. *The United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union,* including in the area of protection against forms of discrimination enshrined in EU law [...]’¹³

In light of current UK law, if the UK is to ratify the Withdrawal Agreement and comply with its terms, the MO is correct to argue:

‘A legal framework is urgently needed to maintain these rights as promised by the UK government in the 2017 Joint report.’¹⁴

⁹ Article 1(vi) B/GFA.

¹⁰ Section 50 British Nationality Act 1981. Emphasis added.

¹¹ Correspondence on file.

¹² Joint Report from the Negotiators of the European Union and the United Kingdom Government, 8 December 2017, TF50 (2017) 19 – Commission to EU 27, para 52. Emphasis added.

¹³ *Ibid*, para 53. Emphasis added.

¹⁴ Correspondence on file.

Of course, if Brexit takes place without a Withdrawal Agreement ('No Deal'), the Joint Report has no legal implications, although we would argue that it stands as an important mutually agreed interpretation of the obligations in the B/GFA, which continue, as a matter of *international law*, irrespective of the type of Brexit.

In summary, there is cause for concern about the implications of the recent change to the 'settled status' scheme. Addressing this concern to uphold the rights of NI born and resident Irish citizens may form the basis for a future legal framework. However, as we turn now to explain, *the change to the 'settled status' scheme does not actually impact on the question of who can access the EHIC scheme*. This is because the basis for access to the EHIC in NI/UK is ordinary residence. As such, reference to *the EHIC should be removed from the MO's arguments* so as to strengthen those arguments that remain.

3. 'Ordinary Residence' as the Basis for Entitlement to the European Health Insurance Card and the Law Facilitating its Operation

3.1 Overview of the European Health Insurance Card

The EHIC is the means for accessing 'needs arising' or emergency healthcare elsewhere in the EU/EEA and Switzerland during temporary stays there. Treatment for 'needs arising' healthcare can include treatment for long-term conditions. However, the EHIC does not provide coverage for those who travel specifically *for treatment*.¹⁵ The EU law underpinning the EHIC is found in Regulation 883/2004/EC and Regulation 987/2009/EC.¹⁶ The EHIC itself is the document referred to in this legislation, but is in fact founded upon Decision S1, which is based on Article 72(a) Regulation 883/2004/EC.

The Regulation is 'directly applicable' in all Member States meaning it takes legal effect without any act of transposition.¹⁷ Under Section 2 European Communities Act 1972, Regulation 883/2004/EC takes effect in UK law in line with the requirements of EU law. Regulation 883/2004/EC must be applied in preference to any contradictory domestic law, in accordance with the principle of supremacy of EU law. But this legislation provides for *coordination* of health and social security systems only, including the EHIC.¹⁸ In other words, there is no harmonisation of national society security laws.¹⁹ Thus, conditions for entitlement to the EHIC, and the rights entailed under EHIC for those on a temporary stay in another Member State, are determined by Member State law. Put simply, the rule is that EHIC-holding EU citizens on a temporary stay have to be treated, for 'needs arising' or emergency health care, as if they were covered by the domestic NHS, and receive any 'benefits in kind' to medical treatment on that basis. Regulation 883/2004/EC defines 'benefits in kind' which it provides for, as including 'long-term care benefits' which the Member States pay for directly.²⁰

¹⁵ In principle the S1 scheme applies to patients who are referred to a specialist provider in another Member State, while Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare OJ L 88/45 applies when patients themselves choose to travel abroad for treatment. For an overview of the different ways in which EU law provides rights to access healthcare elsewhere in the EU/EEA and Switzerland, see: House of Lords, European Union Committee 13th Report of Session 2017–19, Brexit: reciprocal healthcare, HL Paper 107 (House of Lords, 2018).

¹⁶ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems OJ L 166/1; Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems OJ L 284/1.

¹⁷ Article 288 TFEU.

¹⁸ Article 19(1) Regulation 883/2004/EC and Article 25 Regulation 987/2009/EC.

¹⁹ Consistent with Article 168(7) Treaty on the Functioning of the EU, which states 'Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood'

²⁰ Article 1(va)(i) Regulation 883/2004/EC states: 'for the purposes of Title III, Chapter 1 (sickness, maternity and equivalent paternity benefits), benefits in kind provided for under the legislation of a Member State which are intended to supply, make available, pay directly or reimburse the cost of medical care and products and services ancillary to that care. This includes long-term care benefits in kind.'

3.2 'Ordinary Residence'

As summarised in guidance issued by the National Health Service (NHS), '[e]ntitlement to an EHIC is based on insurability under EU law, and *not on a person's nationality*. This applies to all EEA countries.' Moreover, the UK '*operates a residency-based healthcare system, which means that insurability is generally determined by residency and not by the past or present payment of National Insurance contributions or UK taxes.*'²¹ Effectively, visitors who are nationals of any EU Member States are treated in the same way as locals, which is offset by a system of reimbursement between Member States.²² This right to be treated as a local is administered in the form of the EHIC, granting UK nationals access to free or reduced cost healthcare within the EEA.²³ The existing rights to free NHS care for EEA nationals and Swiss nationals under EU law and the rights of UK citizens to access cross-border healthcare in the EU Member States will continue until the point at which the UK formally leaves the EU, currently scheduled for 31 October 2019.

The Electronic Exchange of Social Security Information (EESSI)²⁴ is an information technology system enabling the exchange of personal data across EU social security institutions.²⁵ It provides for an accurate, efficient and secure exchange of the necessary information for treating patients, routing all healthcare documents to the correct destination in another Member State. The information shared is subject to EU data protection legislation, namely the EU's General Data Protection Regulation (GDPR).²⁶ The GDPR protects the fundamental rights of natural persons whose data are 'processed' within the material scope of EU law,²⁷ where the entity processing the data is within the EU, or the data subjects are within the EU. The GDPR also provides for the free movement of data both within and into the EU by providing harmonised minimum level standards of data protection.²⁸ The EESSI also facilitates the payment of the treatment by the 'competent state',²⁹ in this case the UK, to the country which provides the benefit, that is, the needs-based or emergency health care or treatment.

In December 2018, the UK government issued a technical note giving guidance on data protection post-Brexit. That was withdrawn³⁰ and replaced with revised guidance adopted on 6 February 2019.³¹ It is in accordance with the guidance from the Information Commissioner's Office (ICO)³² on the future data protection regime in case of a 'No Deal' Brexit. This will be discussed latterly in this briefing note when the two forms of Brexit are discussed.

²¹ NHS, 'Apply for a free EHIC (European Health Insurance Card)'; available at: <https://www.nhs.uk/using-the-nhs/healthcare-abroad/apply-for-a-free-ehic-european-health-insurance-card/>. Last accessed 1 August 2019. Emphasis added.

²² Recital 5 Regulation 883/2004/EC states 'it is necessary, within the framework of such coordination, to guarantee within the community equality of treatment under the different national legislation for persons covered'. Recital 13 states: 'The coordination rules must guarantee that persons moving within the Community and their dependants and survivors retain the rights and the advantages acquired and in the course of being acquired'.

²³ T Powell, *Healthcare (International Arrangements) Bill 2017-2019* (Briefing Paper Number 8435, 17 January 2019) House of Commons Library.

²⁴ Provided for in Article 78 Regulation 883/2004/EC.

²⁵ Implemented by Article 3(3) Regulation 987/2009/EC states: 'When collecting, transmitting or processing personal data pursuant to their legislation for the purposes of implementing the basic Regulation, Member States shall ensure that the persons concerned are able to exercise fully their rights regarding personal data protection, in accordance with Community provisions on the protection of individuals with regard to the processing of personal data and the free movement of such data'.

²⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ 2016 L 119/1.

²⁷ Article 2(2)(a) GDPR.

²⁸ Article 3 GDPR: 'The institutions shall without delay provide or exchange all data necessary for establishing and determining the rights and obligations of persons to whom the basic Regulation applies. Such data shall be transferred between Member States directly by the institutions themselves or indirectly via the liaison bodies'. Also see Article 2(2) Regulation 987/2009/EC.

²⁹ European Commission, 'Electronic Exchange Of Social Security Information', available at: <https://ec.europa.eu/social/main.jsp?catId=869>. Last accessed 1 August 2019.

³⁰ Department for Digital, Culture, Media & Sports, 'Data Protection if there is no Brexit deal' (13 September 2018, this guidance was withdrawn on the 1 of March 2019), available at: <https://www.gov.uk/government/publications/data-protection-if-theres-no-brexit-deal/data-protection-if-theres-no-brexit-deal>. Last accessed 1 August 2019.

³¹ Department for Digital, Culture, Media & Sports (6 February 2019) 'Using personal data after Brexit', available at: <https://www.gov.uk/guidance/using-personal-data-after-brexit>. Last accessed 1 August 2019. We make no further comment on the obvious unsatisfactory nature of guidance from 6 February 2019 not replacing guidance from December 2018 until 1 March 2019.

³² ICO, 'Data Protection and Brexit', available at: <https://ico.org.uk/for-organisations/data-protection-and-brexit/>. Last accessed 1 August 2019.

3.3 'Ordinary Residence' in One or More Countries

The NHS guidance refers to the following, which is taken from an official manual:

'A person is ordinarily resident if they are normally residing in the United Kingdom (apart from temporary or occasional absences), and their residence here has been adopted voluntarily and for settled purposes as part of the regular order of their life for the time being. Decisions about whether a person is ordinarily resident will need to be based on all the circumstances of the particular case.'

Significantly for those resident in NI:

'A person can be ordinarily resident in more than one country. The fact that a person might be said to have a home in another country does not mean that they cannot also be ordinarily resident in the United Kingdom.'

*'If a person lives in the United Kingdom year after year, they should be treated as ordinarily resident here.'*³³

Those resident in NI might also be resident in the RoI. It should be noted that the NHS guidance states:

'If you are ordinarily resident in the UK and not insured by another EEA country, then you are likely to be considered to be insured by the UK under EU law and, therefore, will be entitled to a UK-issued EHIC. You will need to provide the necessary evidence when applying.'

Moreover, *'[t]here are certain circumstances where you may be entitled to a UK-issued EHIC despite living in another EEA country. Further details can be found in the "Living in Europe" section below.'*³⁴

This is the general picture across the UK and it appears that the EHIC is administered on an all-UK centralised basis. Although this is the case, it may be useful to note that each country within the UK has its own legal arrangements for determining who is 'ordinarily resident' and may have access to healthcare on that basis. Under NI law the Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015 applies to visitors.³⁵ Section 2(1) provides a 'visitor' 'means a person *not ordinarily resident* in Northern Ireland'.³⁶ It does not appear that a specific legal instrument spells out the meaning of 'ordinary residence'. Instead, this concept seems to have been frequently employed in judgments in the revenue context and applied in others, including the EHIC. Dicta from at least one of the latter judgments inform the NHS guidance given above.³⁷

Overall, entitlement of Irish citizens who are resident in NI to EHIC comes from their coverage by the NI system on the basis of being 'ordinarily resident'. To be clear: *loss of access to a EHIC is a loss that falls on people on the basis of residency, not citizenship. That will be the case whatever form of Brexit.*

³³ HM Revenue and Customs, *Child Benefit Technical Manual*, available at: <https://www.gov.uk/hmrc-internal-manuals/child-benefit-technical-manual/cbtm10020>. Last accessed 1 August 2019. Emphasis added.

³⁴ NHS, note 21 above. Emphasis added.

³⁵ Statutory Rules of Northern Ireland 2015 No 27, Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015.

³⁶ Emphasis added.

³⁷ See, for instance, *Regina v Barnet London Borough Council, ex parte Shah* [1982] UKHL 14, per Lord Scarman: 'I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration'. Also see: *R (on the application of YA) v Secretary of State for Health* [2009] EWCA Civ 225.

4. Implications of Current Likely Brexit Scenarios

4.1 Withdrawal Agreement

The WA continues the application of all EU law during the transition period,³⁸ which the UK government calls an ‘implementation’ period (currently from 31 October 2019 until 31 December 2020), even though the UK is no longer a Member State. The transition period may be extended once, by a decision of a Joint Committee³⁹ made before 1 July 2020.⁴⁰ The EU legal framework will be encompassed under the WA, and the practicalities of making that law in the UK will be implemented through an Act yet to be passed by the UK Parliament. All of EU law includes Regulation 883/2004/EC and everything that flows from it, which includes EHIC.

As well as providing continuity through the transition period, the WA also covers people who are subject to the legislation of the UK or an EU-27 Member States at the end of the transition period.⁴¹ Everyone who meets the UK’s ordinary residence test therefore, having free access to the NHS, is ‘subject to the legislation’ of the UK. The WA means that the EU law upholding UK citizens’ right to access cross-border healthcare will continue to be able to be relied on by patients until 31 December 2020⁴² – or longer if the transition period is extended. If a patient is abroad in another Member State on 31 December 2020, they will continue to be able to rely on their rights under the WA until they leave that Member State.⁴³ Neither the maximum duration of stay, nor the reason for the stay, is determined by law. Therefore, a holiday period with 31 December 2020 falling within it would qualify.

The WA also states that the UK will continue to take part in the EESSI during transition.⁴⁴ This is important because practically, for cross border healthcare to operate successfully, personal data concerning the patient must be transferred between the Member States, and because this mechanism is through which reciprocal payments are made under the scheme of Regulation 883/2004/EC. Under the WA, GDPR rules would continue to apply.⁴⁵ The WA confirms the UK’s continuation of using EESSI during the transition period by continuing the application of all EU law. The WA also confirms that the UK will continue to pay its share of the costs.⁴⁶

4.2 ‘No Deal’

If the UK leaves the EU on the 31 October 2019, or a later date, without ratifying the WA, this is what has been termed a ‘No Deal’ Brexit. This means no reciprocal healthcare agreements will operate between the UK and the EU-27 as a bloc. UK patients will immediately lose their rights in EU law to access treatment in another EU country. But there are alternative possibilities for patients to access treatment. None of these are certain, and they involve new law, which has not been tested in courts, or administrative structures. Relying on these rights thus involves greater risk than the known situation currently under EU law, or the situation under the WA which seeks to continue the position under EU law as far as possible for a transitional period after the UK leaves the EU.

One possibility is for the UK to secure bilateral agreements with each of the Member States, or with the EU as a whole, and to implement these through domestic law. On 23 March 2019 the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 received royal assent, establishing the legal basis for implementing reciprocal healthcare arrangements after Britain’s exit. The UK government has proposed that, even in the event of a ‘No Deal’ scenario, reciprocal healthcare continues until the end of December 2020. However, this has not been accepted by the EU, and it is difficult to see how it could be, given the EU’s current negotiating mandate.⁴⁷

³⁸ Article 126 WA.

³⁹ An institution comprising representatives of the EU and the UK, established by Article 164 WA.

⁴⁰ Article 132 WA.

⁴¹ Article 28 WA.

⁴² Article 127 WA: ‘Scope of the transition 1. Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period.’

⁴³ Article 32(1)(c) WA.

⁴⁴ Article 32(2) WA.

⁴⁵ Article 126 WA.

⁴⁶ As per Regulation 997/2009/EC.

⁴⁷ NHS Confederation, ‘Reciprocal Healthcare’, available at: <https://www.nhsconfed.org/regions-and-eu/nhs-european-office/brexit-and-the-nhs/brexit-implications-for-health-and-care/reciprocal-healthcare>. Last accessed 1 August 2019.

A second possibility is for UK patients to rely on domestic law in the country they are visiting. Many EU 27 Member States, such as Ireland, Spain, Italy, France and Greece, have already passed domestic legislation in case of a 'No Deal' Brexit scenario.

In a 'No Deal' scenario, there would be no immediate change to data protection law in the UK.⁴⁸ The Data Protection Act 2018 would remain in place and the EU Withdrawal Act would incorporate the GDPR into UK law. The EU (Withdrawal) Act and secondary legislation such as the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 make no distinction between different types of Brexit. However, although the UK will continue to recognise the EU as a safe place to send data, the EU will treat the UK, as a third-country with no adequacy decision,⁴⁹ as potentially non-compliant with its data protection law.

In the absence of an adequacy decision, data transfer may take place where 'appropriate safeguards' are provided. One such appropriate safeguard is the use of standard contractual clauses.⁵⁰ The ICO has produced guidance on what organisations need to include in contracts for data transfer.⁵¹ The Health Research Authority's guidance confirms the lawfulness of such data transfers.⁵²

As the legal framework which governs the transfers of personal data from EU institutions to the UK would change on exit, so would the procedures currently in place which administer the transfer of patient data. A new system for transferring payments for emergency treatments would also be needed, as the EESSI would no longer be available. This system does not currently exist. It would need to be created and implemented in a 'No Deal' scenario.

5. Bilateral Legal Arrangements between the United Kingdom and the Republic of Ireland

So far the paper has explained the basis for entitlement to the EHIC ('ordinary residence') and the implications of current likely Brexit scenarios. In summary, changes to UK nationality law do not affect access to the EHIC. Given the increased likelihood of a 'No Deal' scenario under the prime ministership of Boris Johnson, it becomes important to outline how, at least as between the UK and RoI, there are bilateral relationships that will operate and underpin access to healthcare between them.

Legal relations between the UK and the RoI are not only determined by EU law. The Common Travel Area (CTA) and North/South cooperation under Strand Two of the B/GFA concern rights of citizens of the UK and RoI and cooperation in healthcare. In the event of a 'No Deal' Brexit, these provide that reciprocal healthcare would continue without the need for an EHIC.⁵³ The UK government have confirmed that the CTA is not reliant on the EU,⁵⁴ as seen in the National Health Service (Charges to Overseas Visitors) Regulation,⁵⁵ which exempts charges for Irish citizens and British citizens ordinarily resident in the RoI.⁵⁶

⁴⁸ Department for Digital, Culture, Media & Sports, 'Data Protection if There's No Brexit Deal', 13 September 2018 (this guidance was withdrawn on the 1 of March 2019), available at: <https://www.gov.uk/government/publications/data-protection-if-theres-no-brexit-deal/data-protection-if-theres-no-brexit-deal>. Accessed 1 August 2019.

⁴⁹ DPA, Section 74.

⁵⁰ GDPR, Article 57.

⁵¹ ICO, 'What Needs to be Included in the Contract?'; available at: <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/contracts-and-liabilities-between-controllers-and-processors-multi/what-needs-to-be-included-in-the-contract/>. Last accessed 1 August 2019.

⁵² MJ Taylor and others, 'United Kingdom: Transfers of Genomic Data to Third Countries', (2018) 137(8) *Human Genetics* 637, 639 citing Health Research Authority NHS, 'Legal basis for processing data', available at: <https://www.hra.nhs.uk/planning-and-improving-research/policies-standards-legislation/data-protection-and-information-governance/gdpr-detailed-guidance/legal-basis-processing-data/>.

⁵³ NHS, 'Healthcare in Ireland', available at: <https://www.nhs.uk/using-the-nhs/healthcare-abroad/healthcare-when-travelling-abroad/healthcare-in-ireland/>. Last accessed 1 August 2019.

⁵⁴ HM Government, 'Travelling Within the Common Travel Area and the Associated Rights of British and Irish Citizens if there is No Brexit Deal', available at <https://www.gov.uk/government/publications/travelling-in-the-common-travel-area-if-theres-no-brexit-deal/travelling-within-the-common-travel-area-and-the-associated-rights-of-british-and-irish-citizens-if-there-is-no-brexit-deal#before-brexit>. Last accessed 1 August 2019.

⁵⁵ The National Health Service (Charges to Overseas Visitors) (Amendment etc.) (EU Exit) Regulations 2019 No 516.

⁵⁶ The National Health Service (Charges to Overseas Visitors) (Amendment etc.) (EU Exit) Regulations 2019 No 516, Explanatory Memorandum.

Through the CTA, British or Irish citizens have the right to access health care in either state.⁵⁷ In the RoI, Sections 45 and 46 Health Act 1970 (as amended) (1970 Act) provide the legislative basis for eligibility for all public health services, and being ordinarily resident is one of the criteria. The RoI's Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019⁵⁸ (also known as the 'Omnibus Act') amends the 1970 Act to give the relevant minister power to continue or create reciprocal healthcare agreements with the UK as were in operation prior to Brexit. Although powers are in place for ministers to adopt it, the secondary legislation providing for reciprocal healthcare between the two countries directly has not yet been written.

The success of the above bilateral agreements is in part due to the EU's funding for cross-border health cooperation on the island of Ireland. Without this EU funding, the practical ability for people to access healthcare on the island of Ireland may change.⁵⁹ However, this does not change the fact that the necessary legal framework which entitles both Irish and British patients to treatment in Northern Ireland already exists. It affects more the practicalities involved in reciprocal healthcare, such as funding.

6. Conclusion

Recent changes to the 'settled status' scheme have generated concern about its implications for NI born and resident Irish citizens. In particular, the MO has suggested that the EHIC is one of the rights affected by those recent changes to 'settled status' scheme and that this is contrary to the B/GFA. In this paper, we explained that this aspect of the MO's argument should be removed, as it is *not a good argument*.

We outlined the implications of UK withdrawal for any entitlement to EHIC to those ordinarily resident in NI (or elsewhere in the UK) under the two most likely Brexit scenarios i.e. under the WA or 'No Deal'.

Removing the EHIC aspect of the MO's case will, we submit, *strengthen* the arguments that the MO does have. Put straightforwardly, when it comes to the EHIC, the recent changes to UK domestic law relating to those born in NI but who identify as Irish (or British or both) are something of a red herring. This is because in the UK, including NI, and the RoI the EHIC is *issued to those who fulfil criteria relating to 'ordinary residence' rather than nationality of the Member States*.

⁵⁷ HM Government, 'Common Travel Area Guidance', available at: <https://www.gov.uk/government/publications/common-travel-area-guidance/common-travel-area-guidance>. Last accessed 1 August 2019.

⁵⁸ Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019, Part 2 Para 4.

⁵⁹ UK Parliament, 'Written Evidence – Co-Operation and Working Together', available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-reciprocal-healthcare/written/79446.html>. Last accessed 1 August 2019.

