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The Common Travel Area between Britain and Ireland

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Abstract: Despite its endorsement by the Treaty of Amsterdam, the origins and content of the 'common travel area' between Britain and Ireland remain largely unknown. This article relies upon published and archive material in order to provide a comprehensive analysis of the common travel area. It shows that the common travel area has been founded upon administrative agreements (in 1922 and 1952), that it has influenced the special status of Irish nationals in British law and vice versa, and that it has been reflected in the law on entry to each state from the other and in the enforcement by each state of the other's immigration policy. It goes on to argue that the existence of a land border between the two states has been the primary reason for the common travel area. The implications for the common travel area of the recent increase in immigration to Ireland are then examined. Here, it is shown there have been significant changes to Irish immigration law relating to the common travel area since 1997, and it is suggested that these new circumstances may result in further reform of laws and practices in both Britain and Ireland.

Keywords: common travel area, United Kingdom, Eire, Republic of Ireland, Northern Ireland, land border, schengen, Treaty of Amsterdam, entry requirements, visas, status, dominion, immigration controls, nationality, Irish free state

The common travel area has acquired new prominence since the 1997 Treaty of Amsterdam confirmed that Britain and Ireland¹ would remain separate from the Schengen system of open borders.² The special relationship between Britain and Ireland in immigration matters was also specifically endorsed by a Protocol to the European Treaties agreed at Amsterdam, which provides that the two states may ‘continue to make arrangements between themselves relating to the movement of persons between their territories (the Common Travel Area)’.³ The recognition given to the common travel area by the Treaty of Amsterdam was highly unusual, however. It fitted awkwardly with the prior reluctance of British and Irish governments to admit that there were ‘arrangements . . . relating to the movement of persons’ between them. Even after the Treaty of Amsterdam, it remains the case that the content of those ‘arrangements’ has not been publicised by the two states.

This article sets out to provide a comprehensive analysis of the history and the content of the common travel area. In order to do so, reliance is placed both upon published sources and upon archive material obtained from the Public Record

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- 1 The term ‘Britain’ is used here as a synonym for the United Kingdom. The terms ‘Irish Free State’ and ‘Ireland’ are used to refer to the Irish state before and after the adoption of the 1937 Constitution of Ireland, save that the terms ‘Eire’, ‘Irish Republic’ and ‘Republic of Ireland’ are used where they appear in a quotation. The terms ‘Great Britain’ and ‘the island of Ireland’ are used to refer to each of the two islands.
- 2 For a discussion of the legal provisions, see M. Hedemann-Robinson, ‘The Area of Freedom, Security and Justice with regard to the UK, Ireland and Denmark: The “Opt-in Opt-Outs” under the Treaty of Amsterdam’ in D. O’Keeffe and P. Twomey, *Legal Issues of the Amsterdam Treaty* (Oxford: Hart, 1999) 291–294.
- 3 Protocol on the application of certain aspects of Art 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland, Art 2.

Office and the National Archives of Ireland.⁴ The account begins with the establishment of the common travel area – initially, after the creation of the Irish Free State in 1922, and again after the introduction of restrictions on movement during the second world war. This is followed by a summary of the main elements of the law relating to the common travel area – specifically, the status of Irish nationals in British law and *vice versa*, the law on entry to each state from the other, and the enforcement by each state of the other's immigration policy. The underlying reasons for the durability of the common travel area are then considered, before a final section examines the changes in Irish law relating to the common travel area which have resulted from the increased immigration and asylum applications there since the mid-1990s. It will be suggested by way of conclusion that the common travel area now faces a qualitatively new set of pressures, the likely result of which is further reform in the laws and practices which relate to it.⁵

The establishment of the common travel area

The absence of immigration controls between Britain and the Irish state has been the norm for most of the period since the Irish Free State was founded on 6 December 1922. Prior to that date, aliens law had been enforced at Irish ports in the same way as elsewhere in the United Kingdom. When the Home Office was faced with the imminent establishment of the Free State, its view was that it 'would not propose to require under the Aliens Order a passport system between this country and Ireland, and could not make any use of such a requirement if they were asked to impose it'.⁶ The *status quo* depended however upon Free State agreement to continue to participate in the British system of immigration control, and two Home Office officials visited Dublin in November 1922 in order to persuade the new Ministry of Home Affairs to do so.⁷ The Irish officials appear to have accepted the proposal with enthusiasm, believing that co-operation was the most effective means for the Free State to control aliens in general and 'Bolsheviks' in particular.⁸ The terms of the co-operation between the two departments were resolved at a further meeting in Dublin in December 1922, and confirmed in a letter from the Home Office to the Ministry of Home Affairs in February 1923.⁹ The new arrangements provided that each state would enforce the other's conditions of landing for aliens; that the British suspect index and circulars relating to aliens would be provided to the Irish authorities; that aliens who moved between the two states would be subject to at most minimal registration requirements; and,

4 The following abbreviations are used for the archive material: Cabinet Office (CAB), Dominions Office (DO), Foreign Office (FO) and Home Office (HO) files of the Public Record Office (PRO) and Department of the Taoiseach (DT) files of the National Archives of Ireland (NAI).

5 Note that the position of the Channel Islands and the Isle of Man are not examined. In British law, the Immigration Act 1971, s 1(3) defines the 'common travel area' to include the Channel Islands and Isle of Man. The benefits which Irish immigration law confers upon British nationals and entry from Britain also extend to the Channel Islands and the Isle of Man: see in particular the definition of 'Great Britain' in the Aliens Order 1946 (SR&O 1946 No 395).

6 'Aliens Restriction Passports for Ireland' memorandum of 2 March 1922 (PRO, HO 45/ 14630).

7 Under the Anglo-Irish Treaty of 1921 a Provisional Government had been established in Dublin on 14 January 1922.

8 Report of O.F. Dawson, 7 December 1922, including a memorandum submitted to the Ministry of Home Affairs on 22 November 1922 (PRO, HO 45/ 15629).

9 Report of E.B. Cooper of 15 December 1922 and letter from Home Office to Ministry of Home Affairs, 2 February 1923 (PRO, HO 45/ 15629).

that each state would enforce the other's deportation decisions. Pursuant to that agreement, the following year saw the provision to the Free State of Britain's 'black list' of those who should not be issued with British passports, and agreement that the Home Office suspect list would be provided to the Free State's newly-established passport office in New York.¹⁰

The two states' administrative co-operation was also reflected in their immigration laws. In March 1923, British law was amended to make it clear that an alien arriving from the Free State would not require leave to enter.¹¹ The 1923 amendment also deemed the Free State to be part of the 'United Kingdom' for the purposes of British aliens law, with the result that limits on the length of an alien's stay in Britain could not be avoided by entry to the Free State. The Free State's Aliens Order 1925 provided that aliens would not require leave to enter if they came from Great Britain or Northern Ireland, save where the British authorities had placed a time limit on their stay which had expired, they had entered Britain illegally, or they had been deported or excluded from Britain.¹² Finally, British law was amended in 1925 so as to give effect to any conditions imposed upon aliens by the Free State.¹³

Unrestricted movement between the two states continued until the second world war.¹⁴ During the war, however, Ireland's neutrality led both states to favour controls on movement – Britain, primarily out of fear of espionage and subversion,¹⁵ and Ireland, primarily in order to prevent an influx of refugees.¹⁶ The British authorities operated controls on passengers between Great Britain and the island of Ireland from September 1939,¹⁷ and a British travel permit was necessary in order to travel in either direction from June 1940.¹⁸ Wartime travel from Ireland to Great Britain was in practice restricted to those who went to Great Britain for the purposes of employment, and was subject to the permission of both the British and Irish authorities.¹⁹ Entry from Ireland to Northern Ireland was also made more difficult by the requirement to possess a document of identity²⁰ and, for longer stays, a residence permit.²¹ The Irish authorities meanwhile required the keepers of hotels and similar premises to make returns to the police of those other than Irish nationals, and prohibited those other than British and Irish nationals from entering Ireland from Britain without leave.²²

10 'Communication of Passport Office Black List to Free State Government' February 1924 (PRO, FO 372/ 2091) and 'Memorandum of Conclusions of a Conference with the Irish Free State Minister of External Affairs at the Colonial Office' June 23rd, 1924' (PRO, HO 45/14630).

11 Aliens Order 1923 (SR&O 1923 No 326).

12 Art 1 of the Aliens Order 1925 (SR&O 1925 No 2).

13 Aliens Order 1925 (SR&O 1925 No 760).

14 See 'Immigration Control Proposed Arrangement for Co-operation between the British Home Office and the Department of Justice' Department of Justice memorandum of 27 February 1952 (NAI, DT S15273A).

15 See E. O'Halpin, 'Anglo-Irish Security Liaison in the Second World War' in B. Girvin and G. Roberts (eds), *Ireland and the Second World War: Politics, Society and Remembrance* (Dublin: Four Courts Press, 2000) 139–140.

16 See 'Memorandum relating to the Control of Aliens and Control of Influx of People from Great Britain' 7 October 1939 (NAI, DT 11512A).

17 Passenger Traffic Order 1939 (SR&O 1939 No 1163) and Aliens Order 1939 (SR&O 1939 No 994).

18 Passenger Traffic Order 1940 (SR&O 1940 No 933).

19 For discussion of Irish labour migration in wartime, see J. Jackson, *The Irish in Britain* (London: Routledge and Kegan Paul, 1963) 98–105 and T. Connolly, 'Irish Workers in Britain during World War Two' in Girvin and Roberts, n 15 above.

20 SRO of Northern Ireland 1940 No 51.

21 Residence in Northern Ireland (Restriction) Order 1942 (SR&O 1942 No 2501).

22 Aliens Order 1939 (SR&O 1939 No 291) and Aliens Order 1943 (SR&O 1943 No 169).

Controls on movement continued for several years after the war. Ireland permitted aliens to enter freely from Britain from December 1946,²³ and the British requirement of a permit when travelling between the island of Ireland and Great Britain lapsed at the end of 1947. British immigration controls remained in place, however, and the consequent checks on those travelling between Northern Ireland and Great Britain were repeatedly questioned by Northern Irish Unionists in the years after 1947.²⁴ The Government's view was that these controls could be abolished only if 'the Irish Republic would once again join with us in working a common system for the control of aliens'. That required 'that the United Kingdom and the Irish Republic should agree to follow a similar immigration policy, to set up a similar system of immigration control, and to agree that any alien who ... got into the other country, would be accepted back if the second country did not want him to stay'.²⁵

The origins of the current common travel area lie in the Irish agreement to such a 'similar immigration policy' in early 1952, in the form of an exchange of letters between the Home Office and the Irish Department of Justice.²⁶ That arrangement provided that each state would refuse leave to land to persons in transit to the other state whom it was 'satisfied that for any reason ... would not be allowed to land in the other country'. The two states were to notify one another of any action taken in relation to persons on the other's list of undesirable aliens. They agreed to re-admit aliens who, having entered the other state through their territory, were not permitted to remain there. It was also provided that the Irish authorities would give the Home Office information about all aliens who entered or left Ireland, so that a single index of entry and exit for the two states could be maintained, to which the Irish would have access. Finally, the arrangement affirmed the right of each state to reach decisions on the grant of asylum and 'in any particular case'.²⁷

Once agreement has been reached with the Irish authorities, Britain abolished immigration controls on travel to Great Britain from the island of Ireland in April 1952, through the repeal of the requirement for aliens to obtain leave to land if their journey was from Ireland.²⁸ The reform of British law relating to aliens in the following year then saw use of the term 'common travel area' to describe this arrangement for the first time.²⁹ The 1952 agreement was not however made public. This appears to have been at the behest of the Irish authorities, who feared that 'objection might be raised to an arrangement for our notifying the British of all arrivals and departures of aliens, on the ground that it would not be in keeping with our position as an independent state'.³⁰ The Irish officials involved in the negotiations informed their Home Office counterparts that, 'since the proposed

23 Aliens Order 1946, Art 5(2). It required aliens to register within 24 hours of arrival, which period was extended to seven days by the Aliens (Amendment) Order 1962 (SI No 112 of 1962).

24 See HC Debs vol 446 col 1158–1166 28 January 1948; vol 463 col 543 24 March 1949; vol 478 cols 842–849 28 July 1950.

25 Under-Secretary of State for the Home Department, Geoffrey de Freitas, HC Deb vol 478 col 847 28 July 1950.

26 The summary here is based on the draft in 'Heads for Arrangement between Home Office, London and Department of Justice, Dublin', February 1952 (NAI, DT S15273A). For the approval of the arrangement by the Irish cabinet, see Cabinet Minutes, 29 February 1952 (NAI). Corresponding information on the British side is apparently unavailable at present in the PRO.

27 It is possible that the terms of the 1952 arrangement were modified during the negotiations, or in subsequent years. Note however that the 1952 draft is also presumed to be authoritative in E. Meehan, *Free Movement between Ireland and the UK: From the 'Common Travel Area' to the Common Travel Area* (Dublin: Policy Institute, 2000) 26–30.

28 Aliens (No 2) Order 1952, SI 1952 No 636.

29 Aliens Order 1953, SI 1953 No 1671, Art 3.

30 'Immigration Control Co-operation with British' Department of Justice memorandum of 15 February 1952 (NAI, DT S15273A).

arrangements would be entirely informal, it would be undesirable that any publicity be given'.³¹ No reference was made to the new agreement when the lifting of controls was announced in the House of Commons.³² Equally, when the Irish Minister for Justice was asked in the *Dáil* if there had been consultation on the abolition of controls, his evasive response was that, while the Irish Government had been informed, 'its attitude was that the abolition of a British control was a matter for the British themselves'.³³

The law on status

Although based upon an administrative arrangement, the common travel area has been manifest in various ways in British and Irish law. The first question to consider is the status of British and Irish nationals in each other's law. It turns out that the answer to that question is a complex one: while Irish nationals have a special position under British *nationality* law, British nationals have a special status under Irish *immigration* law. The difference between the two states has its origins in British and Irish disagreements as to the relationship between their two nationalities in the decades after 1922. What the two states share however is that the common travel area has been among the primary reasons for the special status accorded to the other's nationals.

When the Free State was established in 1922, it was classed as dominion.³⁴ As a result, those born in the territory of the Free State continued to be 'natural-born' British subjects in British law.³⁵ At the same time, the Free State's 1922 Constitution created a separate Free State citizenship, and conferred on its parliament the power to define the conditions governing the acquisition and loss of citizenship.³⁶ When that power of definition was exercised by the Irish Nationality and Citizenship Act 1935, an attempt was made to separate Free State citizenship from British subjecthood. British statute and common law on nationality were repealed in the Free State, and it was provided that 'the facts or events' which gave rise to Free State citizenship should not confer any other nationality or citizenship upon an individual.³⁷ Britain did not however amend its law, on the grounds that the Free State remained within the Commonwealth, and therefore remained part of Britain's dominions.³⁸ This inconsistency persisted until the reformulation of British nationality law by the British Nationality Act 1948, as a result of which those born in Ireland ceased to be British subjects.³⁹ Nevertheless, the 1948 Act

31 Department of Justice memorandum of 27 February 1952, n 14 above.

32 Home Secretary, Douglas Maxwell Fyfe, HC Deb vol 498 cols 820–821 27 March 1952.

33 Frank Aiken, *Dáil Debates* vol 131 col 174 23 April 1952.

34 Under the Articles of Agreement for a Treaty between Great Britain and Ireland (1921), Art 1, the Free State was to have the 'same constitutional status' as Australia, Canada, New Zealand and South Africa.

35 British Nationality and Status of Aliens Act 1914, s 1.

36 Constitution of the Irish Free State, Art 3.

37 Irish Nationality and Citizenship Act 1935, s 33.

38 See the statement of Dominions Secretary, J. H. Thomas, HC Deb vol 295 col 645 27 November 1934, and his speech at Derby on 1 December 1934 (extract in PRO, DO 35/112/1).

39 This was the result of the omission of Ireland from the list of states whose citizens became British subjects: British Nationality Act 1948, s 1. Irish nationals who were British subjects in 1948 were permitted to retain that status on the grounds of Crown service, possession of a British passport, or 'associations by way of descent, residence or otherwise with the United Kingdom': British Nationality Act 1948, s 2 (and now British Nationality Act 1981, s 31). In addition, those born before 1922 in the territory of the Free State but neither domiciled there in 1922, nor subsequently resident, were granted full British citizenship by the Ireland Act 1949, s 5.

continued to treat Irish nationals as a special case: British law was to apply to Irish nationals in the same way as British subjects,⁴⁰ and Ireland was equated with Commonwealth states, in that Irish nationals were not ‘aliens’ and Ireland was not classed as a ‘foreign country’.⁴¹

The special status of Irish nationals under the 1948 Act was intended to ensure that their legal rights in Britain were maintained, rather than to reflect the existence of the common travel area.⁴² The common travel area was however decisive in the retention of the special status of Irish nationals even after Ireland declared a republic and severed its last links with the Crown and Commonwealth in December 1948.⁴³ Some British officials feared that, with those developments, Ireland might have to be classed as a foreign state, with the result that it could not be given preferential treatment in immigration matters. The extension of aliens legislation to Irish nationals would have been costly in administrative terms, and would have conflicted with the postwar need to recruit Irish labour. More importantly, the extension of immigration control to Ireland was thought impossible – firstly, because ‘no effective control over that border is possible, and . . . control of the main roads and railways would cause great inconvenience to the inhabitants of Northern Ireland,’ and secondly, because it was thought politically unacceptable to introduce permanent immigration controls between the island of Ireland and Great Britain.⁴⁴ The solution to these presumed difficulties was contained in section 2 of the Ireland Act 1949, according to which ‘the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the United Kingdom’ and ‘references in any Act of Parliament, other enactment or instrument whatsoever, whether passed or made before or after the passing of this Act, to foreigners, aliens, foreign countries . . . shall be construed accordingly.’ The Prime Minister made clear that these statements specifically reflected the desire to avoid imposing immigration control upon Irish nationals, in light of ‘the difficulties caused because of the fact of the land frontier between Northern Ireland . . . and Eire’.⁴⁵ The British belief that there should not be immigration control between the two states was therefore one of the main reasons for the preservation in 1949 of the special treatment of Irish nationals under the 1948 Act, the substance of which remains in force.⁴⁶

Despite their favoured status in nationality law, Irish nationals are not however a special case within British immigration law. Irish nationals were made subject to immigration law together with Commonwealth citizens by the Commonwealth Immigrants Act 1962.⁴⁷ The inclusion of the Irish in the 1962 legislation was part of an attempt by the Conservative Government of the day to meet the plausible

40 British Nationality Act 1948, s 3. An exception was made for criminal offences for which an alien would not be liable, or for which there would not have been liability if the act were not committed in a Commonwealth state.

41 *ibid* s 32.

42 See the remarks of Attorney-General, H. W. Shawcross, HC Deb vol 453 col 506 7 July 1948.

43 Republic of Ireland Act 1948. s 1 of the Act repealed the Executive Authority (External Relations) Act 1936, which had authorised the King to act on behalf of the Irish state in external relations.

44 Memorandum CPM (48) 11 of the ‘Committee on Preparation for the Meeting of Commonwealth Prime Ministers’ 5 October 1948, and the related letter from Lord Jowitt to Prime Minister, Clement Attlee of 9 October 1948 (PRO, CAB 1/46).

45 Clement Attlee, HC Deb vol 464 col 1855 11 May 1949.

46 s 3 of the 1948 Act is still in force, while the relevant parts of s 32 of the 1948 Act have been replaced by the British Nationality Act 1981, s 50.

47 Commonwealth Immigrants Act 1962, s 1(4).

criticism that its intention was to limit non-white immigration only.⁴⁸ The force of that response was admittedly weakened by the fact that immigration control was not to apply to entry from Ireland (see below). It remains the position under the Immigration Act 1971 that Irish nationals are subject to British immigration law, although entry from Ireland typically is not. One peculiar consequence was that, when the 1962 Act came into force, Irish nationals became liable to deportation from Britain,⁴⁹ even though they could readily evade deportation orders in practice. The rationale for that anomaly was that not to have a power to deport Irish nationals was unacceptable because it would have placed them in a formally better position than Commonwealth citizens.⁵⁰

Irish law on the status of British nationals has followed a quite different route. Because of the importance to Ireland of the separateness of Irish and British nationality, Irish nationality law does not in general treat British nationals as a special case. While the 1935 Act on nationality was silent on the status of those who were not citizens of the Free State, the Irish Nationality and Citizenship Act 1956 provides that a 'non-national' is 'a person who is not an Irish citizen.'⁵¹ The one exception is that a series of Orders passed between 1949 and 1951 provide that British nationals, together with the citizens of certain Commonwealth states, should 'subject to law, enjoy in Ireland similar rights and privileges to those enjoyed by Irish citizens' in those states.⁵² Although these Orders remain in force, it is not clear that they have ever made a difference to the position of nationals of those states. In particular, whereas Irish nationals have full rights of political participation in Britain,⁵³ British nationals had no political rights in Ireland until 1985. They now have a vote in parliamentary elections, but cannot vote in presidential elections or constitutional referenda, and are precluded from election to the Irish parliament.⁵⁴

Preferential treatment has instead been accorded to British nationals by Irish immigration law. While the Aliens Act 1935 – which remains the basis of Irish immigration law – is explicit that '[i]n this Act the word "alien" means a person

48 See 'Commonwealth Immigrants Bill: Application to the Irish Republic' Cabinet memorandum C (61) 180, 7 November 1961 (PRO) The claim that the 1962 legislation effected a 'colour-bar' was one of the main criticisms of it advanced by the Labour opposition: see the remarks of Gordon Walker and Hugh Gaitskell, HC Deb vol 649 cols 709 and 799 16 November 1961. The Irish authorities too were under little doubt as to the objective of the new controls. As the Irish Ambassador put it in November 1961: 'Officials will not deny privately that the coloured problem is at the root of the question. My only fear in this matter is that the Opposition, in their efforts to beat the Government with the colour discrimination stick, may so high-light the different treatment of the Irish as to force the Government to take a stronger line about Irish immigration than they would wish': Letter of Aodh MacCanna of 3 November 1961 to the Secretary of the Department of External Affairs (NAI, DT S15273B).

49 Commonwealth Immigrants Act 1962, s 6 (3), and now Immigration Act 1971, s 3. Deportation is however precluded in the case of Irish nationals and Commonwealth citizens who were 'ordinarily resident' in the United Kingdom on 1 January 1973 and who have been so for the five preceding years: Immigration Act 1971, s 7, which preserved the effects of s 7(2) of the 1962 Act.

50 'Deportation to Ireland General Policy' memorandum of December 1967 (PRO, HO 344/74). It records that between July 1962 and October 1967, 233 of the 713 Irish nationals who had been the subject of deportation orders had subsequently been detected in Britain.

51 Irish Nationality and Citizenship Act 1956, s 2. The term 'non-national' was substituted for 'alien' by the Irish Nationality and Citizenship Act 2001, s 2.

52 Citizens of United Kingdom and Colonies (Irish Citizenship Rights) Order 1949 (SI 1949 No 1) and similar Orders for New Zealand (SI 1949 No 2), Australia (SI 1949 No 18), South Africa (SI 1950 No 198), Southern Rhodesia (SI 1951 No 11) and Canada (SI 1951 No 89).

53 For Irish nationals' right to vote in parliamentary elections, see Representation of the People Act 1983, s 1. The right to stand for election to Parliament derives from the Act of Settlement 1700, s 3, as amended by the British Nationality Act 1981, Sched 7.

54 Constitution of Ireland, Article 16 and Electoral (Amendment) Act 1985, s 2.

who is not a citizen',⁵⁵ it also permits the exemption of nationals of particular states from some or all of its provisions.⁵⁶ In 1935, that power was used to exempt nationals of the United Kingdom and a number of Commonwealth states,⁵⁷ and the benefit of that exemption was continued under the Aliens Order 1946.⁵⁸ After amendments in 1962 and 1999, it is now provided that British nationals, and they alone, are exempt from the 1935 Act and orders made under it.⁵⁹ With minor exceptions, British nationals have therefore never been subject to Irish immigration law, and it has in particular never been possible to exclude or deport them from Ireland.

Here too, the decisive influence of the common travel area can be seen. While the common travel area does not necessitate that British nationals be exempt from Irish immigration law, their exemption presumably reflects the fact that they can anyway freely enter Ireland. Other persons have however been excluded because of the need for consistency in the immigration laws of the two states. In 1962, it was the enactment of the Commonwealth Immigrants Act which led the Irish government to exclude Commonwealth citizens from the exemption, which was instead limited to those 'born in Great Britain or Northern Ireland.'⁶⁰ That however created the difficulty that some British nationals born outside Britain were subject to Irish immigration law, while some persons born in Britain, though lacking British nationality, were not. The Irish authorities are likely to have been especially concerned about the latter group, particularly because those born in Britain since 1 January 1983 have been entitled to British nationality only if one or both of their parents was a British national or 'settled' in Britain at the time.⁶¹ Prior to the 1999 amendments, individuals born in Britain who had not acquired British nationality nevertheless had an unlimited legal right to enter and reside in Ireland. Since 1999, there has instead been broad equivalence in the persons covered by Irish and British immigration law.⁶²

55 Aliens Act 1935, s 2.

56 Aliens Act 1935, s 10.

57 Aliens (Exemption) Order 1935 (SR&O 1935 No 80), which applied to Australia, Britain, Canada, India, New Zealand, Newfoundland and South Africa. Nationals of those states were exempt from the Aliens Act 1935, ss 8 and 9, which restricted aliens' changes of name, and from the Aliens Order 1935 (SR&O 1935 No 108).

58 Aliens Order 1946, Art 1. Much of the detail of Irish immigration law continues to be contained in the 1946 Order, as amended. Note that, by virtue of the Immigration Act 1999, s 2, the 1946 Order (with the exception of its Article 13) and amendments to it prior to the 1999 Act, have the status of an Act of the Irish Parliament. This provision was introduced after the Irish Supreme Court held in *Laurentiu v Minister for Justice, Equality and Law Reform* [2000] 1 ILRM 1 that part of the Aliens Act 1935, s 5, upon which Art 13 of the 1946 Order was based, involved an unconstitutional delegation of power to the Minister for Justice.

59 Aliens Amendment (No 2) Order 1999 (SI No 24 of 1999), Art 3 and Aliens (Exemption) Order 1999 (SI No 97 of 1999).

60 Aliens (Exemption) Order 1935 (Revocation) Order 1962 (SI No 113 of 1962) and Aliens (Amendment) Order 1962 (SI No 112 of 1962), which are considered further below.

61 British Nationality Act 1981, s 1. This rule does not apply where the result would be that the individual was stateless. Ironically, those born in Northern Ireland are eligible for Irish citizenship irrespective of the status of their parents: see Irish Nationality and Citizenship Act 1956, s 6, both prior and subsequent to its amendment by Irish Nationality and Citizenship Act 2001, s 3.

62 The main exception, as we have seen, is that Irish nationals are subject to control in Britain alone. In addition, certain Commonwealth citizens who had a right of abode in Britain on 1 January 1983 are exempt from British immigration law alone: see Immigration Act 1971, s 2(1), as amended by British Nationality Act 1981, s 39(2).

The law on entry

The common travel area is also reflected in the special provision made in British and Irish law for entry from the other state. In Britain, that principle was first made explicit in the law relating to aliens in 1925, and was extended to Irish nationals and Commonwealth citizens when immigration law was codified by the Immigration Act 1971. Section 1(3) of the 1971 Act continues to provide that 'arrival in or departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act,' and goes on to state that 'in this Act the United Kingdom and those places . . . are collectively referred to as "the common travel area".' The effect of section 1(3) is to establish a presumption that no-one travelling from Ireland must obtain leave to enter Britain, as would otherwise be required under section 3 of the 1971 Act.⁶³

The general principle that those arriving from Ireland do not require leave to enter is however subject to a number of exceptions. Some individuals do not have a right to enter without leave: those with a deportation order in force against them;⁶⁴ those to whom leave to enter has previously been refused (and has not subsequently been granted);⁶⁵ and, those who have been excluded from Britain on the grounds that this is 'conducive to the public good'.⁶⁶ Leave to enter is also required by certain categories of person: visa nationals; those (other than Irish nationals) who travel by air from Ireland, having commenced their journey outside the common travel area, but who were not given 'leave to land' in Ireland; those who entered Ireland unlawfully from outside the common travel area; and, those who enter Ireland from another part of the common travel area which they entered unlawfully or where they had remained after expiry of their leave.⁶⁷ While the purpose of these exceptions is to ensure that British immigration requirements cannot be avoided by entry through Ireland, it may be harsh in individual cases, as it may be difficult in practice to obtain leave to enter from Ireland.⁶⁸

British law also places automatic conditions upon the right to remain of persons arriving from Ireland, apart from Irish nationals and those with a right of abode in Britain.⁶⁹ In the usual case, the right to remain is limited to three months,⁷⁰ and an individual may not engage in employment or occupation for reward unless they are

63 For a detailed account of British law on entry from other parts of the common travel area, see A. Nicol, 'The Common Travel Area' in E. Guild and P. Minderhoud (eds), *Security of Residence and Expulsion: Protection of Aliens in Europe* (The Hague: Kluwer, 2001).

64 Immigration Act 1971, s 9(4).

65 *ibid.*

66 Slightly different versions of this exception are contained in the Immigration Act 1971, s 9(4) and in the Immigration (Control of Entry through the Republic of Ireland) Order 1972 (SI 1972 No 1610), Art 3(1)(b)(iv).

67 Art 3 of the 1972 Order. The provision on expiry of leave was added by the Immigration (Control of Entry through the Republic of Ireland) (Amendment) Order 1979 (SI 1979 No 730).

68 For examples of illegal entry related to the absence of immigration controls on travel from Ireland, see *R v Governor of Ashford Remand Centre, ex p Bouzagou* [1983] Imm AR 69, and *R v Secretary of State for the Home Department, ex p Mohan* [1989] Imm AR 436.

69 Art 4 of the 1972 Order. This provision does not apply those who obtain leave to enter and remain in Britain before arrival: see Immigration (Control of Entry through the Republic of Ireland) (Amendment) Order 2000, SI 2000 No 1776.

70 For an example of deportation for staying longer than three months, see *Kaya v Secretary of State for the Home Department* [1992] Imm AR 591.

a European Union national.⁷¹ However, if the individual is a visa national with a 'short visit' visa, they may only stay for one month and must register with the police. In addition, if an individual's leave to remain expired while they were outside Britain, then the right to remain without renewal is limited to seven days.

British law on entry from Ireland has one further aspect. It is well-known that sanctions are not imposed upon carriers who have transported non-nationals with inadequate documentation from Ireland.⁷² It appears too that the so-called 'civil penalty' for transporting clandestine entrants into Britain is not applied to entry from Ireland either.⁷³ In neither case however is there anything in the relevant legislation to preclude application to entry from Ireland. Presumably, the exceptional treatment of entry from Ireland is to avoid a situation in which carriers and hauliers treat Britain and Ireland as having an immigration frontier, even though the state itself considers controls unnecessary.⁷⁴

Irish immigration law also makes special provision for entry from Britain, but is less detailed, and avoids referring to the common travel area in terms. Its approach is to place different obligations on aliens according to whether they have entered from Britain or elsewhere.⁷⁵ Under the Aliens Order 1946, an alien who wishes to enter Ireland from a state other than Britain must land at a designated port, and must obtain leave to land, which may be refused on various grounds. By contrast, aliens who enter Ireland from Britain do not ordinarily require leave to enter. They are instead obliged to have a visa if they are visa nationals, to report to a 'registration officer' within seven days, and to obtain leave to remain within one month of taking up business or employment, or three months in other cases. The law on entry to Ireland was however the subject of a significant amendment in 1997, as a result of which immigration officers may examine aliens entering from Britain, and apply the same conditions to them as if they had arrived from elsewhere.⁷⁶ (The 1997 amendment is considered further below.)

Enforcement

In addition to special provision for entry to Britain from Ireland, and *vice versa*, the common travel area implies that Britain and Ireland may be called upon to enforce

71 The text of the 1972 Order excludes Spanish and Portuguese nationals from the right to take up employment, and does not exempt citizens of non-European Union ('EU') states of the European Economic Area ('EEA'): see Art 4 of the 1972 Order, as amended by the Immigration (Control of Entry through the Republic of Ireland) (Amendment) Orders 1985 (SI 1985 No 1854) and 1987 (SI 1987 No 2092). The rights of EEA nationals to engage in economic activity derive instead from the incorporation of the European treaties into British law, while their right to reside in Britain without leave to remain is set out in the Immigration (European Economic Area) Regulations 2000 (SI 2000 No 2326), Reg 14.

72 I. Macdonald and N. Blake, *Immigration Law and Practice in the United Kingdom*, (London: Butterworths, 4th ed, 1995) 30–31. Carriers' sanctions are provided for by the Immigration (Carriers' Liability) Act 1987, s 1. A new set of provisions on the subject, contained in the Immigration and Asylum Act 1999, s 40, has not yet been brought into force.

73 Immigration and Asylum Act 1999, s 32.

74 The non-application of carriers' sanctions to unauthorised passengers entering from Ireland was one of the arguments that the system was contrary to EC law on the provision of cross-border services in *R v Secretary of State for the Home Department, ex p Hoverspeed* [1999] EuLR 596 (QBD). In rejecting the argument, Simon Brown LJ concluded that, even if Britain was prohibited from discriminating against travel from other Member States, this was not a case of discrimination, as travel from Ireland did not pose the same problems for immigration control.

75 Arts 5 and 6 of the Aliens Order 1946, as amended.

76 Aliens (Amendment) (No 3) Order (SI 1997 No 227).

the other's immigration policy. There is however something of an imbalance between British and Irish law in this respect. Explicit provision for enforcement of Irish policy has been rare in British law. Although the Aliens Order 1925 provided for the enforcement in Britain of Free State immigration conditions, that provision was repealed in 1939 and was not subsequently re-introduced. In the post-war years, Irish policy has been recognised only indirectly, through the provision in the immigration rules after 1972 that 'a passenger arriving in the United Kingdom is to be refused leave to enter if there is reason to believe that he intends to enter any of the other parts of the Common Travel Area, and that he is not acceptable to the immigration authorities there'.⁷⁷ That provision was however removed from the immigration rules in 1994.⁷⁸

Irish immigration law has by comparison frequently reflected the influence of British policy. This has firstly been seen in Irish law relating to particular states. Perhaps the most notorious example was the extension of Irish immigration law to citizens of Commonwealth states in 1962. That change arose out of a Home Office request, prior to the introduction of the Commonwealth Immigrants Bill in 1961, for co-operation to ensure that Ireland would not be an 'open backdoor' to Britain once the legislation took effect.⁷⁹ Indeed, by limiting the exemption from its aliens legislation to those *born* in Britain, the Irish amendment went further than Britain in pursuit of the implicit policy of curtailing non-white immigration. The 1962 Act itself exempted not only those born in Britain, but also others with full British citizenship or who had British passports issued in Britain or Ireland.⁸⁰ The Irish legislation was however deliberately made more restrictive in order to exclude non-white holders of British passports.⁸¹ Despite that background, when the Irish legislation of 1962 was criticised in the *Dáil* for giving effect to 'a most disreputable piece of colour bar legislation passed by the House of Commons',⁸² the Minister for External Affairs insisted that 'the British Government have not requested us to pass legislation or make regulations of this kind'.⁸³ Later, the Minister for Justice similarly declared that 'we were not requested by the British Government to do so, but the necessity to make this Order arose from recent British legislation'.⁸⁴

The common travel area has also led Irish visa policy to be strongly influenced by Britain.⁸⁵ This can be seen for recent decades from Table 1, which gives

77 Statement of Immigration Rules for Control on Entry, HC 509 (1971–72) para 8.

78 The last rule referring to the policy of other parts of the common travel area was in the Statement of Changes in Immigration Rules, HC 251 (1989–90) para 15, which was replaced by the Statement of Changes in Immigration Rules, HC 395 (1993–94). It may be of course that in practice the British authorities continue to refuse entry to those undesirable elsewhere in the common travel area.

79 Department of Justice, 'Meeting with Mr. Chin-chen, British Home Office' memorandum of 20 October 1961 (NAI, DT S15273B).

80 Commonwealth Immigrants Act 1962, s 1(2) and 1(3).

81 Minister for External Affairs, Frank Aiken, argued that the 'British definition of persons "belonging" might entitle all persons who are citizens of the United Kingdom and Colonies at present in Britain (eg the West Indians) to be included in this category by the simple expedient of getting a passport in London', and declared himself unconcerned that 'by adopting such an expedient we may be accused of going even further than the British authorities in adopting a policy of racial discrimination': memorandum of the Minister for External Affairs, 'Control of Alien Immigration into Ireland', 7 February 1962 (NAI, DT S15273B).

82 Noel Browne, *Dáil Debates* vol 193 cols 422–423 21 February 1962.

83 Frank Aiken, *ibid*.

84 Charles Haughey, *Dáil Debates* vol 196 col 1729 5 July 1962.

85 The British 'negative list' of states whose nationals require a visa is set out in HC 395 (1993–94), n 77 above, Appendix I (as amended). The Irish 'positive list' of states whose nationals do not need a visa is set out in Aliens (Visas) Order 2001 (SI No 36 of 2001).

Table 1: New visa states in Britain or Ireland, 1973–2001

State	Britain	Ireland
I. Britain first or simultaneously		
Pakistan	1 January 1973	1 January 1988
Argentina	9 April 1982 – 8 June 1990	never imposed
Sri Lanka	30 May 1985	31 May 1985
Bangladesh	15 October 1986	1 January 1988
India	15 October 1986	1 January 1988
Ghana	23 October 1986	1 January 1988
Nigeria	1 February 1987	1 January 1988
Turkey	23 June 1989	19 November 1989
Tunisia	1 April 1990	1 April 1990
Uganda	2 April 1991	12 August 1993
Sierra Leone	21 September 1994	5 October 1994
Gambia	27 October 1995	28 November 1995 – 1 March 2001
Tanzania	5 January 1996	4 April 1996
Kenya	8 March 1996	15 March 1996
Fiji	4 April 1996	4 April 1996 – 1 March 2001
Guyana	4 April 1996	4 April 1996 – 1 March 2001
Mauritius	4 April 1996	4 April 1996 – 1 March 2001
Zambia	4 April 1996	4 April 1996
Ecuador	1 August 1997	30 August 1997
Slovak Republic	8 October 1998	19 October 1998
Croatia	19 November 1999	until 31 January 1999
II. Ireland first		
Surinam	1 March 1976 – 1 April 1978 and 4 April 1996	throughout period
Haiti	8 July 1989	throughout period
Algeria	1 April 1990	throughout period
Morocco	1 April 1990	throughout period
Ivory Coast	21 September 1994	throughout period
Bahrain	4 April 1996	throughout period
Dominican Rep.	4 April 1996	throughout period
Kuwait	4 April 1996	throughout period
Maldives	4 April 1996	throughout period
Niger	4 April 1996	throughout period
Papua New Guinea	4 April 1996	throughout period
Qatar	4 April 1996	throughout period
United Arab Emirates	4 April 1996	throughout period
Peru	4 April 1996	1 April 1990
Colombia	29 May 1997	1 April 1990
Antigua and Barbuda	never	until 1 March 2001

Table 1: Continued

State	Britain	Ireland
II. Ireland first		
Belize	never	until 1 March 2001
Bolivia	never	until 1 March 2001
Dominica	never	until 1 March 2001
Kiribati	never	until 1 March 2001
Maldives	never	until 1 March 2001
St. Kitts and Nevis	never	until 1 March 2001
St. Lucia	never	until 1 March 2001
St. Vincent and the Grenadines	never	until 1 March 2001
Seychelles		
Solomon Islands	never	until 1 March 2001
Tuvalu	never	until 1 March 2001
Vanuatu	never	until 1 March 2001

Source: Compiled by the author from British Statements of Changes in Immigration Rules and Irish Aliens (Amendment) Orders.

Note that the list does not include newly established states. Note too that from 4 April 1996 until 4 April 2001 Britain and Ireland were bound to require visas of nationals of 101 states and other entities by Council Regulation 2317/95 on the countries whose nationals must be in possession of visas when crossing the external borders of the Member States (1995 OJ L 234/1), and its replacement, Council Regulation 574/ 1999 (1999 OJ L 72/2). The 1999 Regulation was replaced by Council Regulation 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (2001 OJ L 81/1), which does not apply to Britain and Ireland.

information as to the date of coming into force of new visa requirements in Britain and Ireland since 1973. Part I of the Table lists those states upon whom Britain first imposed a visa requirement, including those where Britain and Ireland did so on the same day. The list does reveal some anomalies, such as that Pakistan became a visa state in 1973 for Britain but only in 1988 for Ireland, that Argentina was a visa state for Britain alone between 1982 and 1990, and that in recent years Croatia (1999), Fiji, Gambia, Guyana and Mauritius (all 2001) have ceased to be visa states for Ireland alone. In general however it shows a consistent pattern between 1985 (Sri Lanka) and 1998 (Slovak Republic) that, once Britain imposed a visa requirement upon nationals of a given state, Ireland quickly followed. That may be contrasted with the list of states, set out in Part II of the Table, upon whom Ireland first imposed a visa requirement. In those cases, it is hard to see any evidence of Britain's willingness to follow suit. The clear implication is that in the area of visa policy, Ireland has been upholding British requirements, rather than *vice versa*.

Irish law and practice have also upheld British immigration decisions in relation to individuals. A key provision in this regard authorises the exclusion from Ireland of non-nationals who are undesirable in Britain. That was first provided for in law by the Aliens Order 1966, which permitted Commonwealth and South African citizens to be refused entry if an immigration officer believed that they intended to travel to Britain but would not have been admitted there had they sought to enter

from elsewhere.⁸⁶ A similar provision was extended to all aliens in 1975, and Article 5(2)(j) of the Aliens Order 1946 now provides that leave to enter may be refused if an immigration officer is satisfied that an individual ‘intends to travel . . . to Great Britain or Northern Ireland, and would not qualify for admission to Great Britain or Northern Ireland if he or she arrived there from a place other than the State.’⁸⁷

Article 5(2)(j) has however proven highly controversial. Reliance upon the power was successfully challenged in a High Court case in 1985, when Egan J held that Article 5(2)(j) did not authorise an immigration officer to anticipate the British authorities’ decision.⁸⁸ If that is correct, then Article 5(2)(j) can probably be relied upon only where Irish officials have specific knowledge of the British view of an individual case. Doubts have also been expressed as to the compatibility with the Irish Constitution both of Article 5(2)(j) and of immigration decisions which rely upon it, in that they involve a delegation to Britain of decisions concerning entry to Ireland.⁸⁹ Reliance upon Article 5(2)(j) was also the subject of debate in the Irish parliament in June 1999, when a Japanese national was denied permission to enter Ireland, having previously been refused entry to Britain, even though she claimed that her purpose was to participate in Bloomsday in Dublin.⁹⁰ Ministers justified the particular decision on the basis that the immigration officer was satisfied that she intended to travel to Britain, and maintained that the general policy of exclusion in such circumstances was necessary in order to protect the common travel area.⁹¹

In addition to refusing entry to certain persons thought likely to travel to Britain, the Irish authorities have also been willing to deny residence to those subject to a deportation order in Britain. That was the issue in *Kweder v Minister for Justice*, which concerned the refusal in 1994 of a visa to a Syrian national who wished to join his British wife who was living and working in Dublin. Because the applicant was in principle entitled to live in Ireland as the spouse of an EU migrant worker, the central question was whether Ireland was permitted to deny him residence on public policy grounds under European Community law. In the High Court, Geoghegan J held that, in general, if the granting of an entry visa would jeopardise the continuance of the common travel area, that was sufficient for a public policy defence to be available. In order to rely upon that policy, however, the Minister had to be satisfied that the application to enter Ireland was ‘in reality a device in order to obtain entry into the United Kingdom.’ As that test had not been satisfied in the particular case, the refusal to issue an entry visa was quashed.⁹²

86 Aliens (Amendment) Order, 1966 (SI No 12 of 1966).

87 Art 5(2)(j) of the Aliens Order 1946, as amended by the Aliens (Amendment) Order 1975 (SI 1975 No 128) and the Aliens (Amendment) (No 2) Order 1999.

88 *Nsika v Officer in charge of Fitzgibbon Garda Station*, *Irish Times*, 20 April 1985. The account here relies upon K. Costello, ‘The Irish Deportation Power’ (1990) 12 *Dublin University Law Journal* 81, 84–85.

89 For a discussion, see K. Costello, ‘Some Issues in the Control of Immigration in Irish Law’ in L. Heffernan (ed), *Human Rights: A European Perspective* (Dublin: Round Hall Press, 1994) 156–158.

90 See the criticisms of Proinsias de Rossa, *Dáil Debates* vol 506 cols 702–706 17 June 1999 and of David Norris, *Seanad Debates* vol 159 cols 1662–1665 29 June 1999.

91 See the remarks of Minister for Social, Community and Family Affairs, Dermot Ahern, *Dáil Debates* vol 506 cols 764–766 17 June 1999, and of Trade Minister, Tom Kitt, *Seanad Debates* vol 159 col 1666 30 June 1999.

92 *Kweder v Minister for Justice* [1996] 1 IR 381, 387. The report of the case records that an entry visa was subsequently issued to the applicant.

The reasons for the common travel area

The discussion so far has shown the durability of the ‘arrangements . . . relating to the movement of persons’ between Britain and Ireland. These arrangements have influenced the status of Irish nationals in Britain and British nationals in Ireland and have meant the absence of systematic immigration controls on travel between Britain and Ireland. They have also led the two states – and Ireland in particular – to be prepared to enforce one another’s immigration requirements. It is significant too that the common travel area has survived the security concerns associated with Northern Ireland since 1968, notwithstanding the suggestions that there should be restrictions on travel between the two jurisdictions in Ireland.⁹³

Given the complexity of the relationship between Britain and Ireland, how is their co-operation in the field of immigration control to be explained? An examination of the available material suggests that the peculiarities of the Irish border have been the primary reason for the absence of immigration control. This is partly because of the physical difficulty of immigration control on the Irish border, given that it is approximately 280 miles long,⁹⁴ does not follow natural boundaries and cuts across some 180 roads. It also reflects the political difficulty of such controls, given the social and economic relationships between those on the two sides of the Irish border.⁹⁵

In Britain’s case, the impracticability of immigration controls at the Irish border has been the main reason advanced in support of the common travel area. That argument lay at the heart of the refusal to abolish the wartime controls on travel between Northern Ireland and Great Britain until Ireland had agreed to the resumption of co-operation in immigration control. The alternative, to attempt to make immigration control effective at the Irish border, would have required ‘an army of immigration officers’.⁹⁶ The same justification was advanced at the time of the Commonwealth Immigrants Act 1962, when the primary reason given for not imposing control on entry from Ireland was the difficulty of making it effective at the Irish border:

All experience and information indicates how very difficult it is to police the Republic-Ulster border and prevent people getting across it either by day or, especially, by night. We are, therefore, forced to the conclusion, as we were in war time and after, that if we are to operate a control against the citizens of the Irish Republic we should have to institute a control within the United Kingdom itself. The Government take the view that that would be an intolerable imposition upon British citizens.⁹⁷

93 See for example the remarks of David Trimble, HC Deb vol 187 cols 321–322 6 March 1991. Note however that port and border controls on entry to Great Britain and Northern Ireland have been possible since the Prevention of Terrorism (Temporary Provisions) Act 1974, s 8, and are now contained in the Terrorism Act 2000, s 53 and Sched 7. Previously, individuals could also be excluded from entering Britain, Northern Ireland or Great Britain under the Prevention of Terrorism (Temporary Provisions) Act 1989, ss 4, 5 and 7 and earlier legislation. Those parts of the 1989 Act lapsed with effect from 22 March 1998.

94 The estimate of the length of the border is taken from G. Hand (ed), *Report of the Irish Boundary Commission 1925* (Shannon: Irish University Press, 1969) vol 1, 143.

95 For a discussion of the factual circumstances of the Irish border, see L. O’Dowd and J. Corrigan, ‘Securing the Irish Border in a Europe without Frontiers’ in L. O’Dowd and T. Wilson (eds), *Borders, Nations and States: Frontiers of Sovereignty in the New Europe* (Aldershot: Avebury, 1996) 119–120.

96 Under-Secretary of State for the Home Department, Geoffrey de Freitas, HC Deb vol 478 col 848 28 July 1950.

97 Home Secretary, R.A. Butler, HC Deb vol 649 col 701 16 November 1961.

The same argument was put forward when the common travel area was confirmed in British law by the Immigration Act 1971. The Government argued that the common travel area facilitated travel by Irish workers to Britain, and added that its retention was desirable in order to maintain good relations with the Irish Government in the context of the emergent conflicts in Northern Ireland. However the difficulty of enforcing immigration control at the Irish border was once again the main consideration:

We should have to face the possibility of controlling the land frontier between the Republic of Ireland and Northern Ireland ... and no-one supposes that it would be possible to keep it intact without the most rigorous measures ... If we were to try to enforce the inviolability of the land frontier as a military operation it simply would not be on.⁹⁸

The political difficulty of control on personal movement at the Irish border has also been accepted by Britain in the security context. Although many border crossings were closed under emergency powers legislation,⁹⁹ there were limits to the control it was thought prudent to impose. As the Northern Ireland Office put it in 1990, 'rigid control of movement, where it is physically possible, would cause widespread difficulties, would severely disrupt life in certain areas and would give rise to considerable local friction'.¹⁰⁰ These considerations are plainly applicable to immigration control as well.

It is somewhat more difficult to assess the reasons for Ireland's support for the common travel area, simply because of the reluctance to give its content publicity. The background to the Irish authorities' agreement in 1952 can be seen from archive material.¹⁰¹ As with Britain, the Irish authorities believed that controls on the Irish border were not feasible: 'We have no check on the entry of aliens from [Britain] ... and we could not impose an effective check on account of the existence of the Border.' If Britain wished to abolish passenger controls, it was therefore preferable for Ireland to co-operate with it in immigration control. In addition, it was argued that the ending of restrictions on travel to Great Britain would 'remove an irksome formality for Irish visitors to Britain and should facilitate tourist traffic from Britain to Ireland'.¹⁰²

The reasons for Irish support for the common travel area have also been set out more frequently in recent years. This has partly been a result of increased public and parliamentary debate on immigration law. For example, in arguing that the common travel area was the reason for introducing a power to detain asylum applicants in the Refugee Act 1996 (see below), one minister indicated that the common travel area was 'of enormous importance in the context of Northern Ireland', 'of vital importance to the smooth operation of trade on all parts of this island and between the two islands' and 'an important feature of tourism and other social interchanges on this island'.¹⁰³ Government ministers have also had to

98 Minister for Foreign and Commonwealth Affairs, Andrew Kershaw, HC Standing Committee B 18 March 1971 col 17.

99 Northern Ireland (Emergency Provisions) Act 1978, Sched 3. The Northern Ireland Office estimate was that in 1989, 65 of 291 recognised border crossings were blocked to vehicles under these powers: Home Affairs Committee, *Practical Police Co-operation in the European Community*, memorandum by the Northern Ireland Office, HC 363-II (1989-90), 175.

100 Northern Ireland Office, n 99 above, 175.

101 The discussion in this paragraph is based upon the Department of Justice memorandum of 27 February 1952 (n 14 above).

102 The one disadvantage for the Irish authorities was that the removal of the *de facto* restrictions on the emigration of workers, but that was not thought sufficient reason not to co-operate with Britain.

103 Minister of State in the Department of Justice, Joan Burton, *Dáil Debates* vol 462 col 838, 28 February 1996.

defend the common travel area in order to explain Ireland's position under the immigration and asylum provisions of the Treaty of Amsterdam. As the Foreign Minister put it in 1997,

Ireland's first concern was to protect the common travel area ... Protecting the common travel area with the UK is important for us, since more than 70 per cent of travel originating in Ireland is to, or through the UK.¹⁰⁴ In these circumstances, freer travel between Ireland and continental member states would have made no sense if it meant the imposition of certain new controls on travel between Ireland and Britain.¹⁰⁵

What these statements suggest is that, in addition to its presumed effects in strengthening immigration control, Irish government support the common travel area because of its practical benefits in facilitating movement between the two states, including that across the Irish border.

Developments in Ireland

If the practical and political obstacles to immigration control on the Irish border are the primary reason for the existence of the common travel area, its operation has been shaped by the absence of significant immigration to Ireland. That circumstance helps for example to explain the absence in Irish law of a power to exclude or deport British nationals. It may also explain the far greater influence of British immigration policy in Ireland than *vice versa*, as Ireland has had less reason to seek the reflection of its concerns in British policy. More generally, the low level of immigration to Ireland helps to explain the peculiarity that non-EU nationals who reside in Britain or Ireland do not have an automatic right to travel to the other state.

It is therefore of great significance for the common travel area that the economic expansion in Ireland since the mid-1990s¹⁰⁶ has been associated with a marked increase in immigration and applications for asylum. The speed of change in Ireland can be gauged from the fact that the 1996 census found only 41,744 persons resident in Ireland who had been born outside the European Union, among whom will have been an unknown number of Irish citizens.¹⁰⁷ That may be compared with the information in Table 2 on the number of work permits issued each year to non-EU nationals. It shows an increase from around 1,100 in 1992 to around 18,000 in 2000, to which a further 1,500 work visas issued in 2000 must be added in order to obtain a complete picture.¹⁰⁸ At the

104 This figure presumably excludes travel to Northern Ireland. Note that official estimates show that journeys to Ireland are four times more likely to originate in Great Britain than on the European continent: see Meehan, n 27 above, 56–57.

105 David Andrews, *Dáil Debates* vol 481 col 1096 16 October 1997. For a similar assessment by an Irish official who participated in the Amsterdam negotiations, see B. McDonagh, *Original Sin in a Brave New World: An Account of the Negotiation of the Treaty of Amsterdam* (Dublin: Institute of European Affairs, 1998) 169–170. See too the 'Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland' annexed to the Treaty of Amsterdam (OJ 1997 C 340/143).

106 It is estimated for example that between 1993 and 1999 Irish GNP increased by 57% in real terms: see Central Statistical Office, 'National Income and Expenditure: First Results for 1999' (Dublin: Central Statistical Office, 1999).

107 Central Statistical Office, *Statistical Abstract 1998–1999* (Dublin: Stationery Office, 1999) 40–41. For example, the census recorded 15,619 persons born in the USA and 2,901 born in Canada, many of whom are likely to have been Irish nationals by descent.

108 Department of Enterprise, Trade and Employment, *Annual Report 2000* (Dublin: Stationery Office, 2000) 41. It also records that only 13% (approximately 2,340) of the work permits issued in 2000 were renewals.

Table 2: Immigration and Asylum Statistics in Ireland, 1992–2000

Year	1992	1993	1994	1995	1996	1997	1998	1999	2000
Work permits	—	1103	2610	4333	3778	4544	5715	6253	18017
Asylum applications	39	91	362	424	1179	3883	4626	7724	10398

Source: B. Ingoldsby, 'The Refugee Act 1996 and its Amendments' paper delivered at Bar Council of Ireland seminar on Refugee and Asylum Law in Ireland, January 2001 (available at <http://www.irlgov.ie/justice/Publications/publications.htm>) 12.

same time, in common with other European states, Ireland has seen a large rise in the number of applications for asylum in recent years. This too can be seen from Table 2, which shows that, whereas there were only 39 applications for asylum in 1992 and 91 in 1993, their number had increased to over 1,000 in 1996, and to over 10,000 in 2000.

These new circumstances in Ireland have led to a series of reforms in the field of immigration and asylum law and policy which have related to the common travel area. One significant development in relation to the law on entry was the Aliens Amendment (No. 3) Order 1997, to which reference has been made. It permitted immigration officers to treat aliens entering from Britain as if they had entered from elsewhere. This change was explained as a response to increased illegal entry and asylum applications by those entering from Britain.¹⁰⁹ In practice, it has led to the introduction of a system of selective immigration controls upon those entering Ireland.¹¹⁰

Other changes have pursued the established policy of support for the common travel area, but in new ways. That was seen for example in the introduction of new powers for the detention of non-nationals. The Refugee Act 1996 provides for the detention of an applicant for asylum where an immigration or police officer reasonably suspects that the applicant 'intends to leave the State and enter another State without lawful authority'.¹¹¹ The Illegal Immigrants (Trafficking) Act 2000 then gave immigration and police officers power in the same circumstances to detain an individual against whom a deportation order has been made.¹¹² In each case, ministers claimed that the purpose of the powers of detention was to ensure that Britain was not entered illegally, in order thereby to 'safeguard the integrity' and ensure the 'maintenance and protection' of the common travel area.¹¹³ That policy was moreover endorsed by the Supreme Court when it upheld the constitutionality of the detention power introduced by the 2000 Act. Citing the judgment in *Kweder*, its view was that 'the preservation of the common travel area, which ... is to the benefit of this State, requires some vigilance to ensure that the

109 'Immigrants to be vetted at entry points from Britain' *Irish Times* 26 June 1997 and the statement of the incoming Minister for Justice, John O'Donoghue, *Seanad Debates* vol 151 cols 1155–1157 10 July 1997.

110 '109 refused entry in 10 days of controls' *Irish Times* 11 July 1997 and 'Officers accused of targeting black passengers' *Irish Times* 18 October 1997.

111 Refugee Act 1996, s 9(8), which came into force on 20 November 2000.

112 Immigration Act 1999, s 5(1)(b), as amended by the Illegal Immigrants (Trafficking) Act 2000, s 10(b).

113 Joan Burton (n 103 above) and Minister for Justice, John O'Donoghue, *Dáil Debates* vol 520 col 404–409 31 May 2000.

State is not used as a back door entrance for unlawful immigrants to the United Kingdom'.¹¹⁴

A final set of developments relating to the common travel area has seen the Irish authorities reproduce aspects of British policy on immigration and asylum, in order to remove any advantage for illegal entrants or asylum applicants in coming to Ireland instead of Britain. This dynamic was first seen in relation to welfare provision for asylum applicants. The British Government announced in July 1998 that it intended to introduce a system of support for asylum-seekers based primarily on provision on kind, with designated accommodation, vouchers and limited cash payments.¹¹⁵ At that time, the position in Ireland was that applicants for asylum had the same entitlement as anyone else in the state to the main non-contributory benefits (rent allowance and supplementary welfare allowance). The British decision prompted the Irish Minister for Justice to state that, 'given that we maintain a Common Travel Area with the UK ... a decision of this character by the UK has to be taken into account in a very serious way by any Irish Government'.¹¹⁶ Accordingly, the Irish Government decided in late 1999 that it too would move to a system of 'direct provision', with dispersal of asylum applicants to designated places of accommodation and limited cash payments.¹¹⁷ The new British system came into operation on 1 April 2000, while that in Ireland commenced nine days later.¹¹⁸

The introduction of a criminal offence of trafficking in 2000 provides a second example. In Britain, the Immigration Act 1971 provides that it is an offence to facilitate the entry of someone an individual knows or has 'reasonable cause for believing' to be an illegal entrant or (since 1996) an asylum claimant.¹¹⁹ A very similar provision was introduced into Irish law by section 2 of the Illegal Immigrants (Trafficking Act) 2000. A person who 'organises or knowingly facilitates the entry' of another person into Ireland is guilty of an offence, if the person does so for gain, and knows or has 'reasonable cause to believe' that the other is an illegal entrant or a person who intends to apply for asylum.¹²⁰ The Minister for Justice justified the introduction of an offence of trafficking by

114 *In re Article 26 of the Constitution and sections 5 and 10 of the Illegal Immigrants (Trafficking) Bill*, Supreme Court judgment of 28 August 2000. In its judgment, the Supreme Court rejected the argument that the new s 5(1)(b) of the Immigration Act 1999 involved an unconstitutional delegation of legislative power to immigration and police officers, on the grounds that it did not delegate legislative power at all, but rather sought to ensure respect for the law of other States. This line of argument casts doubt on the suggestion, discussed in the text above, that Art 5(2)(j) of the Aliens Order 1946 is contrary to the Irish Constitution.

115 Home Office, *Fairer, Faster and Firmer: A Modern Approach to Immigration and Asylum*, Cm 4018, especially paras 8.19–8.21 and Home Secretary, Jack Straw, HC Debs vol 317 col 37–38 27 July 1998.

116 'Direct provision for asylum seekers' Department of Justice, Equality and Law Reform press release, 6 September 1998.

117 'Immigration and Asylum Issues' Department of Justice, Equality and Law Reform press release, 14 December 1999. In early 2001, adult applicants obtained IR£15 a week for 'personal requisites': see Minister for Social, Community and Family Affairs, Dermot Ahern, *Dáil Debates* vol 534 col 632 10 April 2001.

118 'Immigration and Asylum' Department of Justice, Equality and Law Reform press release, 28 March 2000. In practice, some applicants have been permitted to rent accommodation, and have thereby become eligible for standard welfare payments: 'Asylum and Immigration Matters' Department of Justice, Equality and Law Reform press release, 7 March 2001.

119 Immigration Act 1971 s 25, as amended by Asylum and Immigration Act 1996 s 5.

120 Illegal Immigrants (Trafficking) Act 2000, s 2. A further similarity with British law is that the 2000 Act provides an exception for *bona fide* organisations among whose purposes is the giving of assistance to applicants for asylum: compare Immigration Act 1971, s 25(1A)(b) with s 2(2)(b) of the 2000 Act.

reference to organised smuggling of illegal entrants and asylum applicants across the Irish border, and the fact that Ireland was one of the few EU Member States that did not have such legislation.¹²¹ It may be added that similar concerns lie behind proposed legislation on carriers' liability that, in the absence of such legislation, illegal entry and asylum applications are easier in Ireland than in other Member States.¹²²

Conclusion: the changing common travel area

The success of the common travel area in the eighty years since the establishment of the Irish Free State has been due to a combination of factors. At its heart has been a pragmatic response by Britain and Ireland to the practical and political difficulties associated with an effective immigration frontier at the Irish border. While that has in general led to the inter-dependence of immigration control in the two states, their different circumstances have meant that Ireland has tended to be involved in the implementation of British immigration policy, rather than *vice versa*. That has been seen here in the 1962 amendments to Irish immigration law, Irish visa policy, in the refusal of entry to Ireland to those whom Britain has excluded or deported, and more recently in the introduction of powers of detention in Ireland whose main purpose is to prevent entry to Britain. The changes to support for asylum applicants, and the introduction of an offence of immigration trafficking, also show that British immigration policy can exert an important indirect influence upon Ireland.

The apparent continuities in the history of the common travel area should not mask the extent to which it now faces a qualitatively new set of pressures. It is arguable that a precondition for the successful operation of the common travel area on its existing basis – an administrative arrangement, with only limited reciprocity – has been the absence of significant immigration to Ireland. It is already apparent that, faced with increased immigration and asylum applications, the Irish authorities have sought to make entry from Britain either more difficult or less attractive. One may speculate too that the changed circumstances in Ireland may also have other, more fundamental, implications. Ireland may for example seek to exert greater influence on British policy than has hitherto been the case. Or, Britain and Ireland may decide to provide for the position of the increased numbers of non-EU nationals resident in one state, but lacking a right to enter and remain in the other. It might even happen that increased immigration to Ireland, together with the increased attention paid to the common travel area since the Treaty of Amsterdam, may encourage the founding of these peculiar arrangements upon a formal, public agreement. At any event, there is every reason to anticipate further developments in the law relating to the common travel area in coming years.

121 John O'Donoghue, *Dáil Debates* vol 511 cols 755–760 24 November 1999.

122 For the proposals, see 'O'Donoghue announces new carriers' liability legislation' Department of Justice, Equality and Law Reform press release, 14 November 2000. Note that, in line with British practice in relation to Ireland, it is not intended that these sanctions should apply to entry from Britain.