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Racial profiling in immigration control: the problem with the Northern Irish border

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ABSTRACT

This article assesses how the discriminatory practice of racial profiling exists and can undermine a human rights-based system of immigration control in Northern Ireland. Post-Brexit there is a possibility that this practice may increase in Northern Ireland, given that it shares a border with another EU State. This article will centrally argue that immigration checks which take place on an ad-hoc basis in country should be prohibited because the risks of discriminatory practices are too high. However, if they are to take place, it will be contended that attempts to stop and question individuals for immigration checking should be subject to greater control and accountability. For example, by restricting the remit under which checks can take place, and by increasing the powers of PONI to receive complaints concerning immigration agents. This article will explore whether enhanced surveillance of Border Force could take place by requiring agents to wear body-worn cameras.

Keywords: Northern Ireland, racial profiling, accountability, border control, police ombudsman, body-worn cameras

1. Introduction

The border between Northern Ireland and the Republic of Ireland has been contentious since the establishment of the Northern Irish state. Due to political issues arising from the conflict it has, until relatively recently, been an area of enhanced military presence.¹ However, in more recent times, the border has become almost invisible. Often the only indicators for anyone crossing it are changes in road markings where different styles and colours are used North and South. It is estimated that up to 30,000 people seamlessly cross the border into the Republic of Ireland each day from Northern Ireland.² On the issue of trade, much of the ‘invisibility’ of border control has been facilitated through joint membership of the UK and Ireland to the European Union, which (at the time of writing) the United Kingdom may be leaving. On the issue of the migration of people, the Common Travel Area (CTA) which exists between the UK and Ireland has allowed the free travel of Irish and British persons to and from each state, as well as EU citizens.

The existence of an invisible border separating two states with different laws and customs may seem to be incongruous to an increasingly bordered and securitised western polity, where immigration control is increasing. For those interested in

¹ B Graham and C Nash ‘The Troubles and borderland life’ Borderlands Project, Queen Mary, University of London <<http://www.irishborderlands.com/index.html>> accessed 20 June 2019.

² FactCheckNI ‘Do 30,000 people cross Ireland-Northern Ireland border daily?’ (*FactCheck NI*, 2017) <<http://www.factcheckni.org/facts/do-30000-people-cross-ireland-northern-ireland-border-daily/#page18-20>> accessed 20 June 2019.

increasing immigration controls in Northern Ireland and the UK, for non-British (including Northern Irish) or non-Irish persons travelling through Irish ports of entry, or across the Irish border, there are a duality of concerns which are possibly contradictory and unresolvable. On the one hand, because of the issues surrounding the peace process, as well as issues relating the economy and immigration, there is no wish to see a 'hard border' erected in Northern Ireland where passport controls or identity checks could be implemented.³ On the other hand, there are several groups who want to see border controls. The current United Kingdom government does not want to see the Irish border used as 'back door' for migrants to enter Britain, and this has led to the establishment of Operation Gull,⁴ which has been running for several years. This is designed to target 'illegal migrants moving between Great Britain and the Irish Republic using the Irish land border and Northern Ireland as a route of illegal entry'.⁵ Immigration officials working under Operation Gull have been accused, by the Migrant Rights Centre Ireland, of racially profiling individuals.⁶

Racial profiling involves, in the context of immigration control, subjecting a person to additional checks because of their racial, religious or ethnic characteristics. It is contrary to human rights law. This article will look at this issue and will assess how racial profiling could be prevented. It will argue that where ad-hoc identity checks take place, in country, by state officials there will always be a danger of racial profiling. In relation to Northern Ireland, it will be argued that Operation Gull should cease, due to the high risk of discrimination. However, should it continue to take place, Border Force should be brought strongly under the remit of the police complaints mechanism - the Police Ombudsman for Northern Ireland. One of the central issues regarding racial profiling is evidencing that it is taking place. A suggestion to emerge from the United States is that body-worn cameras could be used by immigration officials to prevent

³ K Hayward (2017) 'The Irish border is not a technical issue but a political one' (*LSE Brexit*, 2017) 1-3.

⁴ For further information on Operation Gull see: Home Office UK Border Agency, *Common Travel Area: Review of New Arrangement at Northern Ireland Sea Ports* (Home Office, 2011); for information on its continuing use see: <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-04-19/136699/>> accessed 6 June 2019.

⁵ Home Office UK Border Agency, *Common Travel Area: Review of New Arrangement at Northern Ireland Sea Ports* (Home Office, 2011) para 2.2.

⁶ Migrant Rights Centre Ireland, *Singled out: Exploratory study on racial profiling in Ireland and its impact on migrant workers and their families*, (Migrant Rights Centre Ireland, 2011) <http://mrci.ie/wp-content/uploads/2012/10/Singled_Out.pdf> accessed 6 June 2019.

abuses. This idea will be explored in this article, but ultimately dismissed due to concerns around how this could be an invasion into the privacy of those being stopped for immigration checks, and the dangers in how data could be utilised for future immigration control. This article is important because it looks at an issue which has been previously under-explored in academic literature. Additionally, it is temporally pertinent because racial profiling could increase in frequency when the UK leaves the European Union, as European Economic Area (EEA) migrants will no longer automatically be entitled to remain and travel in the United Kingdom. This article also has international relevance – racial profiling is not an issue confined to the UK or Ireland. It is widespread - you can find racial profiling in Spain,⁷ Germany,⁸ or across the Øresund between Denmark and Sweden.⁹

This article will begin by conceptualising racial profiling, before discussing how it is prohibited under international human rights law, as well as the domestic law of the United Kingdom. It will then look at how people move between Ireland and the United Kingdom, and the issues created with regards to racial profiling. This article will assess how border controls are implemented within the United Kingdom, and how the wide remit immigration officials are given to question individuals creates an environment where there is the potential for discrimination. This article will also argue that there should be greater accountability of Border Force in Northern Ireland to the executive police complaints body – the Police Ombudsman of Northern Ireland (PONI). In addition, it will be assessed whether the enhanced surveillance of Border Force agents

⁷ United Nations Office of the High Commissioner, *Statement to the media by the United Nations Working Group of Experts on People of African Descent, on the conclusion of its official visit to Spain, 19-26 February 2018* (UNHCR, 2018)

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22705&LangI%20D=E>> accessed 20 June 2019; J J. Garcia Blesa and N Graffin 'Suspending the Rule of Law for Racial Minorities in Border Management? Racial Profiling in the Western Mediterranean and the Post-Brexit Irish Border' (in K von Sachsen, N Szuka & J J. Garcia Blesa *Legal Implications of Brexit*, (eds.) (Münstercher Verlag für Wissenschaft, 2018) 195-214).

⁸ M Khan, 'Anti-immigration mood drives fear of racist profiling on EU borders' *Financial Times* (London, 26 August 2018) <<https://www.ft.com/content/fac891a6-93f9-11e8-b67b-b8205561c3fe>> accessed 20 June 2019.

⁹ C Duffy, 'Beginning of the end of passport-free travel in Europe?' *The Irish Times* (Dublin, February 5, 2016) <<https://www.irishtimes.com/life-and-style/abroad/generation-emigration/beginning-of-the-end-of-passport-free-travel-in-europe-1.2523860>> accessed 5 June 2019.

could take place using body-worn cameras – it will ultimately conclude, within its context, that this is an undue interference into the privacy rights of individuals.

2. Conceptualising racial profiling

The issue of ethnic or ‘racial’ profiling first arose in the United States and was used to describe the police practice of stopping African American or Hispanic drivers in disproportionate numbers. The practice was based on the police singling out these communities as more likely to be involved in criminal activities.¹⁰ The decisive feature of racial profiling is that the law enforcement measures at stake are not directed against an individual or group based on their behaviour or on objective evidence, i.e., based on reasonable suspicion as the general principle of the rule of law would require, but rather based on their race, ethnicity, religion, etc (in this article we will use the phrase ‘racial profiling’ for short hand – which is the common method of describing this type of profiling).¹¹ Racial profiling may derive from legislation in a given country or region, but as Schutter and Ringelheim describe it may not necessarily take place as a result of a *de jure* requirement, but it can take place as part of *de facto* informal practice, based on officer’s memories, experiences or assumptions about the typical features of offenders,¹² or in this context in relation to individuals traversing borders. As a practice, racial profiling can occur both at the moment of targeting and during the processing of state actions, which can include searching, arresting or charging an individual on ethnic grounds.¹³ Applying the common understanding of racial profiling at borders, an officer identifies racial, religious or ethnic characteristics (or profile) of individuals and applies these to assess whether they are common characteristics of a person who resides in a State. He or she then uses their understanding of who does not match the local profile to select these people for immigration checking. Others who

¹⁰ O de Schutter, and J Ringelheim, ‘Racial profiling: A rising challenge for European human rights law’ (2008) 3 *The Modern Law Review* 71, 360-361. DOI: 10.1111/j.1468-2230.2008.00697.x.

¹¹ Open Society Justice Initiative, *Human Rights Digests: European Standards on Racial profiling*, (Open Society Justice Initiative, 2013) 4; European Fundamental Rights Agency, *Guía para entender y evitar la elaboración de perfiles étnicos discriminatorios* (Oficina de Publicaciones de la Unión Europea, 2010), 8-14, 20ff.

¹² De Schutter and Ringelheim, *supra* n 10, at 362.

¹³ Open Society Justice Initiative, *supra* n 11.

match the typical profile of a person from the state will be excluded from the process. This means that individuals can be stopped for additional immigration checking, solely based on their racial, religious or ethnic profile. According to the last report of the Fundamental Rights Agency of the EU (EUFRA), racial profiling persists throughout the EU and is practised in all Member States.¹⁴

3. Racial profiling and its legal prohibition

Racial profiling at borders engages several rights which are protected through international standards. The International Covenant on Civil and Political Rights (ICCPR)¹⁵ and the International Convention on the Elimination of all forms of Racial Discrimination 1969 (ICERD)¹⁶ provide a general prohibition on discrimination.¹⁷ The ICCPR, to which all EU member States are party, prohibits racial profiling as a violation of, among other rights, the right not to be discriminated against (Article 26), the right to freedom of movement (Article 12(1)) and the right to an effective remedy (Article 2(3)). In a case to come before the UN Human Rights Committee (HRC), *Williams Lecraft v Spain*,¹⁸ which assessed whether an identity check to which the applicant had been subjected was an act of racial discrimination, it was stated:

When the authorities carry out such checks, the physical or ethnic characteristics of the persons subjected thereto should not by themselves be

¹⁴ EU Fundamental Rights Agency, *Fundamental Rights Report* (EUFRA, 2017), 88-92; Human Rights Watch, *World Report 2016* (HRW, 2016), see especially sections on Germany, Netherlands and Spain <<https://www.hrw.org/world-report/2016/country-chapters/european-union-0#fc635d>> accessed 31 May 2019); Open Society Justice Initiative, *Racial profiling in the European Union: Pervasive, Ineffective, and Discriminatory*, (Open Society Justice Initiative, 2009) <https://www.opensocietyfoundations.org/sites/default/files/profiling_20090526.pdf> accessed 31 May 2019; J J. Garcia Blesa and N Graffin 'Suspending the Rule of Law for Racial Minorities in Border Management? Racial Profiling in the Western Mediterranean and the Post-Brexit Irish Border' (in K von Sachsen, N Szuka & J J. Garcia Blesa *Legal Implications of Brexit*, (eds.) (Münstercher Verlag für Wissenschaft, 2018) 195-214).

¹⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 17.

¹⁶ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

¹⁷ Article 14 of the European Convention on Human Rights does not provide a general prohibition – it can only be invoked in conjunction with the finding of a breach of other substantive rights.

¹⁸ *Williams Lecraft v. Spain*. UN Human Rights Committee. FF. Communication No. 1493/2006 (Views adopted on 27 July 2009, Ninety-sixth session). A/64/40, vol. II (2009) Annex VII.FF., 295

deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics. To act otherwise would not only negatively affect the dignity of the persons concerned but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination.¹⁹

The HRC in this case also established that the main reason why the State had violated the rights of the applicant was that the check had been carried out 'solely on the grounds of her racial characteristics and that these were the decisive factor in her being suspected of unlawful conduct'.²⁰ The ICERD specifically provides that racial discrimination should be prohibited in the enjoyment of 'the right to freedom of movement and residence within the border of the State', and 'the right to leave any country, including one's own, and to return to one's country' (Article 5(d) i and ii). The Committee for the Elimination of Discrimination, which monitors the ICERD, has stated that racial profiling can amount to discrimination.²¹ In its General Recommendation no.31 of 2005,²² the Committee points out that:

States parties should take the necessary steps to prevent questioning, arrests and searches which are based solely on the physical appearance of a person, that person's colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.²³

The Programme of Action adopted at the World Conference against Racism in 2001 also urged:

¹⁹ *ibid*, para 7.2.

²⁰ *ibid*, para. 7.4.

²¹ Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada*, UN Doc CERDC/61/CO/3, para 338 (2002).

²² Committee on the Elimination of Racial Discrimination, *General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, A/60/18, pp. 98-108

²³ *Williams Lecraft v. Spain*, para. 20.

States to design, implement and enforce effective measures to eliminate the phenomenon popularly known as 'racial profiling' and comprising the practice of police and other law enforcement officers relying to any degree on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity.²⁴

Regarding the control of the external borders of the EU, Article 7.2 of the Schengen Borders Code²⁵ provides that '[w]hile carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Article 7.1(2) directs border guards that '[a]ny measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures'. These provisions clearly prohibit targeting individuals for checks based on race or ethnicity. The FRONTEX Code of Conduct also prohibits racial discrimination of any kind (however, FRONTEX do not operate within the UK or Ireland).²⁶ On the European level, the prohibition of discrimination is also stipulated under Article 14 of the ECHR. This states:

The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.²⁷

The European Court of Human Rights has held that this is a non-exhaustive list of grounds.²⁸ Article 14 is 'parasitic', meaning that it only applies to 'rights and freedoms

²⁴ UN General Assembly, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, Durban, 31 August - 8 September 2001, January 2002, A/CONF.189/12, para 72.

²⁵ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJEU (L 77/1), 23.3.2016.

²⁶ Frontex, *Frontex Code of Conduct: For all persons participating in Frontex activities* (Frontex, 2019) Article 2(f).

²⁷ Article 14 European Convention on Human Rights

²⁸ *Andrejeva v. Latvia*, App no 55707/00 (ECHR, 18 February 2009) para. 74 (emphasis added).

set forth' in the Convention and its Protocols, and can only be found to be in breach when another substantive breach of another right or freedom has been found. It cannot be found to be in breach on its own.²⁹ It is supplemented by Protocol 12 of the Convention, which entered into force in 2005, and is designed to fill the gap by providing a general prohibition against discrimination, not contingent on finding a breach of another substantive right. However, Protocol 12 has not been widely ratified to date. The United Kingdom has not signed the Protocol. The Republic of Ireland has signed the Protocol, but has not ratified it.³⁰ This means that, in the case of the Irish border, anyone claiming discrimination in the UK or Ireland because of racial profiling in front of the European Court will need to be able to specify what Convention rights have been impacted upon as a result of discriminatory treatment before they can claim that they have been discriminated against under Article 14. Nevertheless, for some cases involving racial profiling in immigration control, applicants can make a successful claim that their rights to freedom of movement under Article 2 of Protocol 4 have been violated, in conjunction with Article 14, as happened in *Timishev v Russia*, discussed below.³¹ Article 2 of Protocol 4 guarantees movement within the state, but it does not guarantee the right for an alien to enter or to reside in a particular country,³² nor does it guarantee the rights of an illegal entrant.³³ However, individuals who are lawfully residing within the state, who have been subjected to identity checks, can rely upon it where racial profiling is present.

In the case of in *Timishev v Russia* the applicant and his driver travelled by car from Nazran in the Republic of Ingushetia to Nalchik in the Kabardino-Balkar Republic.³⁴ According to the applicant, his car was stopped at a checkpoint on the administrative border between Ingushetia and Kabardino-Balkar and he was refused entry, based on his Chechen ethnic origin.³⁵ The Court found a violation of the

²⁹ D Harris, M O'Boyle, E Bates and C Buckley, *Law of the European Convention on Human Rights* (2nd edn, OUP, 2009) 578.

³⁰ For a full list of signatures and ratifications see: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=g9EYb5q5> accessed 01/06/2018.

³¹ *Timishev v Russia*, App nos. 55762/00 and 55974/00 (ECHR, 13 December 2005).

³² *Sisojeva v Latvia*, App no 60654/00 (ECHR, 15 January 2007), para 99.

³³ *Paramanathan v FRG*, App no 12068/86 (ECHR, 1 December 1986).

³⁴ *Timishev*, para 12.

³⁵ *ibid*, para 13.

applicant's freedom of movement under Article 2 of Protocol No. 4, because it ruled that the restriction had not been in accordance with the law.³⁶ It also held that the applicant's freedom of movement had been restricted solely on the grounds of his ethnic origin.³⁷ The Court also found a violation of Article 14, establishing the European Court's standard for racial profiling in immigration control, clearly stating:

No difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.³⁸

This case is important because it appears to dispense with a proportionality requirement if law enforcement decisions are being made which discriminate on a person's ethnic origin, if the person's ethnic origin can be determined as a decisive criterion in decision-making. However, this entails that a difference in the treatment of an individual must be proven to at least a 'decisive extent'. This means that a person's ethnic origin can be a factor that can be taken into consideration, in the view of the European Court, if it is not decisive in creating a difference in treatment. In relation to this article, it prohibits individuals being stopped for identity checks in Northern Ireland who do not match a British or Irish profile, if it appears that this is the primary criteria for them being stopped. However, it leaves it open for some decision-making based on the perceived racial characteristics of the person having their identity checked, if it is a subsidiary consideration. If an immigration officer suggests that a person is acting suspiciously, and this is the primary reason for stopping them, rather than the person's racial profile, then this is legal. This potentially gives an immigration officer a wide remit in stopping individuals to check their identity because, as we will discussed below, it will be up to them to decide as to whether someone is acting suspiciously or not.

The lack of case law in front of the European Court is notable. As discussed below, this is not because racial profiling does not take place. Rather, it appears to be difficult to prove, and therefore cases are less likely to come before the courts.

³⁶ *ibid*, para 49.

³⁷ *ibid*, para 59.

³⁸ *ibid*, para 58.

Providing witness testimonies or recorded evidence may be difficult as identity checks can take place against targeted individuals in areas where they are in transit and immigration officers may be mobile (more of this will be discussed below). Therefore, it can be difficult for witnesses to note whether patterns are emerging. This makes the case of *Timishev* additionally problematic because providing proof that ethnicity is being used as a decisive criterion in immigration control will be difficult.

In the United Kingdom, it is noteworthy that the prohibition on public authorities to discriminate on grounds of race or ethnicity under the Race Relations (Amendment) Act, and its Northern Ireland equivalent, the Race Relations (Amendment) Regulations (Northern Ireland) Order 2003, does not apply to immigration authorities. Nevertheless, common law provides safeguards against the practice. In *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*³⁹ it was held that immigration officers operating at Prague airport had discriminated on racial grounds against Roma seeking to travel. Lady Hale in this case stated:

The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping.⁴⁰

It was further considered:

Immigration officials should have been given careful instructions in how to treat all would-be passengers in the same way, only subjecting them to more intrusive questioning if there was specific reason to suspect their intentions from the answers they had given to standard questions which were put to everyone. The system operated by immigration officers at Prague Airport was inherently and systemically discriminatory on racial grounds.⁴¹

³⁹ *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55.

⁴⁰ *ibid*, para 74.

⁴¹ *ibid*, para 97.

This case clearly provides that everyone should be treated in the same way in immigration control. However, it relates to controls which can be applied to everyone, in an airport. This requires individuals to be stopped *en masse*, which may not take place when people are having their identity checked on an ad-hoc basis, where they can be stopped randomly. Nevertheless, the tenor of Lady Hale's argument is that reasonable suspicion should form the basis of more invasive questioning, which is important for the unfolding arguments.

It is evident therefore that racial profiling is prohibited in Europe and in the law of the United Kingdom. Therefore, although it is unlikely that racial profiling can come before the courts as a *de jure* practice, a cautionary postscript can be added to the section for the post-Brexit world we are moving into. In the past racial profiling in the United States has been judicially authorised as a law enforcement measure,⁴² but is now illegal in ordinary law enforcement under the Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, Or Gender Identity.⁴³ However, notably, it is explicitly stated in this document that this does not apply to border control.⁴⁴ The New York Times has reported that this is because the Department of Homeland resisted efforts to limit the factors it can consider when looking for illegal immigrants.⁴⁵ When racial profiling derives directly from the legal framework that regulates law enforcement itself, like it does in the United States, it amounts to an illegitimate suspension of the principle of rule of law. In such cases, immigration officers are given the power to put certain groups of people outside the protection of the rule of law by denying them their right to be subjected to scrutiny only on the grounds of reasonable suspicion.

⁴² For example, see: *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975).

⁴³ US Department of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity*, (US department of Justice, 2016).

⁴⁴ *Ibid*, footnote 2.

⁴⁵ M Apuzzo and M S. Schmidt, 'U.S. to Continue Racial profiling in Border Policy', *New York Times*, (New York, 5 December 2008).

4. The movement of people to and within the UK and Ireland and the Common Travel Area

There are a number of 'border points' within Northern Ireland. There is the currently 'invisible' border with the Republic of Ireland, which stretches for 499 kilometres with more than 200 crossing points.⁴⁶ Northern Ireland is separated by sea from the rest of Britain, therefore there are internal crossing points within the UK that include ports and airports. These ports also serve as border points to the rest of the world. This section will outline the current arrangement of free movement to and across the island of Ireland. The fundamental rule of immigration law in the United Kingdom is that everyone is excluded from lawful residence unless they are exempted from control or have 'leave'. This is derived from the Immigration Act 1971 which states:

(1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance...

(2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act...⁴⁷

British and Commonwealth citizens with a right to abode are not subject to immigration control. All others will need permission to live, work and settle in the UK, enter or remain. In Europe, the Schengen Area, established through the Schengen Agreement 1985 and its 1990 implementing Convention,⁴⁸ has traditionally allowed citizens of 27 states to travel without passport control.⁴⁹ The UK and the Republic of Ireland opted

⁴⁶ P Wintour, 'Irish border checks will be impossible after Brexit, says ambassador', *The Guardian* (London, 8 February 2017).

⁴⁷ Immigration Act 1971, sections 1 and 2.

⁴⁸ European Union, *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders (Schengen Implementation Agreement)*, 19 June 1990.

⁴⁹ B Ryan, 'The Common Travel Area between Britain and Ireland', (2001) 64 *The Modern Law Review* 6, 856. DOI: 10.1111/1468-2230.00356.

out of Schengen, however, European Economic Area (EEA) nationals have a right to admission and residence under EU law.⁵⁰ This is also established under section 7 of the Immigration Act 1988.⁵¹ EEA nationals do not need passports to travel, but are required to have a valid identity card.⁵² In the case of other nationals, passports, or refugee documents are required.⁵³

Although the UK and Ireland have opted out of Schengen, a Common Travel Area (CTA) has almost continually existed between the two states since 1922 which has allowed Irish, Northern Irish and British nationals to travel to and from each country without the requirement of a passport. As Northern Ireland and the Republic of Ireland are part of the EU, and the border barely discernible, there is no requirement that EU citizens need to produce a passport to cross the border. However, if individuals arrive into Northern Ireland or the Republic of Ireland at a port or airport, they will need to produce a valid passport or national identify card issued by an EEA country.⁵⁴

Despite its *de facto* existence since the creation of the Irish Free State in 1922, the origins of the CTA between Britain and Ireland remain largely unknown.⁵⁵ Originally based upon an administrative agreement, it has been confirmed within the laws of both Ireland and the United Kingdom, although it is not established by any specific treaty regulating its operation (however, there have been recent calls for one)⁵⁶. It has been argued that its existence 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'.⁵⁷ An interesting reminder from history relevant to current Brexit negotiations in relation to the border is when Ireland severed its links with the

⁵⁰ European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, Article 45. Note that there are some categories of individuals excluded from this, including individuals without incomes or criminals.

⁵¹ Immigration Act 1988, section 7.

⁵² Case C 378/97 *Wijsenbeek* [1991] I-6207.

⁵³ Gov.uk, 'Entering the UK' (Gov.uk, 2019) <<https://www.gov.uk/uk-border-control/before-you-leave-for-the-uk>> accessed 21 June 2019.

⁵⁴ *Ibid.*

⁵⁵ Ryan, *supra n 49*, at 855.

⁵⁶ J Campbell, 'Brexit: Call for new UK-Irish treaty on Common Travel Area' *BBC News* (London, 13 November 2018) <<https://www.bbc.co.uk/news/uk-northern-ireland-46178534>> accessed 6 June 2019.

⁵⁷ Ryan, *supra n 49*, at 874.

United Kingdom in 1948, archival evidence has shown that that British officials were concerned that if Irish nationals were considered aliens, it would be costly to administer but also unworkable. One might suggest that given the conflict in Northern Ireland, and its subsequent peace process, these controls would be much more difficult to enforce.

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... [it is] politically unacceptable to introduce permanent immigration controls between the island of Ireland and Great Britain.⁵⁸

What appears to be a current favoured option of dealing with the movement of people into the UK, post-Brexit, is through tighter controls over work permits and access to services,⁵⁹ through the Immigration Act 2014 and the Immigration Act 2016, which apply in England, and partially to Northern Ireland. The Immigration Act 2016, for example, enhances the powers that immigration authorities have in detecting where individuals who are not legally allowed within the UK are working.⁶⁰ The Immigration Act 2014 introduced the concept of the 'right to rent' which requires landlords to check the immigration status of prospective tenants.⁶¹ The Immigration Act 2016, amending the Immigration Act 2014, requires that landlords check a potential tenant's 'right to rent' or face imprisonment, or a fine, or both.⁶² This means that private landlords, including those who sub-let or take in lodgers, must check the right of prospective tenants to be in the country. These checks are currently only mandatory in England. Under sections 38 and 39 of the Immigration Act 2014 a health charge was introduced for persons without immigration status, requiring the NHS to conduct immigration checks (it was the case that the NHS would have to share information with the Home

⁵⁸ Committee on Preparation for the Meeting of Commonwealth Prime Ministers, *Memorandum CPM* (48) 11, 5 October 1948, and the related letter from Lord Jowitt to Prime Minister, Clement Attlee of 9 October 1948 (PRO, CAB 1/46) (in Ryan, *supra* n 49, at 860).

⁵⁹ D Roberts, J Rankin and H McDonald, 'UK to seek Irish border waivers on customs and food safety after Brexit' *The Guardian*, (London, 16 August 2017).

⁶⁰ For example, by appointing a new Director of Labour Market Enforcement, an Intelligence Hub, creating a new criminal offence to tackle serious breaches of the law by employers and changing the Gangmasters Licensing Authority into the Gangmasters and Labour Abuse Authority, which has a wider remit and stronger powers to deal with labour exploitation across the economy.

⁶¹ Section 21 of the Act provides details on who is disqualified by immigration status as having a right to rent, or who has a limited right to rent.

⁶² Immigration Act 2016, 33C.

Office. This has been revoked).⁶³ Although health is a devolved matter in Scotland, Wales and Northern Ireland, these provisions apply across the UK. This is because the UK government has responsibility for immigration matters. Under section 40 of the Immigration Act 2014, there is a prohibition on opening current accounts for 'disqualified persons' (those without leave to remain in the UK), meaning that banks and building societies must conduct 'status checks' before accounts may be opened. This applies to all the United Kingdom. Under section 40C of the Immigration Act 2014, the Secretary of State has the powers to freeze the bank account of a disqualified person. These powers apply across the United Kingdom.

It is difficult to see how powers not already extended to Northern Ireland, will be, or how they could be enhanced, particularly given the backlash to the Windrush scandal, and the de-escalating of the 'hostile environment'. In addition, the 'right to rent' scheme, for example, has been ruled illegal by the High Court – although this decision is currently being appealed.⁶⁴ In any case, this type of immigration control only prevents individuals from residing legally in Northern Ireland or in Britain, and accessing housing, the labour market and healthcare. It does not prevent individuals from living or working illegally or travelling within the country or to Britain from Northern Ireland. Additional immigration controls will still be required for these individuals.

5. Racial profiling in Irish immigration control

Operation Gull is a joint operation between Garda Síochána, PSNI and the UK Visas and Immigration, which has been running since 2005. It is designed to stop immigration offenders within the CTA. It is carried out mostly at Northern Ireland ports: Belfast City Airport, Belfast International Airport, Belfast City Docks and Larne Docks.⁶⁵ It involves immigration officers being stationed at ports and asking incoming passengers on domestic flights for identification to verify their immigration status.⁶⁶

⁶³ D Campbell 'NHS will no longer have to share immigrants' data with the Home Office' *The Guardian*, (London, 9 May 2018).

⁶⁴ BBC News, 'Right to rent' checks breach human rights - High Court' *BBC News* (London, 1 March 2019) <<https://www.bbc.co.uk/news/uk-47415383>> accessed 6 June 2019.

⁶⁵ Law Centre (NI) 'Operation Gull, Law Centre (NI) Briefing October 2008' (Law Centre (NI), 2008) para 5, <<https://www.lawcentreni.org/policy/policy-briefings/203.html>> accessed 21 June 2019.

⁶⁶ *ibid*

These are internal crossing points, so the rules regarding questioning in-country apply. The most recent statistics published concerning Operation Gull record the 'interception' of 775 'irregular migrants' in the year 2015/2016.⁶⁷

Officers working under Operation Gull have been accused of racially profiling individuals.⁶⁸ Most recently, Senator Mark Daly in the Oireachtas in the Republic of Ireland suggested those working under Operation Gull were racially profiling people who are travelling from Northern Ireland into Britain.⁶⁹ A number of cases have come before the Northern Irish High Court in respect of Operation Gull, including that of Jamiu Olanreaju Omikunle, who obtained a student visa and was unlawfully detained at Belfast International Airport on a local journey.⁷⁰ In another case, a woman received an apology from the Home Office and £2,000 after an immigration official had stopped her and asked for her identification stating that she, 'looked foreign'.⁷¹ In 2009 the NIHRC published a report into how immigration officers of the then Immigration and Nationality Directorate arrived at the decision to detain individuals.⁷² The report raised concerns about the way Operation Gull was conducted and argued that racial profiling was used by the UK Border Agency.⁷³ The report recorded instances of cases where individuals claimed that they had been stopped because of their identity, for instance, individuals being asked for ID when they were the only visible ethnic minorities present.⁷⁴ Although this report is now 10 years old, Operation Gull is still in operation, albeit not on a continual basis. It has been suggested that this operation may be expanded following Brexit,⁷⁵ whereas it should be noted that immigration checks in the

⁶⁷ Organised Crime Task Force, 'Annual Report and Threat Assessment 2016' (Department of Justice NI, 2016) <<https://www.octf.gov.uk/Publications/OCTF-Annual-ReportAnd-Threat-Assessment/OCTF-Annual-Report-Threat-Assessment-2016>> accessed 6 June 2019.

⁶⁸ Migrant Rights Centre Ireland, *supra* n 6.

⁶⁹ Seanad Special Committee on the Withdrawal of the United Kingdom from the European Union Debate, 27 April 2017.

⁷⁰ *An Application for Judicial Review by Jamiu Olanrewaju Omikunle* [2008] NIQB 79.

⁷¹ Belfast Telegraph, 'Home Office apology after woman challenged over ID at airport', *Belfast Telegraph*, (Belfast, 20 June 2016) <<https://www.belfasttelegraph.co.uk/news/northern-ireland/home-office-apology-after-woman-challenged-over-id-at-airport-34899488.html>> accessed 21 June 2019.

⁷² Northern Ireland Human Rights Commission, 'Our Hidden Borders: The UK Border Agency's Powers of Detention' (NIHRC, 2009) <<http://www.nihrc.org/uploads/publications/our-hidden-borders-uk-border-agency-powers-of-detention-immigration-report-2009.pdf>> accessed 21 June 2019.

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ A Travis, 'Post-Brexit world could see Ireland carrying out Britain's passport checks', *The Guardian*, (London, 9 October 2016).

London Underground stations have stopped (as will be discussed below). Racial profiling does not arise when all persons crossing a border or internal checking area are subject to no controls, or the same controls. It only arises when individuals are checked by immigration officers selectively. In the absence of full border controls, and a perceived need to control migration, ad-hoc identity controls, possibly like those of Operation Gull, could be the established norm across the CTA (if this is not the case already). This is speculative but seems entirely plausible given the history of such checks in the CTA and the perceived need to control immigration. It is therefore an imperative that more is done to make the operations of Border Force more transparent and accountable, to ensure that immigration control in the CTA is not considered to be ubiquitously racist.

6. Restricting the powers of Border Force officials to stop and question

The UK border force is responsible for controlling the border, conducting passport and identity checks at ports and airports and in other areas in-country. On arrival within the UK, a passenger with or without entry clearance will encounter an immigration officer. Immigration officers have extensive powers to examine passengers and to search or detain them under Schedule 2 of the Immigration Act 1971. Under s4(1) of the 1971 Act, immigration officers have a statutory power to give or refuse leave to enter (this is required if someone is staying in the UK for over six months). When a person has entered the UK, immigration officers do not have the same powers as the police to stop individuals in public spaces. However, they do have the power to examine any persons who have arrived in the UK under paragraph 2 or 2A of Schedule 2 of the Immigration Act 1971. This power is not confined to ports of entry but can be extended 'in-country'.

Immigration officers can interview in-country through what is known as an 'administrative enquiry'. This follows a three-stage process of exploratory questioning, initial examination under paragraphs 2 or 2A of schedule 2 of the Immigration Act 1971, and further examination. Exploratory questioning entails attempting to determine whether there are reasonable grounds to conduct an examination under paragraphs 2 and 2A of the Immigration Act 1971. There is no legal authority to determine that an individual should comply with exploratory questioning, and the Home Office guidance clearly states that 'a refusal to answer questions or provide proof of their status does not, of itself, constitute a reasonable suspicion that the

person is an immigration offender'.⁷⁶ This is an important point, because many individuals will feel that they need to comply with immigration officers and, in fact, unless they are being interviewed under the Immigration Act 1971, they do not. If reasonable grounds for a further interview are established, because of information a person (including a third party) provides, an individual may have an initial examination interview under paragraphs 2 or 2A of Schedule 2 to the Immigration Act 1971. The purpose of these interviews is to establish whether a person has committed a breach of immigration law and/ or to gather information from a third party, or to identify if a person is liable to be removed. These can be conducted in the field or in an office.⁷⁷ These are followed by further examinations, usually within immigration offices.⁷⁸

There is an overarching consideration that questioning should be intelligence led and based on reasonable suspicion. This is within the guidance which is provided to Border Force officers.⁷⁹ The requirement of intelligence driven investigations is also confirmed, with respect to investigations conducted under Schedule 2, in the case of *Singh v Hammond* [1987] 1 ALL ER 829, where it was stated that:

An examination [under paragraph 2 of Schedule 2 to the Immigration Act 1971] ... can properly be conducted by an immigration officer away from the place of entry and on a later date after the person has already entered ... if the immigration officer has some information in his possession which causes him to enquire whether the person being examined is a British citizen and, if not, ...whether he should be given leave and on what conditions.⁸⁰

The 'intelligence led' requirement is open to interpretation – no definition is provided in the Home Office guidance. In 2013, Border Force conducted immigration checks in London Underground stations. The former Immigration Minister, Mark Harper, stated

⁷⁶ Home Office, *General Instructions Immigration Removals and Detention: Enforcement Interviews*, (Home Office, 12 July 2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537358/Enforcement-interviews-v1.pdf> accessed 21 June 2019, 8.

⁷⁷ *ibid*, 11.

⁷⁸ *ibid*, 11.

⁷⁹ *ibid*, 6.

⁸⁰ *Singh v Hammond* [1987] 1 All ER 829, para 290.

that 'the choice of London Underground stations for spot checks was driven by intelligence, and that individuals were targeted on the basis of their behaviour rather than their physical appearance'.⁸¹ Yet, at the time immigration officers had a broad discretion under the guidance to conduct immigration checks with 'avoiding eye contact' deemed a reason suitable for stopping an individual. These checks were criticised as involving racial profiling.⁸² The guidance also states that questioning under the Immigration Act 1971 is allowed of a person 'who does not obviously meet the intelligence basis', meaning that intelligence is not always a requirement for questioning someone.⁸³ The power of immigration officers to do this is wide-ranging, and includes stopping an individual because of how they behave – as the guidance states 'where a person gives reasonable cause for suspicion that they are someone who requires leave but does not have it or that they may be removed from the United Kingdom by their behaviour (for example an attempt to conceal themselves or leave hurriedly)'.⁸⁴ Once a person is subjected to a formal interview under the Immigration Act 1971, they are under an obligation to answer questions to the immigration officer. This is confirmed in *Singh*, where it states:

When a person is examined under para 2(1), or indeed under para 2(3), then under para 4 of Schedule 2 he is under a duty

'to furnish to the person carrying out the examination all such information in his possession as that person may require for the purpose of his functions under that paragraph'

⁸¹ D Batty, 'Immigration spot checks not racist, says Home Office', *The Guardian*, (London, 3 August 2013).

⁸² *ibid.*

⁸³ Home Office, *supra* n 76, 7.

⁸⁴ The other reasons include: from their answers to exploratory questions about the whereabouts of a person named or described in intelligence, by any documentation which they present to identify themselves and/or their immigration status in the UK that appears to be a forgery or is otherwise reasonably suspected of being used to deceive, at private addresses, or where there is reason to believe that the status of a person, for example a spouse or child, may be dependent on the status of the suspect and where there is intelligence that communal premises are being used to accommodate offenders (Home Office, *supra* n 76, 7.)

In other words, a person who is the subject of an examination properly carried out under para 2(1) *is not entitled to refuse to answer the questions*. He is under a duty to answer them. The duty is enforced by s 26(1)(b) under which it is an offence not to furnish the information that he is required to furnish.⁸⁵

The remit of the powers of immigration officers is too open to interpretation, creating the potential for abuse, not only with respect to invasion of privacy, but in creating an environment where racial profiling could flourish. An individual could be stopped and subjected to an interview under the Immigration Act 1971, where they can be compelled to answer questions, without reasonable suspicion and with little discernible justification. Given that a decision is made by the immigration officer alone on whether someone 'leaves hurriedly', for example, creates the potential for abuse of power. In busy transit areas such as the London Underground or in ports, individuals are often likely to be in a hurry. Even if they are not, an immigration officer may simply suggest that they are, and the individual will find it difficult disputing the contrary. This makes racial profiling always, to a degree, inevitable. It will be argued below that to prevent racial profiling ad-hoc checks like these should cease. However, if they are to continue, there is a question mark over whether the guidance is currently appropriate in terms of the wide powers it grants immigration officers. It seems more acceptable, to curtail racial profiling, that all identity checks should be intelligence led, with the potential of that intelligence being reviewable by an appropriate independent third party, such as an ombudsman, should a complaint be made.

Germany offers a method that could help to prevent racial profiling in this context. The German courts appear to go further than the European Court of Human Rights in providing protection against racial profiling. Article 22.1(a) of the German Federal Police Act (Bundespolizeigesetz) allowed members of the Federal Police forces to stop, identify and search *any person* ('*jede person*') inside train stations or in the proximity thereof without regard to the conduct of the individual or any reasonable suspicion. This rule was interpreted by the German Institute for Human Rights as an

⁸⁵ *Singh, supra* no 80, paras 288-289 (emphasis added).

open door to arbitrariness in policing, and it was argued that it could have led to substantial racial profiling practices.⁸⁶ This was eventually quashed by the Higher Administrative Court of Rheinland-Pfalz in 2016.⁸⁷ The Court in this case found that in cases of racial discrimination there is a switch in the burden of proof, so that the State must prove that ethnicity was not one of the decisive criteria for stopping a person for an identity check.⁸⁸ This is a potential preventative guard against racial profiling, and it is recommended here that this same shift in the burden of proof should apply when an allegation of racial profiling has been made. This places a burden on immigration officials to be always cognisant of why they are stopping individuals, and one would assume to be required to write to notes detailing their reasons for stopping persons, enabling a strong safeguard against racial profiling. If allegations are made of racial profiling, an immigration officer should be in the position to defend that he or she stopped the person in question for a legitimate reason. In respect of this, it is not suggested a high standard of proof would be required. Reasonable explanations equating, in the English and Welsh legal system, of meeting the threshold of the civil standard of balance of probabilities should be enough.

7. Is enhanced surveillance of immigration officers the answer?

As previously stated, there can be difficulties obtaining evidence of racial profiling when it takes place, because it happens in areas of transit, and because Border Force have a wide remit in justifying why they might stop someone. Border Force agents are not routinely monitored by independent observers, and it would be unrealistic to expect this to happen. In the United States, the Immigration Customs Enforcement (ICE) Body Camera Bill 2017 was introduced to require all immigration and custom enforcement

⁸⁶ H Cremer, 'Amicus-Curiae-Stellungnahme des DIMR im Verfahren vor dem OVG Rheinland-Pfalz: Grund- und menschenrechtliche Bewertung von § 22 Abs. 1 a Bundespolizeigesetz; and 'Racial Profiling' – Menschenrechtswidrige Personenkontrollen nach § 22 Abs. 1 a Bundespolizeigesetz, 2013', (Deutsches Institut fuer Menschenrechte, 2015) <<http://www.institut-fuer-menschenrechte.de/publikationen/schutz-vor-rassismus/>> accessed 21 June 2019.

⁸⁷ Press Release 'Zum Urteil des Oberverwaltungsgerichts Rheinland-Pfalz Menschenrechtsinstitut begrüßt Urteil zum Schutz vor rassistischen Personenkontrollen', April 22, 2016, <<http://www.presseportal.de/pm/51271/3308674>> accessed 21 June 2019.

⁸⁸ Judgement of 21 April 2016. OVG Rheinland-Pfalz. Urteil. 21.04.2016. Aktenzeichen 7 A 11108/14.OVG, paras 107- 114.

officials to wear body-worn cameras, although to date it has not been formally enacted.⁸⁹ In May 2018, US Customs and Border Protection began testing the use of body cameras in nine locations.⁹⁰ According to the Bill, a recording shall be provided to each party to any administrative proceeding, civil action, or criminal prosecution to which it pertains.⁹¹ Democratic Congresswoman, Yvette Clarke, who introduced the Bill to Congress stated:

As Donald Trump has dramatically expanded the number of undocumented Americans who are a priority for deportation, many immigrants in Brooklyn and across the United States now fear a knock on the door in the middle of the night...These immigrants as well as advocates are concerned about the possibility of abuse... We need to establish procedures that protect their rights. Immigrants and their families are entitled to respect for their humanity and to the full rights guaranteed under the law. With the ICE Body Camera Act of 2017, we will secure their rights.⁹²

It might be argued that the video surveillance of immigration and asylum interviewing by the Home Office, through body-worn cameras, is something which could lead to greater accountability of immigration officers. In Northern Ireland, like in the rest of the United Kingdom, many police units wear body-worn cameras.⁹³ These wearable cameras are clipped to uniforms or are worn as a headset. They serve several functions – first, they are designed to increase the transparency of police behaviour by documenting events and serve as a reliable source of evidence of interactions between the police and citizens. Second, because of this, it is considered that they will act as a deterrent to the misuse of force. Third, because of the deterrent effect, it is considered that confidence in policing will increase. Fourth, body-worn

⁸⁹ ICE Body Camera Bill of 2017, H.R. 1497.

⁹⁰ E Spagat, 'U.S. border agency tests body cameras on agents' *Associated Press* (New York, 2 May 2018).

⁹¹ ICE Body Camera Bill of 2017, H.R. 1497, Bill summary.

⁹² W Bredderman 'Brooklyn Congresswoman Pushes Bill to Force ICE Officers to Wear Body Cameras' *Observer* (London, 3 October 2017) <<http://observer.com/2017/03/immigration-customs-enforcement-deportation-body-camera-yvette-clarke-ice-donald-trump/>> accessed 21 June 2019.

⁹³ For further details see: <https://www.psni.police.uk/advice_information/body-worn-video/> accessed 21 June 2019.

cameras can provide evidence that the police are doing their jobs in an appropriate manner, which can be useful if a complaint is subsequently made against them.⁹⁴

Body-worn cameras might have a wider use in preventing abuse and the video surveillance of the interactions between Border Force officials and members of the public could be used to prevent racial profiling. If an individual is claiming that racial profiling is taking place, the evidence obtained using body-worn cameras could be used to support a legal claim (or complaint to the Ombudsman) that a person/s of a profile are being stopped for identity checks. Safeguards are normally adopted for the use of body-worn cameras. For example, the United States ICE Body Camera Bill of 2017 states that ICE must establish policies for: when officers should wear, activate, and deactivate such cameras, the effective placement of such cameras, receiving and storing accurate recordings, the proper management and use of such cameras; and the availability of recordings to the subjects of removal proceedings, victims of crime, and the general public and for internal use by law enforcement officials.⁹⁵ However, there are logistical and privacy issues with Border Force officials wearing body-worn cameras.

While body word cameras could have the potential of preventing discrimination, it is not proposed here that they should be used, as they could have the potential to impose further arbitrary measures against individuals in contravention to their rights to privacy. Bordering is an increasingly problematic issue, where technologies are being looked to as a solution to the managing of the flow of people and things.⁹⁶ We live in a world full of closed-circuit video cameras, smartphones, facial recognition systems and a variety of other methods of technological surveillance. Due to this there has been a massive expansion of the use of surveillance technologies, databases and biometrics. The growing use of body-worn cameras in law enforcement creates ethical issues and privacy threats, which could become particularly problematic issues as

⁹⁴ F Coudert, D Butin, D Le Métayer, 'Body-word cameras for police accountability: Opportunities and risks' (2015) 31 *Computer Law & Security Review* 6, 750. DOI: 10.1016/j.clsr.2015.09.002.

⁹⁵ ICE Body Camera Bill of 2017, H.R. 1497, Bill summary.

⁹⁶ B Ajana. 'Augmented borders: Big Data and the ethics of immigration control' (2015) 13 *Journal of Information, Communication and Ethics in Society* 1, 58 – 78. DOI: 10.1108/JICES-01-2014-0005.

states further seek to use data for immigration control. In this environment, in Foucauldian terms, visibility may be a trap,⁹⁷ where video evidence designed to prevent racial profiling, begins to be used as a tool of surveillance by the state. As Zuboff suggests, every surveillant technology that can be used for observation and control, will be used for these purposes – these technologies tend to creep from their original intent towards greater societal control.⁹⁸ This can be viewed in how forms of surveillance, such as facial recognition, are increasingly being used and can now, for example, be seen being deployed in the streets in the United Kingdom where members of the public are being watched.⁹⁹

There are also issues with regards to how data is stored, and for how long. Although being legally challenged at the time of writing,¹⁰⁰ the Data Protection Act 2018¹⁰¹ in the UK provides an immigration exception under Schedule 2, Part 1, para 4 which would remove fundamental data subject rights if the ‘data controller’ thinks the disclosure of that data would ‘prejudice’ ‘the maintenance of effective immigration control’, or ‘the investigation or detection of activities that would undermine the maintenance of effective immigration control’. Under the EU General Data Protection Regulation (GDPR)¹⁰² we have rights to restrict processing, to object to the processing, to erasure of data, and to be provided information about what our data will be used for when it is collected from us. Each of these rights, would be exempted if a data controller decided disclosure would ‘prejudice... effective immigration control’. Therefore, in theory, immigration data does not require to be destroyed. There is a question mark whether this might apply to information obtained from body-worn

⁹⁷ M Foucault *Discipline and punish: The birth of the prison* (New York, NY: Vintage, 1979) 253.

⁹⁸ S Zuboff ‘Be the friction: Our response to the New Lords of the Ring’. *Frankfurter Allgemeine Zeitung*, (Frankfurt 25 June 2013) 25 <<http://www.faz.net/aktuell/feuilleton/the-surveillance-paradigm-be-the-friction-our-response-to-the-new-lords-of-the-ring-12241996.html>> accessed 6 June 2019.

⁹⁹ C Coleman, ‘Police facial recognition surveillance court case start’ *BBC News* (London 21 May 2019).

¹⁰⁰ M Rice, ‘What is at stake with the immigration exemption legal challenge?’ *Open Rights Group* (London, 3 August 2018) <<https://www.openrightsgroup.org/blog/2018/what-is-at-stake-with-the-immigration-exemption-legal-challenge>> accessed 21 June 2019.

¹⁰¹ Data Protection Act 2018.

¹⁰² 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).

cameras, but there is no suggestion that it might not. In addition, an exception like this provides an indication of the UK government's views on how data should be treated when it relates to immigration concerns, lending credence to the view that data stored from body-worn cameras could be used for additional surveillance. In addition to these issues is an operational one – body-worn cameras worn by the police are not permanently switched on,¹⁰³ for example, if an officer needs to go to the toilet, he or she should not be recorded. Individuals wearing body-worn cameras will therefore have control over recordings, which could mean that a Border Force official could switch off his or her camera to conduct an identity check they did not wish to be recorded.

Given these issues, the enhanced surveillance of Border Force agents is not the answer. Rather, the answer appears to be in prohibiting the very act itself. The law is likely to have a limited effect in preventing racial profiling as a *de jure* or *de facto* practice where ad-hoc immigration checks take place in-country. Although greater accountability and a tightening of the rules with regards to when individuals should be questioned can help, much of the time the evidential requirements needed to prove that racial profiling has taken place can make proving it difficult (although not impossible as shown in previous successful cases). Within this paradigm, where racial profiling is likely to continue to occur with relative impunity, to prevent discriminatory practices continuing, it is argued that Operation Gull in Northern Ireland should cease, in addition to any further ad-hoc immigration checks.

8. Accountability

The first EU-wide survey of immigrant and ethnic minority groups' experiences of discrimination and victimisation shows that the inadequacy of complaint mechanisms is resulting in a serious problem of under-reporting of violations in Europe,¹⁰⁴ which in

¹⁰³ F Coudert, D Butin, D Le Métayer, *supra* n 94, 760.

¹⁰⁴ According to this study, up to 36% of the victims of discrimination did not submit a complaint due to lack of knowledge about how or where to submit it. As other causes of underreporting the survey points at the social condition of the victims, the lack of public support or the lack awareness about possible remedies. See: EU Fundamental Rights Agency, 'Access to justice in cases of discrimination in the EU – Steps to further Equality' (EUFRA, 2012) 19

turn represents a violation, even if indirect, of the right to a fair and effective remedy.¹⁰⁵ This is one of the reasons why EU anti-discrimination legislation and the EU Agency for Fundamental Rights have long recommended Member States to institute remedy systems that encompass non-judicial avenues considered more cost-efficient and accessible to victims.¹⁰⁶ In general terms, non-judicial remedies seem at least a necessary addition to court remedies in order to guarantee the accountability of law enforcement in cases of racial profiling.

Remedies should combine judicial avenues with the availability of a non-judicial, independent system of complaints and clear sanctions against the perpetrators.¹⁰⁷ Currently, non-judicial independent avenues do not exist at the level of European law¹⁰⁸ and Member State law often offers little support in this respect. For instance, under the 2015 Home Security Act of Spain¹⁰⁹ an explicit and clear prohibition of racial profiling is not at hand and no non-judicial independent complaint bodies or procedures exist that would allow potential victims to seek redress.¹¹⁰ These shortcomings of the complaint system might explain that as of September 2017 no complaints, either criminal or otherwise, have been filed in Spain against state police forces for reason of racial profiling.¹¹¹

In Northern Ireland, there have been cases where individuals have successfully taken the Home Office to court for racial profiling. Currently the Equality Commission

<http://fra.europa.eu/en/publication/2012/access-justice-cases-discrimination-eu-steps-further-equality>> accessed 21 June 2019.

¹⁰⁵ Article 13 of the European Convention on Human Rights.

¹⁰⁶ See for instance Article 7(1) of the EU Racial Equality Directive 2000/43/EC, which directs Member States to 'ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available...'

¹⁰⁷ Article 15 of the Racial Equality Directive provides that 'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.'

¹⁰⁸ The mandate of the European Commission against Racism and Intolerance (ECRI) does not include any sort of complaint system open to potential victims, see: <<http://www.coe.int/ecri>>

¹⁰⁹ LO 4/2015 de protección de la seguridad ciudadana, 30 March 2015.

¹¹⁰ Rights International-Spain, 'Racial profiling in Spain: a generalized and unresolved police practice', (Rights International-Spain, 2017) 9f.

¹¹¹ This information has been obtained through direct consultation with the Central Unit for Border Control of the Policía Nacional. Consultation no. 48471.

in Northern Ireland can take cases on behalf of individuals in limited instances and provide guidance and assistance.¹¹² Further legal claims should be encouraged and financially supported. In the United Kingdom, if an individual has a complaint about the standard of service received from Border Force, or the professional conduct of Border Force staff or contractors, he or she can email or write to Border Force directly. According to the Parliamentary and Health Service Ombudsman, in 2016-2017 Border Force received 73 complaints, 40 of which were assessed internally.¹¹³ There are obvious issues surrounding the Home Office investigating complaints against its staff directly. The lack of independence of those handling complaints can lead to allegations of bias, and thus a lack of public confidence in the system. There is a plethora of research on the need for an independent complaint's mechanism in policing, which cite much of the same rationale which applies here,¹¹⁴ and where much rhetoric around immigration and asylum within politics and society is hostile, even amongst elites,¹¹⁵ this necessitates a greater need,¹¹⁵ to ensure that complaints are dealt with independently and impartially.

All complaints relating to the conduct of Border Force on issues of racial profiling could be dealt with by PONI, where currently they only have a limited remit. PONI was set up to deal with police complaints independently. The Hayes Report 1997¹¹⁶ and the Patten Report 1999¹¹⁷ both recommended the creation of an independent system for dealing with complaints. The Patten Report and the

¹¹² For further information see:

<<https://www.equalityni.org/Individuals/I-have-a-problem-with-a-service/Race>>

¹¹³ Parliamentary and Health Service Ombudsman, 'Complaints about UK government departments and agencies and other UK public organisations 2016-17' (Parliamentary and Health Service Ombudsman, 2017).

<https://www.ombudsman.org.uk/sites/default/files/PHSO%20Parliamentary%20Statistics%20Report%202016-17_1.pdf> accessed 21 June 2019.

¹¹⁴ I Waters and K Brown, 'Police complaints and the complainants' experience' (2000) 40 *British journal of criminology* 4 (2000) 617-638; M Seneviratne, 'Policing the police in the United Kingdom' (2004) 14 *Policing and Society* 4, 329-347. DOI: 10.1080/1043946042000286056.

¹¹⁵ L McLaren and M Johnson, 'Resources, Group Conflict and Symbols: Explaining Anti-Immigration Hostility in Britain' (2007) *Political Studies* 55, 709. DOI: 10.1111/j.1467-9248.2007.00680.x.

¹¹⁶ M Hayes, 'Police Ombudsman for Northern Ireland? A review of the police complaints system in Northern Ireland', 1997, <<http://eprints.lse.ac.uk/46297/1/Reading%20the%20riots%28published%29.pdf>> accessed 21 June 2019.

¹¹⁷ C Patten, 'A New Beginning: Policing in Northern Ireland: The Report of the Independent Commission on Policing for Northern Ireland' (London, HM Stationery Office, 1999).

establishment of PONI was designed to herald a new age in policing in Northern Ireland, where transparency and accountability were core to proceedings.¹¹⁸ PONI has a wide remit to investigate all complaints against the police. It cannot prosecute police officers, but it can refer cases to the Director of Public Prosecutions for Northern Ireland. It can make recommendations of specific actions which should be taken direct disciplinary matters to be brought against police officers. These include, for example, recommendations that officers attend formal disciplinary proceedings with the PSNI.¹¹⁹ Disciplinary proceedings may result, for example, in management advice, a written warning, a final written warning, reduction in rank, or dismissal with or without notice.¹²⁰ PONI already has a remit to deal with complaints arising from Border Force but only if these are 'serious' in nature.¹²¹ This is a relatively new power for PONI, which came into force in March 2015. Although racial profiling, theoretically, could lead to a complaint to PONI, it could be argued that individual complaints may not be considered sufficiently serious to fall under their auspices. This might be different if widespread and systematic abuse was uncovered.

The lack of accountability of Border Force to PONI appears to be a striking oversight. Immigration officers are agents of the State, and so it appears antithetical to the spirit of the Patten Report that Border Force agents would be treated differently to the PSNI in overseeing their executive actions. It is argued here that Border Force officials should be subject to the complete oversight of PONI as they are a policing force, exercising extensive executive functions. If Border Force officials were deemed to have racially profiled individuals, they could be subject to the same proceedings as police officers are. This would provide a deterrent effect against misconduct and provide a more rigorous safeguard against the potential for racial profiling. It may also allow for a greater insight into the scale of racial profiling taking place, as individuals may be encouraged to submit a complaint who might have otherwise been unwilling to commit to pursuing litigation. PONI would also have the power to review whether immigration checking is taking place for the correct reasons. As argued previously,

¹¹⁸ Report of the Independent Commission on Policing for Northern Ireland, the Patten Report, (Northern Ireland Office, 2001).

¹¹⁹ Section 59 of the Police (Northern Ireland) Act 1998.

¹²⁰ The Police (Conduct) Regulations (Northern Ireland) 2016.

¹²¹ Irish News, 'New complaints role for Police Ombudsman' *The Irish News*, (Belfast, 17 March 2015).

intelligence should be the sole criteria for immigration controls, in-country. PONI, could review intelligence to ensure that it is appropriate for actions to be taken by Border Force. This is particularly important because 'intelligence' is open to interpretation - safeguards should be in place to ensure that the concept is not be treated too liberally.

9. Conclusion

Racial profiling is not a new phenomenon in the Common Travel Area. There have been criminal cases and cases settled out of court concerning it, and reports of incidents of it happening for several years. Brexit poses an additional threat to a human rights-based immigration system with the Common Travel Area. Its consequence is a requirement that immigration from EU states is controlled and given the large number of EU nationals who are not British or Irish, residing within or travelling to the UK from Ireland, the potential for an increase in racial profiling without safeguards is substantial. However, the issue is not simply a Brexit-related one – if the UK decide to stay within the European Union the issue will remain. The central argument to article is that, to prevent racial profiling, ad-hoc immigration checks should stop. This means, in Northern Ireland, the cessation of Operation Gull. However, if they are to continue, it should be stressed the current remit that immigration officers have to stop and question individuals is too wide, that it should be intelligence led, with no grounds for assuming reasonable suspicion on spurious grounds such as 'walking hurriedly'. To discard of these requirements would enable some protection against abuse of power by immigration officers. In addition, when an allegation of racial profiling has been made, the burden of proof should be placed on to immigration officers to evidence that they have stopped and questioned individuals for appropriate reasons and provide reasonable explanations for their actions. In addition, this article argued that Border Force, like the PSNI, should be made fully accountable to PONI – this would mean extending their remit so that they cover all complaints – not just those that are serious in nature. It was also assessed in this article whether immigration officers could wear body-worn cameras, but ultimately this was dismissed as an undue interference into the privacy rights of individuals, where concerns over 'mission creep' of the state's role in surveillance are very real.