NOT A “REAL” COMMON TRAVEL AREA: PACHERO V MINISTER FOR JUSTICE AND EQUALITY

INTRODUCTION*

There are two issues given consideration in this case note. On the first account is the judgment itself in Pachero v Minister for Justice and Equality\(^1\) concerning two third-country nationals, and their legal status within the jurisdiction of Ireland. The parties in question had challenged a section of the Immigration Act 2004, which determined their legal status within the State after appearing to innocently fall foul of the archaic and somewhat indistinguishable features of Irish immigration law. This outcome stemmed from the Common Travel Area and the open land borders between the United Kingdom and Ireland. Secondly, there is the substance of the Common Travel Area, regarding which the judge in his judgment provides one of the clearest understandings of the relevant public policy since the decision in Kweder v Minister for Justice\(^2\).

This case note at the outset contextualises the Common Travel Area, setting out how it came about, and why it is still in use 90 years after its creation. The facts of Pachero are then discussed, wherein the applicants had apparently misunderstood the Common Travel Area. Next, the judgment of Hogan J. is examined. Finally, some wider analysis and commentary is provided on the current undertakings by British and Irish immigration officials on a new regime of short-term visas through the creation of a British-Irish Visa Scheme, unique for the United Kingdom and Ireland, separate from the Schengen Visas used elsewhere in the European Union. By mapping out the circumstances over the course of the case note, it will become apparent that Pachero has played an important role in getting to a point of closer British-Irish co-operation on the Common Travel Area.

BACKGROUND TO THE COMMON TRAVEL AREA

Although it may appear as something that is taken for granted by Irish citizens, the Common Travel Area is a peculiar area of the law with both practical and political implications. Shortly after Ireland (the “Irish Free State”) became an independent country in the early 1920s, it was still a member of the

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Commonwealth which, in the result, created numerous circumstances and gave rise to legal measures that were developed to accommodate the creation of a new “Irish” citizenship and other non-Irish citizens in the jurisdiction. Other than for a short period during and after the Second World War, the Common Travel Area has been as we know it today, at least in terms of its practicalities for British and Irish citizens. On the island of Ireland, given the legal, political and social status of Northern Ireland and the history of the region spanning the last one hundred years, there is no physical border in existence between Ireland and Northern Ireland. The partitioned island, jurisdictionally speaking, is borderless, with no boundary controls of any kind.

The Common Travel Area was first inserted into European Union law in the protocols to the Treaty of Amsterdam. This reflected an “opt-out” that both the United Kingdom and Ireland received as the then Community sought to integrate the Schengen Agreement into Union law, exempting both States from accepting any Union legislation regarding border controls. This opt-out was sought and received so that, in the words of an Irish public official, “we and our neighbours can continue to operate the Common Travel Area”. This was because the right of freedom of movement for citizens was deemed essential to the proper functioning of the two jurisdictions. The most thorough legal account of the Common Travel Area to date has described the opt-outs as “awkwardly” yet concurrently recognising its pragmatic and practical aspects for persons that the Common Travel Area applies to. Hogan J. in his judgment refers to the Common Travel Area as,

“… essentially a mutual understanding [between the United Kingdom and Ireland] to synchronise their mutual immigration laws and administrative practices so as to facilitate freedom of travel for Irish and British nationals as between the two countries”.

This followed on a previous judgment on the Common Travel Area, where Geoghegan J. in Kweder stated: “I accept that the Common Travel Area arrangements as between Ireland and the United Kingdom have been and are perceived by the general public to be of great advantage to this State.” The very legal basis of the Common Travel Area could have been called into

3. The Treaty of Amsterdam came into effect in 1999 with an annexed Protocol on the application of certain aspects of art.7a of the Treaty establishing the European Community to the United Kingdom and to Ireland. It is currently incorporated into the Treaties through Protocol 20 on the application of certain aspects of art.26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland.
question in these cases, as its operation under administrative arrangements between the jurisdictions took hold. However, it has been upheld by the courts. Although the Common Travel Area is not judge-made law, it is apparent that the judiciary has legitimised it as a solid point of public policy. This has resulted in the creation of some problems for the Common Travel Area. The issue had been previously raised, prior to the opt-outs of the Treaty of Amsterdam, as to whether the policy was compatible with the laws of the European Community as it was then. Given the lack of a solid legal basis within Irish legislation on the matter prior to the Treaty of Amsterdam, it has been argued by Diarmaid McGuinness that if the legislature decides not to regulate a certain matter, that decision not to act does not in itself require an Act of the Oireachtas.

This being so, it allows the executive actors the freedom to decide whether accompanying rules are indeed necessary for the operation of the Common Travel Area. With only administrative arrangements in place between the two States on the Common Travel Area, while at the same time other immigration laws are applicable to citizens of third countries, it has created uncertainty in the case of individuals who seek to rely on Common Travel Area measures.

It has been said that the Common Travel Area “is arguably the most important explanatory factor of Irish policy choices in European affairs affecting in particular its landmass and borders”. Similar declarations have been made by executives, where a joint statement of both heads of the British and Irish Governments in 2012 restated that they are “firmly committed to preserving and protecting the Common Travel Area, which allows ease of travel for our people”. The backdrop of tighter immigration controls in the United Kingdom and the closer scrutiny of individuals within their jurisdiction for counter-terrorism purposes resulted in the identification of the Common Travel Area as a weak link in the ability to control peoples within the United Kingdom. Added to that, the Northern Ireland Executive, which possesses no immigration powers under devolution from the United Kingdom, have in recent years sought visa policies for their own jurisdiction. However, this has been denied these controls based upon grounds of national security.

In sum, the Common Travel Area permits citizens of both the United Kingdom and Ireland to travel unhindered by border control (theoretically) between the islands of Great Britain and Ireland. This is reflected in somewhat

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obscure fashion in Irish legislation. The Immigration Act 2004\textsuperscript{15} states that that Act applies to all non-Irish citizens as defined by the Immigration Act 1999.\textsuperscript{16} That meaning, in turn, is taken from the Aliens Act 1935.\textsuperscript{17} While this goes back quite some time, it is compounded by the Aliens (Exemption) Order 1999,\textsuperscript{18} which exempts British citizens from the Aliens Act 1935.\textsuperscript{19} The discrepancies, however, arising from the system are obvious. Even though separate channels for visitors arriving from the United Kingdom into Irish airports existed in the past, whereby there were no border controls, a single passage through Dublin Airport in recent years on an arriving flight from the United Kingdom is all that it takes to note that this segregation is no longer in place. Today, passengers arriving from all destinations, including arrivals from regional airports within the State, must pass through Irish border control. This modern practice would appear to go against the spirit of the Common Travel Area, but given its restriction to just two citizenships, relevant persons at the Irish border must be able to demonstrate an appropriate form of identity to take advantage of the Common Travel Area. For non-British and Irish citizens, regular immigration controls apply.

These discrepancies associated with the Common Travel Area emerge when citizens of third states attempt to make use of the policy, particularly in instances when the United Kingdom and Ireland as independent States operate differing immigration policies for citizens of a particular third State.

THE CASE OF PACHERO V MINISTER FOR JUSTICE AND EQUALITY

\textit{Pachero} presented a set of facts that involved both British and Irish public bodies that cooperated fully to ensure each of their own legal regimes on border controls were implemented. Given the jurisdictional issues, the High Court of Ireland was evidently able to deal with matters only from an Irish legal perspective. Matters of British law fell to be decided by the UK’s legal system.\textsuperscript{20} Notwithstanding this, the case was heard and concluded in the High Court of Ireland, with a full written judgment in just over 11 days. Given, however, the pending deportation of the applicants by British authorities back to their own State, the issue of law surrounding their legal status in Ireland needed urgent clarification.

The case involved two Bolivian citizens who had arrived in the State via Dublin Airport with the intention to enrol in a language course.\textsuperscript{21} Pursuant to s.4 of the Immigration Act 2004 (the “2004 Act”), they were granted permission to enter the State. In accordance with the 2004 Act, persons who are third-
country nationals entering the State that are visa-exempt can be given 30 days to register with the relevant Irish public body, in this case, the Garda National Immigration Bureau. Following their entry into the State, they had crossed the non-existent border into Northern Ireland, whose immigration and border control matters are a responsibility of the United Kingdom. For the two days of their stay in Northern Ireland, with no automatic checkpoints or hindrances for passage between the two jurisdictions, they remained undetected by immigration officials. The fact of their being in the United Kingdom only came to the attention of public officials following their entry to mainland Great Britain through the port of Stranraer in Scotland. It appears likely that the applicants were under the mistaken impression that the lack of customary border controls between the two jurisdictions allowed for free unfettered access for them to cross between the two States as they pleased. This is apparent from Hogan J.’s comments that the applicants presented their documentation “openly and without concealment”. Unfortunately for them, this was not the case, and they were apprehended by the British authorities. The United Kingdom and Ireland have to date operated different visa and immigration rules for persons possessing Bolivian passports. While Irish authorities do not require Bolivian nationals entering the State to be in possession of a prior visa, such an approach is not adopted by the United Kingdom. In that jurisdiction, a much stricter regime involving a mandatory visa operates.

The United Kingdom Border Agency had directed enquiries to the Garda National Immigration Bureau in order to ascertain whether the stamps they received for entry into Ireland were indeed valid. Upon the Irish public body being given notice by the United Kingdom Border Agency of their arrival in Scotland, the Garda National Immigration Bureau were of the view that the Immigration Act 2004 was to be interpreted in such a way that once a person was granted leave to enter the State, and had subsequently left, that person’s right of entry into the State was no longer applicable. The applicants’ legal team, on the other hand, were of the impression that a decision had been taken by the Garda National Immigration Bureau to cancel their permission to be in the State.

With the United Kingdom authorities seeking the deportation of the applicants to their home country, a solicitor lodged an application in the High Court of Ireland seeking an order by means of a mandatory interlocutory injunction to reinstate the permission they had been given to remain in the country. If successful, it would prevent the deportation of the applicants. The legal question that was raised was whether their permission to remain in the State had lapsed once they had left the jurisdiction. Sections 4(1) and 4(2) of the Immigration Act 2004 were the key legislative provisions in dispute. The wording of the former reads:

Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a nonnational a document, or place on his other passport or other equivalent document an inscription authorising the nonnational to land or be in the State (referred to in this Act as “a permission.”).  

The applicants argued that this should be interpreted as not merely permission to enter, but also a legal entitlement to be in the State for the stated period of time. Section 4(2) of the same Act adds to s.4(1) the words: “a nonnational coming by air or sea from a place outside the State shall, on arrival in the State, present himself or herself to an immigration officer and apply for a permission”. On this basis, Hogan J. held that the only correct interpretation of the two subsections, when put together, was that permission granted does indeed cease to exist when that person leaves the State. This is because subs.4(2) states that any person seeking entry into the State that is not an Irish or British citizen (leaving aside for now the legalities on other European Union citizens, passport holders from the European Economic Area and Switzerland), must apply each time for permission to enter the State, and the subsection does not provide exemptions for those who already had permission previously.

Any immigration practitioner or expert would be able to highlight the enormous practical and legal difficulties that the Irish/Northern Irish border presents for citizens of third countries. A citizen of Bolivia at the time did not need a visa to enter Ireland as permitted by the Immigration Act 2004 (Visas) (No. 2) Order 2011. However, British law required that they did in order to enter their jurisdiction, including Northern Ireland. Hogan J. noted that a genuine passport-free Common Travel Area had long ceased to exist and illustrated several discrepancies within the system. These arose mainly because no common visa scheme for third-country nationals had ever been put in place between the United Kingdom and Ireland. The judge was implying, in effect, that the enforcement of the Common Travel Area’s internal border between Ireland and Northern Ireland had created substantial difficulties for authorities in the past, and would continue to be unenforceable in the absence of new enhanced cooperation measures. As Hogan J. noted with a measure of frustration: “I find myself nonetheless obliged to choose the interpretation which best makes the section work effectively and consistently with the underlying statutory objectives, while mitigating the possibility for anomaly.”

The judgment, first, appears to reaffirm that the Common Travel Area is applicable to British and Irish citizens, and no one else. Secondly, the views articulated by the Garda National Immigration Bureau were upheld, in that the Immigration Act 2004 was deemed no longer to apply to the Bolivian passport holders once they had left the State. This is a problematic area for Irish immigration law, given the open borders with the neighbouring jurisdiction of Northern Ireland, and the absence of border controls which allow for the unhindered and unchecked movement of persons.

The decision in *Pachero* was clearly a contributory factor in the publication of a report some months later by the United Kingdom Border Agency on the Common Travel Area and entry to the mainland of Great Britain via Northern Ireland. Ryan has observed that the British and Irish opt-out of the Schengen Area when the Treaty of Amsterdam was being drafted was exceedingly abnormal, given that the text of the opt-out discussed the arrangements between the two States. Previously, both the United Kingdom and Ireland were reluctant to admit or demonstrate publicly the provisions of the Common Travel Area.

With anomalies existing for some decades on the Common Travel Area, *Pachero* provided Hogan J. with an opportunity to highlight, and in some ways lobby for, the establishment of a “real” Common Travel Area. He indirectly criticised the legislature for not acting on the issues that had arisen within the Common Travel Area. These had been highlighted for decades, with various matters pertaining to the Common Travel Area having come before the Irish courts on a number of occasions. In particular, the case of *Kweder* provided the main support for the existence of the Common Travel Area. In that case, an individual holding citizenship of a third country sought to avail himself of the Common Travel Area for apparently illegitimate reasons. Geoghegan J. stated in the High Court that where there is a “serious threat to the long term continuance of the Common Travel Area”, actions may be taken by public bodies to uphold the public policy, as there had previously been doubt as to the legal underpinning of the Common Travel Area for any persons, British, Irish or otherwise, due to a lack of a formal agreement between the jurisdictions. The *Kweder* judgment amounted to a robust judicial view, upholding the Common Travel Area arrangements, and a ringing endorsement of the policy, something keenly pointed to by the Department of Justice.

COMMENTARY

of the Common Travel Area as a matter of public policy, despite it “lacking in clarity”,\(^38\) meant it did not put excessive strain on the State. Such strong judicial support for the Common Travel Area reflected the duty of the court to uphold the separation of powers and, by so doing, refused to expand the scope of the Common Travel Area beyond its use for British and Irish citizens. The long-held view of the Irish judiciary that such important matters should be the prerogative of the Oireachtas appears to be continued, and it is then left to imagine how a Supreme Court might interpret such a judgment, given that only a few years later in *O’Neill v Minister for Agriculture*,\(^39\) the High Court criticised an administrative procedure by a Government Department that was not sanctioned by either an Act of the Oireachtas or Statutory Instrument.

**THE FUTURE OF THE COMMON TRAVEL AREA**

Full legislative reform of the Common Travel Area has not come about, even though other areas of immigration policy have been substantially overhauled. The Immigration Act 2004 had its origins as an emergency Bill that was fast-tracked through the Oireachtas because of a High Court ruling in *Leontjjava and Chang v Director of Public Prosecutions*.\(^40\) The view that was taken was that, without the enactment, executive control over immigration policy would be jeopardised. Despite the absence of any Government-initiated legislation on the Common Travel Area, a Private Members’ Bill dealing with the travel documentation element for British and Irish citizens recently arose in Dáil Éireann.\(^41\) Deputy Terence Flanagan, the proposer of the Bill, noted that the Common Travel Area remains a “grey area”\(^42\) of the law and creates discrepancies involving the type of identification that is required for travel for any person to and from the United Kingdom, and not just those for whom the Common Travel Area is applicable. While the issues associated with the Common Travel Area have been numerous and growing, with different tracks of “common” travel available to a multitude of citizens, Hogan J. in his judgment pointed to the fact that “there is no unified visa system which would allow third country nationals possessing such a visa untrammelled access to the two jurisdictions participating in the common travel area”.\(^43\) While a number of years have passed since Hogan J.’s judgment was handed down, maturity has been evident between the public bodies of the two jurisdictions, it becoming apparent that both British and Irish Governments are beginning to find genuine common solutions. The Ministers with responsibility for immigration and border control in the two governing administrations issued a

\(^{39}\) *O’Neill v Minister for Agriculture* [1998] 1 I.R. 539.  
\(^{40}\) *Leontjjava and Chang v Director of Public Prosecutions* [2004] 1 I.R. 591.  
\(^{41}\) Freedom of Movement (Common Travel Area) (Travel Documentation) Bill 2014.  
\(^{42}\) 250 Dáil Debates Col.843 (5 June 2014).  
\(^{43}\) [2011] 4 I.R. 698 at 703.
joint statement on the creation of a new cooperative programme on the external borders of the Common Travel Area, seeking closer integration of the visa schemes, paving the way for discussion and negotiation at an in-depth level of a possible common visa to be issued by either jurisdiction, with reciprocal recognition by both authorities. The process began around the same time that the Pachero judgment was delivered that led all the way up to the separate announcements in both London and Dublin in June 2014 of the new British-Irish Visa Scheme.

The successful roll-out of the British-Irish Visa Scheme to all third-country nationals for short-term visas will lead to the winding-up of the Visa Waiver Programme introduced only a number of years ago, as an interim measure before negotiations began on the subsequent British-Irish Visa Scheme. While the Scheme is at an early stage of development, it will become more apparent that the newly integrated short-stay visa for reciprocal travel between the United Kingdom and Ireland for third-country nationals is an early attempt by the two governments to imitate the true borderless area seen in the Schengen Area, an integral part of Union law. At the time of writing, the Scheme was on the verge of implementation on a limited basis, but it is clearly envisaged that a joint visa arrangement should remove any doubt in the mind of any citizens, be they from the EU or third State, about whether they are legally entitled to be on the island of Ireland, if on a short-stay visa. The requirements to give effect to the British-Irish Visa Scheme, while of major significance, do not require major legislative change in either jurisdiction. The United Kingdom is to make provision for the new joint visa by amending the Immigration (Control of Entry through Republic of Ireland) Order 1972 through Ministerial direction and signature, while in Ireland, an equivalent Statutory Instrument, the Immigration Act 2004 (Visas) Order, will be modified, with neither State having to pass new acts of parliament.

**CONCLUSION**

While today’s Schengen Area, which the United Kingdom and Ireland are not a part of, is a highly integrated area of Union law between the participating

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47. The Visa Waiver Programme, operated by Irish immigration officials, allowed third-country nationals who possessed short-stay visas for the United Kingdom to also enter Ireland without the need for an Irish visa.
48. The British-Irish Visa Scheme was being run on a trial basis initially for citizens of China and India, but if successful, will be rolled out to every third-country citizen needing a visa to visit either Ireland or the United Kingdom.
50. 660 Dáil Debates Col.847 (8 July 2014).
Member States, Hogan J. is absolutely correct in acknowledging that the Common Travel Area that the United Kingdom and Ireland operate is simply for the benefit of citizens of the two countries, and no one else. The Pachero case offered the judge an opportunity to take the Kweder judgment to task, which strongly supported the Common Travel Area on grounds of public policy. Instead, he chose not to, as the opportunity for doing so should have been years earlier, but did say that “any other conclusion would effectively puncture a major hole in our system of immigration control and would lead to conclusions inconsistent with the objectives of the 2004 Act”. Recent case law, from the Supreme Court in Bode v Minister for Justice, and the High Court in C.A. and T.A. v Minister for Justice and Equality, provides two instances wherein administrative practices have been upheld without a mandate from primary or secondary legislation, reflecting an outcome closer to Kweder and Pachero than to that in O’Neill.

It is clear that his Pachero judgment in this instance has contributed indirectly to push both Governments to find some permanent sensible solutions to overcome the many anomalies that exist in the laws on the Common Travel Area. Notwithstanding the facts of this case, the judgment has impacted more widely on the future development of the Common Travel Area. The British-Irish Visa Scheme, while not perfect, appears to be a step in the right direction of harmonising arrangements between the jurisdictions of the United Kingdom and Ireland.

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51. Four non-EU Member States are also a party to the Schengen Area: Switzerland, Lichtenstein, Norway and Iceland.
55. Indeed, the judge believes that further legal aspects of the Common Travel Area will arise again, noting that: “The question of whether the Court has even a jurisdiction to grant the exceptional relief of the kind thus sought in these proceedings must accordingly await another more suitable case for its resolution.” See [2011] 4 I.R. 698 at 709.