



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Illegal Migration Bill
Submission to House of Lords
Sub-Committee on the Protocol**

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1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(1) of the Northern Ireland (NI) Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in NI. The NIHRC is also mandated, under section 78A(1) to monitor the implementation of Article 2(1) of the Windsor Framework,¹ to ensure there is no diminution of rights protected in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast (Good Friday) Agreement 1998 as a result of the UK's withdrawal from the EU. In accordance with these functions, the following evidence is submitted to the House of Lords Sub-Committee on the Protocol in response to its inquiry into the Illegal Migration Bill (the Bill).
- 1.2 NIHRC welcomes the opportunity to brief the Committee. This short submission focuses on the potential interaction of the current draft of the Bill with Article 2 of the Windsor Framework, while situating those questions briefly in the context of wider human rights concerns.² Further briefing on the Bill will be available in the coming weeks to inform forthcoming Parliamentary stages.

2.0 Foundational human rights principles

- 2.1 Article 14 of the Universal Declaration of Human Rights states that, "everyone has the right to seek and enjoy in other countries asylum from persecution". The UN Refugee Convention 1951 (the Refugee Convention) builds on this to include the right not to be penalised for being in or entering a country without permission where this is necessary to seek and receive asylum.³
- 2.2 In terms of focusing on refugees, people seeking asylum and migrants that have arrived on boats, the UN Refugee Agency has

¹ The Windsor Framework was formerly known as the Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement and all references to the Protocol in this document have been updated to reflect this change. (see Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework).

² For further detail on wider human rights concerns see also NIHRC Submission Joint Committee on Human Rights Inquiry on Illegal Migration Bill, (NIHRC, April 2023). A further briefing is in development.

³ Article 31, UN Refugee Convention 1951.

observed that differential treatment determined by refugees and people seeking asylum mode of arrival into the UK is manifestly incompatible with the Refugee Convention.⁴ It states that:

most people fleeing war and persecution are simply unable to access the required passports and visas. There are no safe and “legal” routes available to them. Denying them access to asylum on this basis undermines the very purpose for which the Refugee Convention was established.⁵

- 2.3 Thus, the UN Refugee Agency concludes that, in its current form, the Bill amounts to an asylum ban which is a clear breach of the Refugee Convention by “extinguishing the right to seek refugee protection in the UK for those who arrive irregularly, no matter how genuine and compelling their claim may be, and with no consideration of their individual circumstances”.⁶

- 2.4 The CoE Parliamentary Assembly has stated that:

...as a starting point, international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants need protection and are entitled to certain minimum human rights in order to live in a humane and dignified manner. These rights include certain basic civil and political rights and social and economic rights.⁷

- 2.5 The NIHRRC shares the significant concern for the number of people who resort to dangerous Channel crossings to seek safety and protection in the UK. However, the NIHRRC is gravely concerned by the current draft of the Bill and the general direction of recent developments that seek to diminish the rights of refugees, asylum seekers and migrants who arrive to the UK by irregular means.⁸

⁴ UN Refugee Agency, ‘Statement on UK Asylum Bill’. Available at: <https://www.unhcr.org/uk/news/press/2023/3/6407794e4/statement-on-uk-asylum-bill.html>.

⁵ UN Refugee Agency, ‘Statement on UK Asylum Bill’. Available at: <https://www.unhcr.org/uk/news/press/2023/3/6407794e4/statement-on-uk-asylum-bill.html>.

⁶ Ibid.

⁷ Parliamentary Assembly ‘Resolution 1509 (2006) Human rights of irregular migrants’, 27 June 2006.

⁸ See: Nationality and Borders Act 2022; Home Office, ‘Memorandum of Understanding (MoU) between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the provision of an asylum partnership arrangement’, (Gov.UK, 2022); Home Office, ‘New Plan for Immigration’, (Gov.UK, 2022).

- 2.6 The UK Government has obligations under the international human rights framework to which it has committed. In accordance, refugees, asylum seekers and migrants are entitled to respect for their human rights and to receive minimum standards of treatment while in the UK, regardless of their motivation and mode of arrival. Yet, the current draft of the Bill seeks to ignore that anyone who may be in need of protection should have the opportunity to have their claim fairly and comprehensively assessed. It also significantly hinders the ability to meaningfully challenge removal from the UK in most cases.
- 2.7 Unlike what is portrayed in the current draft of the Bill, human rights protection is not limited to migrants, including refugees and people seeking asylum, that are fleeing persecution or conflict. This approach frames certain groups of rights holders, in this case certain migrants, as less entitled to rights protection than others. Taking this divisive approach, by way of example, excludes from protection migrants attempting to reunite with their families, individuals affected by natural disasters or environmental degradation, individuals fleeing inhumane treatment such as forced labour, modern slavery and human trafficking. It also excludes migrants who leave their home country because they have limited or no access to social or economic rights, thereby facing poverty, destitution, or barriers to healthcare. Thus, the current draft of the Bill creates an implied hierarchy of rights-holders and adopts an unjustified blanket approach to particular groups, both of which are contrary to the foundational human rights principles of inalienability, universality and proportionality.
- 2.8 **The NIHRC recommends that the present Bill should be revised to ensure that the principles of inalienability, universality and proportionality are embedded throughout, including in the language used, to prevent the demonisation and unjustifiable denial of human rights protection to particular groups of migrants.**

3.0 Compliance with the 'no diminution of rights' commitment in Article 2 of the Windsor Framework

- 3.1 The NIHRC is considering compliance of the Bill with the UK Government's commitment under Article 2 of the Windsor Framework to ensure no diminution of protections in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast (Good Friday) Agreement 1998, as a result of the UK's withdrawal from the EU.
- 3.2 The NIHRC takes the view that the rights of asylum-seekers and refugees fall within the protection of the relevant chapter of the Belfast (Good Friday) Agreement and that therefore a number of EU standards, which were binding on the UK on 31 December 2020, remain binding in Northern Ireland.
- 3.3 The first section of this chapter of the Belfast (Good Friday) Agreement is entitled 'Human Rights' and opens with a general commitment to the "civil rights and religious liberties of everyone in the community". This is followed by a non-exhaustive list of rights "affirmed in particular".⁹ Within this human rights section is the UK Government's commitment to the incorporation of the ECHR with direct access to the courts and remedies for breach. The breadth of rights and protections addressed is important in determining the range of EU laws relevant to, and within scope of, Windsor Framework Article 2. In summary, the chapter represents wide-ranging acknowledgement of and commitment to civil, political, economic, social and cultural rights and equality of opportunity, anticipating further legislation to entrench and safeguard those rights.
- 3.4 The UK Government's 'Explainer' document on Windsor Framework Article 2 acknowledges that its protections apply to everyone who is "subject to the law in Northern Ireland".¹⁰ Asylum-seekers are part of the community, subject to the law in NI and are therefore

⁹ The UK Government has also recognised that the rights, safeguard and equality of opportunity protections in the Belfast (Good Friday) Agreement are not limited to the "affirmed in particular" rights. See paragraph 9 of the NI Office, '[UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What does it Mean and How will it be Implemented?](#)' (NIO, 2020).

¹⁰ NI Office, '[UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What does it Mean and How will it be Implemented?](#)' (NIO, 2020), at para 8.

protected by the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement. In court proceedings ongoing at the time of writing, the Home Office has not disputed the argument that the protections of the relevant chapter of the Belfast (Good Friday) Agreement extend to asylum-seekers and refugees.¹¹

- 3.5 Read in the context of the additional pledges on rights within this chapter, the general commitment of the Belfast (Good Friday) Agreement signatories to the range of rights referenced within the chapter must be understood as embracing, as a minimum, those rights set out in the ECHR.¹² In its Explainer the UK Government has confirmed that the “key rights and equality provisions in the [Belfast (Good Friday)] Agreement are supported by the ECHR”. The Explainer further confirms that the UK Government acknowledges that “in NI, EU law, particularly on anti-discrimination, has formed an important part of the framework for delivering the guarantees on rights and equality set out in the [Belfast (Good Friday)] Agreement”.¹³ The Commissions are adopting a working assumption that the non-diminution commitment in Windsor Framework Article 2 encompasses the full range of rights set out in the ECHR, to the extent that they are underpinned by EU legal obligations in force on or before 31 December 2020. Put another way, the Commissions consider that all EU law in force in NI on or before 31 December 2020 which underpins an ECHR right, falls within scope of the non-diminution commitment in Windsor Framework Article 2.
- 3.6 A number of ECHR rights are engaged by the Bill, bringing into scope relevant EU law as outlined below. Relevant ECHR rights include, for example, protections against slavery and forced labour (Article 4 ECHR), the right to liberty and security (Article 5 ECHR) and the right to a private and family life (Article 8 ECHR) as well as freedom from discrimination (Article 14 ECHR).

¹¹ *In the matter of an application by Aman Angsom for Judicial Review* (Case Ref. 22/006236)

¹² This relates to the scope of issues and EU law relevant to Article 2, rather than the question of whether Article 2 requires the UK to remain committed to the ECHR as considered in Social Change Initiative, ‘[Human Rights and Equality in Northern Ireland under the Protocol – A Practical Guide](#)’ (SCI, 2021); Christopher McCrudden, ‘[Parliamentary Scrutiny of the Joint Committee and the Application of the Northern Ireland Protocol – Evidence to the House of Commons European Scrutiny Committee](#)’ (ESC, 2020); and Sylvia De Mars, Aoife O’Donoghue, Colin Murray and Ben Warwick, ‘[Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement](#)’ (2018).

¹³ NI Office, ‘[UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?](#)’ (NIO, 2020), at para 3.

- 3.7 The NIHRC, along with the Equality Commission for NI, have identified the Reception Directive,¹⁴ the Procedures Directive,¹⁵ the Qualification Directive¹⁶ and the Dublin III Regulation¹⁷ as relevant to Windsor Framework Article 2. These measures address, for example, free movement, accommodation, detention including conditions designed to meet special needs, family unity, access to healthcare, the best interests of the child and education of minors. The Procedures Directive includes specific provisions on access to judicial review where an applicant for asylum is held in detention and a right to an effective remedy in respect of a decision to consider an application in admissible.¹⁸ EU Directives on Victims and Combating Human Trafficking are also relevant.¹⁹ A published appendix to the Commissions' working paper sets out relevant transposing legislation.²⁰
- 3.8 Given this analysis, failure to address compliance with Windsor Framework Article 2 in the Human Rights memorandum to the Bill is a matter of concern.
- 3.9 The NIHRC recommends that the Committee explore what steps the Secretary of State has taken to assure herself that the Bill complies with Article 2 of the Windsor Framework.**
- 3.10 The NIHRC recommends that the Human Rights Memorandum to the Bill be amended to set out in detail an assessment of the compliance of the Bill with Article 2 of the Windsor Framework.**

¹⁴ Directive 2003/9/EC, 'Council Directive laying down minimum standards for the reception of asylum seekers', 27 January 2003.

¹⁵ Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', of 1 December 2005.

¹⁶ Directive 2004/83/EC 'Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted' 29 April 2004.

¹⁷ Regulation 2013/604/EU, 'Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person', 26 June 2013

¹⁸ Article 18 and 39, Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', of 1 December 2005.

¹⁹ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012; Directive 2011/36/EU, 'EU Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.

²⁰ NIHRC and ECNI 'Table of EU Directives which underpin the Rights, Safeguards and Equality of Opportunity provisions included in the Belfast (Good Friday) Agreement chapter of the same name and implementing Domestic Legislation' (NIHRC and ECNI, 2022)

4.0 Detention and bail

4.1 Further to the explanation above, the Commission advises that, as a consequence of Windsor Framework Article 2, the EU Procedures Directive remains relevant for determining the minimum standard of rights required in Northern Ireland, to the extent that those measures were binding on the UK on 31 December 2020.²¹ For example, Article 18 of the Directive provides that where an applicant is held in detention,²² Member States shall ensure that there is a possibility of speedy judicial review and that no one should be held in detention for the sole reason that they are an asylum seeker. In addition, all EU law relevant to the UK-EU Withdrawal Agreement must be interpreted in line with EU norms which include the EU Charter of Fundamental Rights, including Article 18 on the right to asylum and Article 47 on the right to an effective remedy and to a fair trial. The Commission is reviewing the Bill's provisions on detention, bail and access to judicial supervision of such decisions in light of these provisions.

4.2 The NIHRC recommends that the Committee ask the Minister to detail the Secretary of State's consideration and analysis of the compliance of the Bill's provisions on detention, bail and access to judicial supervision of such decisions, with Article 2 of the Windsor Framework.

5.0 Children

Clause 3: Unaccompanied children

5.1 Article 3 of the UN CRC requires that "in all actions concerning children... the best interests of the child shall be a primary consideration". Article 22 of the UN CRC requires States to ensure that the rights set out in the UN CRC extend, without exception, to refugee children and children seeking asylum.

5.2 Children who have become temporarily or permanently separated from their parents, relatives or caregivers are dependent on State authorities to uphold their rights. Of all refugees, people seeking

²¹ Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', of 1 December 2005.

²² See paragraph 3.8 and 3.9 in relation to admissibility of application for asylum.

asylum and migrants, unaccompanied children are among the most vulnerable to violence, abuse and exploitation.²³

- 5.3 The UN Committee on the Rights of the Child emphasises that the “ultimate aim in addressing the fate of unaccompanied and separated children is to identify a durable solution that addresses all their protection needs”.²⁴ Determining a child’s best interests and seeking a durable solution depends on an assessment of the individual circumstances of that child.
- 5.4 The current draft of the Bill prevents children from making an asylum claim where they arrive to the UK irregularly. As a result, it denies such children the opportunity to seek protection and stability within the UK. As set out above, the Bill’s blanket policy in respect of people who arrive to the UK irregularly contravenes foundational principles of human rights and, in the context of children, further contravenes obligations under the UN CRC.
- 5.5 For the reasons detailed above, the Commission advises that, as a consequence of Windsor Framework Article 2, the Procedures Directive,²⁵ the Qualification Directive,²⁶ the Reception Directive²⁷ and the Dublin III Regulation,²⁸ remain relevant for determining minimum standards of rights required for asylum-seekers and refugees in NI, to the extent that these standards were binding on the UK on 31 December 2020. All of these measures stipulate that “the best interests of the child shall be a primary consideration” when implementing relevant provisions.²⁹ Moreover, all EU law relevant to the UK-EU Withdrawal Agreement must, under Article 4 of that Agreement be interpreted in line with EU norms which

²³ UNHCR, ‘High Commissioner’s Dialogue on Protection Challenges: Children on the Move’ 28 November 2016, at paras 14 -18.

²⁴ ²⁴ CRC/GC/2005/6, UN Committee on the Rights of the Child, General Comment No.6 (2005) Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, at para 79.

²⁵ Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, of 1 December 2005.

²⁶ Directive 2004/83/EC ‘Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted’ 29 April 2004.

²⁷ Directive 2003/9/EC, ‘Council Directive laying down minimum standards for the reception of asylum seekers’, 27 January 2003.

²⁸ Regulation 2013/604/EU, ‘Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person’, 26 June 2013

²⁹ Articles 18, 19, Reception Directive; Recitals and Article 17 Procedures Directive; Recitals and Article 20, Qualification Directive; Recitals and Article 6, Dublin III Regulation.

include the Charter of Fundamental Rights of the EU, Article 24 on the rights of the child being particularly relevant in this regard.

5.6 The NIHRC recommends that the Committee ask the Secretary of State to consider and detail her analysis of the compliance of the provisions affecting children, including unaccompanied minors, with Article 2 of the Windsor Framework.

6.0 Modern Slavery

Clauses 21 -28: Modern slavery

- 6.1 Clauses 21-28 of the current draft of the Bill deny victims of modern slavery who have arrived in the UK irregular access to existing support. The Bill also proposes to stop victims using such claims to prevent their removal. The right to be protected against slavery and servitude, as provided for by Article 4(1) of the ECHR, is absolute and cannot be interfered with under any circumstances. The ECtHR has held that trafficking in human beings falls within the scope of Article 4³⁰ and has emphasised States' duty to protect victims.³¹
- 6.2 Further to the explanation above, the Commission advises that, as a consequence of Windsor Framework Article 2, the Victims' Directive³² and the Human Trafficking Directive,³³ remain relevant for determining the minimum standard of rights required in NI, to the extent that those measures were binding on the UK on 31 December 2020. The rights of victims of crime and human trafficking fall within the scope of the relevant chapter of the Belfast (Good Friday) Agreement for three reasons: first, the chapter embraces the rights protected in the ECHR, including Article 4 on the prohibition of slavery and forced labour; secondly, due to recognition of human trafficking as a form of 'gender-based

³⁰ *Rantsev v Cyprus and Russia* (2010) ECHR 22, at para 284.

³¹ *V.C.L. and A.N. v. the United Kingdom* (2021) ECHR 132, at para 151.

³² [Directive 2012/29/EU](#) of the European Parliament and of the Council of 25 October 2012 establishing **minimum standards on the rights, support and protection of victims of crime**, and replacing Council Framework Decision 2001/220/JHA

³³ [Directive 2011/36/EU](#) of the European Parliament and of the Council of 5 April 2011 on **preventing and combating trafficking** in human beings and **protecting its victims**, and replacing Council Framework Decision 2002/629/JHA

violence'³⁴ and thirdly due to the inclusion of victims' rights within the chapter. The Commission is considering the compliance of Clause 4 and Clauses 21 to 28 with these Directives.

- 6.3 By way of example, Articles 8 and 9 of the of the Victims' Directive detail the support and assistance that must be provided to potential victims and Article 1 states that "The rights set out in this Directive shall apply to victims in a non-discriminatory manner, *including with respect to their residence status*". This point is also emphasised in the recitals which state: "Member States should take the necessary measures to *ensure that the rights set out in this Directive are not made conditional on the victim's residence status in their territory or on the victim's citizenship or nationality*" (emphasis added in both cases).
- 6.4 Article 2 of the Human Trafficking Directive stipulates that "The *consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant*" where trafficking has occurred by any of the means set out including coercion, deception, fraud or giving or receiving payments (emphasis added). Article 8 requires that authorities be entitled not to prosecute or impose a penalty on victims of human trafficking for their involvement in criminal activities they have been compelled to commit as a consequence of being trafficked.
- 6.5 The NIHRC recommends that the Committee ask the Secretary of State to consider and detail her analysis of the compliance of the modern slavery provisions with Article 2 of the Windsor Framework.**

³⁴ Recital 17, Victims Directive 2012/29/EU – full citation at n.30