



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Briefing on the Immigration and Social
Security Coordination (EU Withdrawal)
Bill**

September 2020

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Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC):

- 2.5** recommends that clarity is provided on the Common Travel Area and that the associated rights are enshrined in law by agreeing a comprehensive bilateral treaty between the UK and Irish governments. The NIHRC further recommends that this agreement codifies reciprocal free movement rights and rights to employment, education, health and justice and security and that it is incorporated into domestic legislation on the basis of maintaining the same level of protection as exists during the transition period.
- 2.13** recommends that the laws relating to citizenship and immigration are amended to reflect the birthright commitment in the Belfast (Good Friday) Agreement 1998 to identify, and be accepted, as Irish or British or both without any loss of rights or entitlements.
- 2.18** recommends that consideration is given to narrowing the scope of Schedule 1 to ensure it is strictly construed and limited to those EU derived rights that are directly linked to the exercise of free movement.
- 2.19** recommends that this Bill specifically preserves any EU derived rights or retained EU law that would fall under the scope of the commitment in Article 2 of the Ireland/Ni Protocol to ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the EU.
- 3.9** recommends that, to protect against the diminution of rights contained in Article 2 of the Ireland/Ni Protocol, Irish citizens retain the more exacting substantive and procedural safeguards against deportation in Article 28 of the EU Citizens' Directive and associated case law of the Court of Justice of the EU.

3.10 advises that the Common Travel Area is built on reciprocation of rights and equality of treatment in both jurisdictions and consideration should be given to reciprocating the approach of the law in Ireland, which exempts British citizens from deportation in UK immigration law.

3.14 recommends that NI born citizens who identify as Irish, be protected from deportation in any circumstances to meet the requirements of the Belfast (Good Friday) Agreement 1998.

4.4 recommends that the powers in clause 4 are narrowly drawn to preclude changes in immigration and any consequential laws and policies, which would impact on the human rights of people living in the UK.

5.4 recommends that there is clarification that all people who have already acquired, or are entitled to acquire, settled and pre-settled status under the EU Settlement Scheme and that all Irish citizens resident in the UK will retain their existing social security rights.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to Section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). Furthermore, the NIHRC advises the Executive Committee of the Assembly of legislative and other measures which ought to be taken to protect human rights. In accordance with these functions, the NIHRC provides this briefing on the Immigration and Social Security Coordination (EU Withdrawal) Bill.
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas.

2.0 Clause 1 - Repeal of Retained EU Law Relating to Free Movement

- 2.1 Clause 1 and Schedule 1 of the Immigration and Social Security Coordination (EU Withdrawal) Bill repeal the retained EU law which currently gives effect to freedom of movement. Clause 8 of the Bill empowers the Secretary of State to set the commencement date of these provisions by statutory instrument.
- 2.2 The UK-EU Withdrawal Agreement protects the principle of freedom of movement during the transition period.¹ Any EEA national who exercises free movement rights to come to the UK prior before the 1 January 2021 will have those rights protected under the EU Settlement Scheme, provided they apply before the deadline of 30 June 2021.²
- 2.3 Many Irish citizens in the UK can apply to register under the EU Settlement Scheme which will secure the rights which are currently protected under the UK-EU Withdrawal Agreement and protected in local

¹ Part Two, Agreement on the Withdrawal of the UK from the EU and the European Atomic Energy Community 2020.

² Part 3, European Union (Withdrawal Agreement) Act 2020.

law under the EU (Withdrawal Agreement) Act 2020. However where Irish citizens are ineligible or have followed the guidance advising them that they do not need to apply to settled or pre-settled status,³ then they will be reliant on the rights and safeguards which are associated with the Common Travel Area. Those rights and safeguards are much more limited than those derived under retained EU law and have been characterised as “written in sand, and its terms are much more limited than is often believed to be the case”.⁴

2.4 In May 2019, the UK Government and Government of Ireland signed a Memorandum of Understanding which set out what is understood by the Common Travel Area and associated rights and privileges.⁵ This decision was designed to ensure that the Common Travel Area does not create “legally binding obligations”.⁶ Whereas, placing these rights on a legal footing, has been described as the ‘Gold Standard’ which would set out “common immigration rules, travel rights, residency rights and related rights to education, social security, work, health, and security and justice”.⁷ The UK Government and Government of Ireland have codified the areas relating to social security coordination into a treaty.⁸ However, all other rights associated with the Common Travel Area including free movement of people, the rights to reside and to work, the rights to social housing, social protection, healthcare and education are all guaranteed on a reciprocal basis in domestic law in the UK and Ireland.

2.5 **The NIHRC recommends that clarity is provided on the Common Travel Area and that the associated rights are enshrined in law by agreeing a comprehensive bilateral treaty between the UK and Irish governments. The NIHRC further recommends that this agreement codifies reciprocal free movement rights and rights to employment, education, health and justice and security and that it is incorporated into domestic legislation on the basis of**

³ UK Government, ‘Apply to the EU Settlement Scheme (Settled and Pre-settled Status) – Who should apply’. Available at: www.gov.uk/settled-status-EU-citizens-family/eligibility.

⁴ Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick, ‘Discussion Paper on the Common Travel Area’ (NIHRC and IHREC, 2018), at 9.

⁵ Memorandum of Understanding between the UK Government and the Government of Ireland Concerning the Common Travel Area and Associated Reciprocal Rights and Privileges, 8 May 2019.

⁶ Ibid, para 17.

⁷ Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick, ‘Discussion Paper on the Common Travel Area’ (NIHRC and IHREC, 2018), at 11.

⁸ Convention on Social Security between the Government of the UK and the Government of Ireland 2019. This Convention has not yet entered into force.

maintaining the same level of protection as exists during the transition period.

2.6 Article 2(1) of the Protocol to the UK-EU Withdrawal Agreement on Ireland/Northern Ireland (the Protocol) guarantees that:

the UK shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the [Belfast (Good Friday)] 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.⁹

2.7 The rights set out in the Belfast (Good Friday) Agreement include the right to equality of opportunity in social and economic activity, the right to freely choose one's place of residence and the right of women to full and equal political participation.

2.8 The NIHRC welcomed the commitment by the UK Government in New Decade, New Approach to review its immigration rules "taking into account the letter and spirit of the Belfast Agreement and recognising that the policy should not create incentives for renunciation of British citizenship by those citizens who may wish to retain it".¹⁰ In May 2020, the Home Office released a Statement of Changes in Immigration Rules which provides for a "relevant person of Northern Ireland" to access EU free movement law protections.¹¹ These changes came into force on 24 August 2020 and will remain in place until the EU Settlement Scheme closes to new applications on 30 June 2021. A 'relevant person of NI' is defined as someone who is a British citizen, an Irish citizen, or both British and Irish and was born in Northern Ireland to a parent who was British, Irish or both, or otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.¹²

⁹ Protocol on Ireland/Northern Ireland to the Agreement on the Withdrawal of the UK from the EU and the European Atomic Energy Community 2020.

¹⁰ NI Office, 'New Decade, New Approach' (NIO, 2020), at Annex A on UK Government Commitments to Northern Ireland, para 13.

¹¹ Home Office, 'Statement of Changes in Immigration Rules CP232' (HO, 2020), at 10.

¹² NI Human Rights Commission, 'EU Settlement Scheme extended to the people of Northern Ireland: What does it Mean for Me?' (NIHRC, 2020).

- 2.9 The NIHRC welcomes this change, however it does not address the commitment in the Belfast (Good Friday) Agreement to “recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose”.¹³
- 2.10 In 2008, the NIHRC submitted its advice on a Bill of Rights for NI, which included a recommendation that the right of people of NI to identify as British or Irish or both and hold the associated citizenship “with no detriment or difference of treatment of any kind” be accepted.¹⁴ In 2009, the UK Government recognised the “considerable symbolic importance of a choice by person to identify himself or herself as British or Irish or both, in line with the commitments made in the Belfast Agreement” and that “any Bill of Rights for Northern Ireland should enshrine in legislation the right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both”.¹⁵ It proposed that the NI Bill of Rights should “include the right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both”.¹⁶
- 2.11 The NIHRC welcomed the (then) Prime Minister Theresa May’s recognition in February 2019 that “the birthright to identify and be accepted as British, Irish or both, and to hold both British and Irish citizenship is absolutely central to the Agreement”.¹⁷ The NIHRC further welcomed her statement that she had initiated a review of immigration rules “to deliver a long term solution consistent with the letter and spirit of the Belfast Agreement”.¹⁸ The results of this review have not been published.
- 2.12 In April 2020, the Joint Committee of the NIHRC and Irish Human Rights and Equality Commission published commissioned research, which set out a number of recommendations on how the birthright commitment in the Belfast (Good Friday) Agreement could be incorporated into UK immigration and nationality law without undermining or inadvertently risking rights of a person who chooses to identify as British or Irish or both.¹⁹

¹³ Agreement between the Government of the UK and the Government of Ireland, 10 April 1998, at Article 1(vi).

¹⁴ NI Human Rights Commission, ‘A Bill of Rights for NI – Advice to the Secretary of State for NI’ (NIHRC, 2008), at 41.

¹⁵ NI Office, ‘Consultation Paper: A Bill of Rights for Northern Ireland: Next Steps’ (NIO, 2009), at para 6.6.

¹⁶ *Ibid*, Annex 1 Summary of Recommendations, at 101.

¹⁷ Theresa May ‘PM Speech in Belfast’, 5 February 2019.

¹⁸ *Ibid*.

¹⁹ Alison Harvey, ‘A Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998’ (NIHRC and IHREC, 2020).

- 2.13 The NIHRC recommends that the laws relating to citizenship and immigration are amended to reflect the birthright commitment in the Belfast (Good Friday) Agreement 1998 to identify, and be accepted, as Irish or British or both without any loss of rights or entitlements.**
- 2.14 Schedule 1 of the Bill makes provision to end the right to free movement of persons and to repeal EU retained law and end other EU-derived rights relating to immigration. Part 3 of Schedule 1 states that “any rights, powers, liabilities, obligations, restrictions, remedies and procedures which (a) continue to be recognised and available in domestic law by virtue of section 4 of the EU (Withdrawal) Act 2018... cease to be recognised and available in domestic law”.²⁰ In addition, paragraph 6 states that any other EU derived rights will cease to be recognised and available in domestic law where they are inconsistent with or “otherwise capable of affecting the interpretation, application or operation of” the Immigration Acts or where they are “otherwise capable of affecting the exercise of functions in connection with immigration”.²¹
- 2.15 This provision is very broadly framed and risks having the unintended consequence of repealing EU derived rights which might otherwise have been saved. In the EU (Withdrawal) Act 2018 there is a commitment to ensuring that the “validity, meaning or effect of any retained EU law is to be decided... in accordance with any retained case law and any retained general principles of EU law”.²² One of the general principles of EU law is that of legal certainty.²³ The very broad framing of these provisions creates uncertainty as which EU derived rights continue to be retained by the saving the EU (Withdrawal) Act 2018 and which are captured for removal by this Bill. For example, the EU Victims’ Directive includes specific protections for victims of human trafficking and it is not clear that these provisions will not be “otherwise capable of affecting the exercise of functions in connection with immigration”.²⁴

²⁰ Schedule 1, Immigration and Social Security Coordination (EU Withdrawal) Bill 2020-21.

²¹ Ibid.

²² Section 6, EU (Withdrawal) Act 2018.

²³ *Kolpinghuis Nijmegen BV*, Case 80/86, 8 October 1987.

²⁴ EU Directive 2012/29/EU, ‘Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime’, 25 October 2012.

- 2.16 In the UK Government's explainer on its commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland, it confirms that the EU Victims' Directive, among others, will continue to apply in NI and states that "we do not envisage any circumstances in which those rights would be rolled back".²⁵
- 2.17 Article 2(1) of the NI Protocol includes the commitment to protect against the diminution of those rights set out in the 'Rights, Safeguards and Equality of Opportunity' section of the Belfast (Good Friday) Agreement resulting from the UK's withdrawal from the EU. The Belfast (Good Friday) Agreement includes specific protections for the rights of victims in that section.²⁶
- 2.18 **The NIHRC recommends that consideration is given to narrowing the scope of Schedule 1 to ensure it is strictly construed and limited to those EU derived rights that are directly linked to the exercise of free movement.**
- 2.19 **The NIHRC recommends that this Bill specifically preserves any EU derived rights or retained EU law that would fall under the scope of the commitment in Article 2 of the Ireland/NI Protocol to ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the EU.**

3.0 Clause 2 - Irish Citizens

- 3.1 The NIHRC welcomes the provisions in clause 2 that amend the Immigration Act 1971 to grant leave to enter or remain in the UK to Irish citizens based on nationality rather than the origin of their journey having been within the Common Travel Area. In addition, clause 2 sets out new provisions for the deportation of Irish citizens where the Secretary of State "has issued directions for the Irish citizen not to be given entry to the UK on the ground that the Irish citizen's exclusion is conducive to the public good".²⁷

²⁵ 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 13.

²⁶ Agreement between the Government of the UK and the Government of Ireland, 10 April 1998, at Article 1(vi).

²⁷ New clause 3ZA(2)(a), Immigration Act 1971.

- 3.2 Article 28 of the EU Citizens' Directive 2004 permits expulsion states that "host Member State may not take an expulsion decision against [EU] citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security".²⁸ Any deportation decision on grounds of public policy must take into account the personal conduct of the individual and whether this creates a "genuine and sufficiently serious threat affecting one of the fundamental interests of society".²⁹ In addition the Court of Justice of the EU has "repeatedly stated, the public policy exception, like all derogations from a fundamental principle of the Treaty, must be interpreted restrictively".³⁰
- 3.3 The circumstances in which an EU citizen can be deported from the UK are interpreted more strictly the longer an EU citizen has been in the UK and in the cases of a child under the age of 18 or a person who has resided in the UK for the previous ten years, a decision to deport must be "based on imperative grounds of public security".³¹ The Court of Appeal has recognised that this "connotes a very high threshold" and "a higher hurdle for the Secretary of State than 'serious grounds' of public security".³²
- 3.4 The substantive and procedural safeguards against deportation of the EU Citizens Directive and associated case law have been incorporated into UK law via the Immigration EEA Regulations 2016. Clause 1 of this Bill will repeal these regulations and as is noted above, clause 2 will permit the exclusion of Irish citizens when 'conducive to public policy', which is a clear lowering of the threshold for the deportation of Irish citizens in the UK.
- 3.5 Immigration Minister, Kevin Foster MP, in response to questioning in the Public Bill Committee confirmed that the current policy on deportation of Irish citizens will not change and stated that "I confirm that our approach is to deport Irish citizens only where there are exceptional circumstances or where a court has specifically recommended deportation, which is

²⁸ EU Directive 2004/38/EC. 'Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States', 29 April 2004.

²⁹ *Donatella Calfa*, Case C 348/96, 19 January 1999, at 25.

³⁰ *Ibid*, at 23.

³¹ Article 28(3), EU Directive 2004/38/EC, 'Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States', 29 April 2004.

³² *LG (Italy) v Secretary of State for the Home Department* [2008] EWCA Civ 190, at para 32 and 52.

incredibly rare".³³ As noted by the Minister, this position reflects the long standing policy of the UK Government in relation to deportation of Irish citizens.³⁴

- 3.6 Under law in Ireland, British citizens are exempt from restrictions on entry and residence and from the possibility of deportation.³⁵
- 3.7 On the of the stated aims of the Memorandum of Understanding between the UK Government and Government of Ireland on the Common Travel Area is to "reaffirm the associated rights and privileges enjoyed by British and Irish citizens in each other's state".³⁶ In addition, the Memorandum of Understanding commits the two governments to allow "British and Irish citizens to move freely between the UK and Ireland" and the two governments commit to ensuring their national laws provide for "a right to reside".³⁷
- 3.8 Article 2(1) of the Ireland/Ni Protocol includes the commitment to protect against the diminution of those rights set out in the 'Rights, Safeguards and Equality of Opportunity' section of the Belfast (Good Friday) Agreement resulting from the UK's withdrawal from the EU. The Belfast (Good Friday) Agreement includes the "right to freely choose one's place of residence" in that section.³⁸
- 3.9 **The NIHRC recommends that, to protect against the diminution of rights contained in Article 2 of the Ireland/Ni Protocol, Irish citizens retain the more exacting substantive and procedural safeguards against deportation in Article 28 of the EU Citizens' Directive and associated case law of the Court of Justice of the EU.**
- 3.10 **The NIHRC advises that the Common Travel Area is built on reciprocity of rights and equality of treatment in both jurisdictions and consideration should be given to reciprocating the approach of the law in Ireland, which exempts British citizens from deportation in UK immigration law.**

³³ UK Parliament Hansard, 'Public Bill Committee – Immigration Social Security Coordination (EU Withdrawal) Bill - Minister for Future Borders and Immigration, Kevin Foster MP', 11 June 2020.

³⁴ UK Parliament Hansard, 'Written Ministerial Statement – Irish Nationals (Deportation) - Minister for Immigration, Citizenship and Nationality, Liam Byrne MP – Column 3-4 WS', 19 February 2007.

³⁵ Aliens (Exemption) Order 1999; Aliens (Amendment) (No. 2) Order, 1999.

³⁶ Memorandum of Understanding between the UK Government and the Government of Ireland Concerning the Common Travel Area and Associated Reciprocal Rights and Privileges, 8 May 2019, at para 2.

³⁷ Ibid, at para 6 and 7.

³⁸ Agreement between the Government of the UK and the Government of Ireland, 10 April 1998, at Article 1(vi).

- 3.11 There is no exemption in clause 2 for a Northern Ireland born Irish citizen who has the right to identify and be accepted as British or Irish or both.³⁹ Section 1 of the British Nationality Act 1981 states that “a person born in the UK... shall be a British citizen if at the time of the birth his father or mother is (a) a British citizen; or (b) settled in the UK”. This clause does not reflect the birthright commitment in the Belfast (Good Friday) Agreement, which has not been incorporated into UK law.
- 3.12 Immigration Minister, Kevin Foster MP, in response to questioning in the Public Bill Committee, noted that clause 2 “supports the citizenship provisions in the Belfast agreement that enable the people of Northern Ireland to identify as British, Irish or both as they may so choose, and to hold both British and Irish citizenship”.⁴⁰ In addition, the Minister reiterated that the UK Government “will remain steadfast in our commitment under international law to the Belfast agreement and what it symbolises in the peace process in Northern Ireland”.⁴¹
- 3.13 As noted above, in New Decade, New Approach, the UK Government was aware of how UK immigration rules and policy could “create incentives for renunciation of British citizenship”.⁴² Prior to the change in the immigration rules as they apply to the people of NI, a NI born Irish person may have renounced British citizenship to exercise the rights and protections under the EU Citizenship Directive and are now at risk of being covered by the deportation provision in clause 2.
- 3.14 **The NIHRC recommends that NI born citizens who identify as Irish, be protected from deportation in any circumstances to meet the requirements of the Belfast (Good Friday) Agreement 1998.**

4.0 Clause 4 - Consequential Provision

- 4.1 Clause 4 of the Bill gives the Home Secretary broad powers to make any regulation she “considers appropriate in consequence of, or in connection with any provision of this Part” of the Bill. Part 1 of the Bill repeals

³⁹ Ibid.

⁴⁰ UK Parliament, ‘Public Bill Committee – Immigration Social Security Coordination (EU Withdrawal) Bill - Minister for Future Borders and Immigration, Kevin Foster MP’, 11 June 2020.

⁴¹ Ibid.

⁴² NI Office, ‘New Decade, New Approach’ (NIO, 2020), at Annex A on UK Government Commitments to Northern Ireland, para 13.

retained EU law on free movement and consequential rights and safeguards from the UK statute book, therefore the scope of this consequential power is extensive.

- 4.2 The power conferred by clause 4 is a 'Henry VIII' power, which permits the Home Secretary to make regulations to modify any provision made by or under primary legislation and retained direct EU legislation. This provision includes the power to make "supplementary, incidental, transitional, transitory or saving provision" or "to make different provision for different purposes".⁴³ In addition, this clause empowers the Secretary of State to modify any provision relating to fees and charges made in primary law.⁴⁴
- 4.3 The Commission reiterates its position that important questions of human rights inherent in immigration law with their attendant consequences are best addressed in primary law which allows for greater time and space for consultation, evidence gathering, scrutiny and amendment. Policy changes which impact on the enjoyment of human rights should not be made by statutory instrument.
- 4.4 **The NIHRC recommends that the powers in clause 4 are narrowly drawn to preclude changes in immigration and any consequential laws and policies, which would impact on the human rights of people living in the UK.**

5.0 Clause 5 - Power to Modify Retained Direct EU Legislation Relating to Social Security Coordination

- 5.1 Clause 5 empowers the Secretary of State, NI Executive, or a UK Minister acting jointly with the NI Department, to amend retained direct EU law on social security coordination and lists five EU regulations covered by this provision.
- 5.2 The UK Government has committed to upholding the rights of EU citizens and EEA migrants through the UK-EU Withdrawal Agreement and its implementing legislation through the EU Settlement Scheme.⁴⁵ Nevertheless, there is nothing in this clause which limits the scope of this

⁴³ Clause 4(3), Immigration and Social Security Coordination Bill 2020-21.

⁴⁴ Clause 4(5), Immigration and Social Security Coordination Bill 2020-21.

⁴⁵ Part 3, EU (Withdrawal Agreement) Act 2020.

power to exclude those who will have settled or pre-settled status prior to the closing date of the scheme in June 2021 and assures that their existing social security rights will be protected. Nor is there any provision for safeguarding the rights of those EU citizens and EEA migrants who arrived before January 2021 and are still entitled to apply to the EU Settlement Scheme before the 30 June 2021.

- 5.3 In addition, there should be clarification as how these changes of rules will apply to Irish citizens in the UK, who may or may not have applied through the EU Settlement Scheme, and to ensure that they will retain existing social security rights.
- 5.4 **The NIHRC recommends that there is clarification that all people who have already acquired, or are entitled to acquire, settled and pre-settled status under the EU Settlement Scheme and that all Irish citizens resident in the UK will retain their existing social security rights.**

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