



NORTHERN IRELAND
HUMAN RIGHTS
COMMISSION

**Joint ECNI / NIHRC Briefing on the
provisions on Voting/Candidacy Rights
of EU citizens in Northern Ireland in
the Elections Bill**

04 March 2022

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Recommendations

The Commissions consider that passing the Elections Bill in its current form could potentially lead to a violation of Article 2(1) of the Protocol, in depriving EU citizens who take up residence in Northern Ireland from the beginning of 2021 from voting or standing in Northern Ireland District Council elections.

- **The Commissions recommend that the UK Government sets out, in full, its assessment of the relevant provisions of the Elections Bill, in the context of its conformity with its commitments under Article 2(1) of the Protocol.**
- **In the absence of any convincing explanation as to how the provisions the Elections Bill complies with Article 2(1), the Commissions recommend that the Elections Bill should be amended to ensure compatibility with Article 2(1) of the Protocol.**
- **Specifically, the Commissions recommend the following amendments to the Bill in order to avoid a potential breach of the “no-diminution” commitment under Article 2 of the Protocol:**
 - **Clause 13 of the Elections Bill, which gives effect to Schedule 8, should be amended to exclude Northern Ireland District Council elections from its application; and**
 - **Part 3 of Schedule 8 of the Elections Bill should be amended to remove Paragraphs 7, 8 and 9, thus restoring the status quo ante, and permitting all EU citizens lawfully resident in Northern Ireland to continue to be able to vote/stand for election in District Council elections in Northern Ireland.**

1. Introduction

- 1.1 The Equality Commission for Northern Ireland (ECNI) is an independent public body established under the Northern Ireland Act 1998. Its powers and duties derive from a number of equality statutes providing protection against discrimination on the grounds of age, disability, race, religion and political opinion, sex and sexual orientation. Its remit also includes overseeing the statutory duties on public authorities on the promotion of equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998.
- 1.2 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).
- 1.3 The EU (Withdrawal Agreement) Act 2020 empowers the Commissions to monitor, advise, report on, promote, and enforce the implementation of Article 2(1) of the Ireland/Northern Ireland Protocol ('the Protocol') to the UK-EU Withdrawal Agreement.

2. The Elections Bill and Article 2 of the Protocol

- 2.1 The Commissions have concerns in relation to the provisions of the Elections Bill that relate to the voting/candidacy rights of EU citizens who come to reside in Northern Ireland after the end of the Brexit Transition Period, namely 31 December 2020. These concerns relate to their rights to vote and stand in local district council elections, in the context of the UK Government's non-diminution of rights obligation under Article 2 (1). The Commissions consider that the changes proposed by the Elections Bill may amount to a breach of the Government's obligations under Article 2 (1) of the Protocol.
- 2.2 Specifically, the Commissions are concerned about the implications of the provisions in Part 3 of Schedule 8, to be brought into effect by Clause 13 of the Elections Bill, should it become law, on the rights of certain EU citizens who come to reside in Northern Ireland after the end of the Brexit Transition Period.
- 2.3 The implications of these provisions for EU citizens who have arrived in Northern Ireland after that date, and who are not Commonwealth or Irish citizens, are that they will not be able to vote and stand for local

elections in Northern Ireland without a reciprocal voting and candidacy rights agreement being in place between the UK Government and the relevant individual EU Member State of that EU citizen.

Article 2 of the Protocol

2.4 Article 2 (1) of the Protocol states:

“The United Kingdom shall 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 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.”

2.5 Article 2(1) of the Protocol means that the UK Government must ensure there is no diminution of rights, safeguards and equality of opportunity provisions, as set out in the relevant chapter of the Belfast (Good Friday) Agreement 1998, resulting from the UK’s withdrawal from the EU¹.

Provisions in the Elections Bill

2.6 Clause 13 of the Elections Bill gives effect to Schedule 8, which amends the voting and candidacy rights of EU citizens, including in Northern Ireland local council and Assembly elections. It does not apply to equivalent elections in Scotland or Wales because, unlike in Northern Ireland, election law regarding these elections is a devolved matter.

2.7 The changes will, if the Bill is passed into law, be accomplished through the creation of two new types of EU citizenship for the purposes of UK elections law: ‘a qualifying EU citizen’ and ‘an EU citizen with retained rights’², in addition to a category of EU citizens who do not fall into either of these two categories. Only those EU citizens who fall into one or other of these two new categories will be able to stand or vote in Northern Ireland District Council and Assembly elections.

¹ [Belfast \(Good Friday\) Agreement](#), 10 April 1998, at Rights Safeguards and Equality of Opportunity, Human Rights, paragraph 1

² A ‘qualifying EU citizen’ is one who is a citizen of an EU state with which the UK has a reciprocal voting treaty with another country, whereas an ‘EU citizen with retained rights’ is one who was resident in the UK, Jersey, Guernsey, or the Isle of Man, prior to the end of the transition period and holds lawful immigration status.

- 2.8 Part 3 of Schedule 8 provides for the specific amendments that apply these eligibility criteria to certain elections in Northern Ireland. Paragraph 7 amends the Electoral Law Act (Northern Ireland) 1962; paragraph 8 amends the Local Government Act (Northern Ireland) 1972; and paragraph 9 amends the Elected Authorities (Northern Ireland) Act 1989. We understand that the effect of these paragraphs is, taken together, to restrict the ability to stand and to vote in future District Council Elections in Northern Ireland to the two new categories of EU citizens.
- 2.9 Paragraphs 10 and 11 amend the Northern Ireland Act 1998 and the Northern Ireland Assembly (Elections) Order 2001 respectively to accomplish the same result with regard to elections to the Northern Ireland Assembly.
- 2.10 Paragraphs 12 and 13 provide for transitional arrangements which enable an EU citizen elected to these bodies before the new arrangements come into force to serve their full term of office.

Bill's provisions and compliance with Article 2

- 2.11 The UK Government has indicated, as set out in its Explainer Document (2020), that in order to establish a violation of Article 2, the alleged violation must relate to a right contained within the Rights, Safeguards and Equality of Opportunity section of the Belfast (Good Friday) Agreement 1998³. The right must have been enshrined in the domestic legal order in Northern Ireland before the end of the transition period⁴ and any diminution of one or more rights must have occurred as a result of the UK's withdrawal from the EU⁵.
- 2.12 In the context of rights of voting/candidacy rights of EU citizens in Northern Ireland, and the UK Government's obligations under Article 2 (1), we consider that several provisions of the relevant Belfast (Good Friday) Agreement rights are engaged.
- 2.13 The first paragraph of the relevant part of the 1998 Agreement consists of a general provision protecting the '*civil rights*' of '*everyone in the*

³ [Belfast \(Good Friday\) Agreement](#), 10 April 1998, at Rights Safeguards and Equality of Opportunity, Human Rights, paragraph 1

⁴ UK Government, "[Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#)" 7 August 2020, at para 10

⁵ Ibid

community', which is then followed by a list of specific rights⁶. We consider that the right to vote/stand for election is encompassed within the term 'civil rights'.

- 2.14 In addition, the Commissions consider that the following more specific rights are also engaged: '*the right of free political thought*'; '*the right to pursue democratically national and political aspirations*'; '*the right to seek constitutional change by peaceful and legitimate means*'.
- 2.15 The rights protected by the relevant section of the Belfast (Good Friday) Agreement are to apply to '*everyone in the community*'. We consider, in the context of the Bill, that EU citizens (irrespective of whether they are Irish citizens or Commonwealth citizens), who are lawfully present in the UK and who are currently resident in Northern Ireland but arrived in Northern Ireland after the end of the Brexit transition period, should be considered to be '*in the community*' and that Article 2 of the Protocol applies to protect their voting/candidacy rights.
- 2.16 The relevant Belfast (Good Friday) Agreement rights identified above were given effect in the legal order in Northern Ireland as regards EU citizens' voting rights prior to the end of the transition period⁷.
- 2.17 In addition, the rights of EU citizens to vote in local district council (but not Assembly) elections in Northern Ireland were underpinned by EU law up to the end of the transition period⁸.
- 2.18 As a result of the UK's exit from the EU this underpinning of EU law (both under the Treaties and under the relevant Directives) no longer has legal effect in Northern Ireland, and any legal status they may have as

⁶ [Belfast \(Good Friday\) Agreement](#), 10 April 1998, at Rights Safeguards and Equality of Opportunity, Human Rights, paragraph 1

⁷ In particular, the franchise for voting in district council elections in NI, is outlined in the Elected Authorities (Northern Ireland) Act 1989 at section 1. Section 1(1) specifies that a person is entitled to vote at a local election in any district electoral area if they are: registered to vote, a British or Commonwealth citizen; a citizen of the Republic of Ireland (RoI) or other EU citizen; 18 or older; and there is no legal reason why they cannot vote. The right to stand as a candidate in district council elections in NI is outlined in section 3 of the Local Government Act (Northern Ireland) 1972, as amended by SI 1995/1948. Section 3 identifies that a "relevant citizen of the Union" is entitled to stand for election to local council.

⁸ Article 20 TFEU establishes Union citizenship. Articles 20(2)(b) and 22(1) TFEU, and Article 40 of the EU Charter of Fundamental Rights, provide that citizens of the Union have the right to vote and stand as candidates in municipal elections in their Member State of residence, under the same conditions as national of that State. Article 22 TFEU provides that the exercise of this right is to be subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament. Two EU Directives subsequently set out these detailed arrangements (Council Directive 94/80/EC of 19 December 1994 and Council Directive 2013/19/EU of 13 May 2013).

‘retained EU law’ under the European Union (Withdrawal) Act 2018 would be removed by the Elections Bill.

- 2.19 The ‘*diminution*’ of these rights, resulting from the provisions in the Elections Bill, could not, legally, have occurred had the UK remained in the EU because the Treaties and Directives would have remained in force and any contrary domestic legislation would have been in conflict with it.
- 2.20 For these reasons, the Commissions consider that passing the Elections Bill in its current form would potentially lead to a violation of Article 2 of the Protocol.

Engagement with Government

- 2.21 Prior to the Elections Bill being introduced in Parliament the Commissions had written to the Secretary of State for Northern Ireland on 11 June 2021, highlighting our concerns that any changes to domestic law that would result in the loss of voting and candidacy rights for EU citizens could engage Article 2(1).
- 2.22 To date we have not received a formal response to our letter, though we were alerted by Government officials to the Government’s proposed changes to the rights of EU citizens in Northern Ireland set out its Policy Paper “Local Voting Rights for EU Citizens Living in the UK” published on 17 June 2021⁹.
- 2.23 When the Bill was published, there was no reference in the Bill’s Explanatory Notes as to what consideration the Government had given to ensuring the Bill’s compliance with Article 2(1).
- 2.24 In October 2021 the Commissions raised concerns about the Elections Bill with the House of Commons Public Bill Committee¹⁰.
- 2.25 On 7 February 2022, the Commissions wrote to the House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol (‘House of Lords Sub-Committee’) raising our concerns about Article 2 compliance¹¹. The Commissions requested that the Committee ask the Government to set

⁹ UK Government Policy paper, [Local Voting Rights for EU Citizens Living in the UK](#), 17 June 2021

¹⁰ [Letter](#) from Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission to the House of Commons Public Bill Committee on the Elections Bill, 20 October 2021

¹¹ [Letter](#) from the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission to the European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland on the Elections Bill, 7 February 2022

out, in full, its assessment of the conformity of the relevant provisions of the Elections Bill with its commitments under Article 2(1) of the Protocol.

2.26 The House of Lords Sub-Committee has consequently, on 24 February 2022, written to the Minister of State at the Cabinet Office¹² highlighting these concerns and inviting the Government to set out in full its assessment of Clause 13 and Schedule 8 of the Bill in the context of their conformity with its obligation under Article 2 of the Protocol to ensure no diminution of rights. A detailed reply to that letter from the Minister of State at the Cabinet Office to the House of Lords Sub-Committee is awaited.

2.27 However, in his recent response¹³ to a letter from the House of Lords Sub-Committee raising a number of Article 2 related concerns, including voting rights of EU citizens post-Brexit¹⁴, the Minister of State for Northern Ireland has set out two broad grounds for why the Government does not consider that Article 2(1) is engaged by the provisions of the Bill:

1. Article 22 TFEU rights apply only to EU citizens who are resident in another Member State. The UK is no longer a Member State, and Article 22 TFEU rights are no longer applicable to EU citizens resident in the UK.
2. As there is now no requirement under the Protocol for EU Member States to grant voting rights to new Northern Ireland nationals arriving in the EU, it would be *'irrational'* if Article 2 of the Protocol required the voting rights of new EU citizen arrivals to be retained in Northern Ireland where there are no reciprocal arrangements for Northern Ireland nationals arriving in the EU.

2.28 The Commissions do not consider that either of these arguments provides a convincing explanation justifying the Government's assertion that Article 2(1) would not be violated by the provisions of the Bill.

¹² [Letter](#) from the European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland to Lord True CBE, Minister of State on the Elections Bill, 24 February 2022

¹³ [Letter](#) from Conor Burns MP, Minister of State, NIO, to Lord Jay, Chair of the European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland on Article 2 of the Protocol on Ireland/Northern Ireland, 24 January 2022

¹⁴ [Letter](#) from to Lord Jay, Chair of the European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland to Conor Burns MP, Minister of State, NIO on Article 2 of the Protocol on Ireland/Northern Ireland, 16 December 2022

- 2.29 The Minister's first argument does not address the issue raised by the Commissions. We do not suggest that an EU citizen who would be excluded from voting in Northern Ireland District Council elections as a result of the passing of the Bill has any rights in the United Kingdom currently under Article 22 TFEU, but that is irrelevant for the purposes of deciding whether Article 2 is now engaged.
- 2.30 Second, the Commissions consider that Article 2(1) is clearly not based on any principle of reciprocity. The obligations to which it gives rise apply only to the United Kingdom and not to the EU or to Member States. There is no textual support in the Protocol supporting the importation of any requirement of reciprocity into the application of Article 2, however much it may or may not underpin other parts of the Withdrawal Agreement. When reciprocity is required in the Withdrawal Agreement, it is specifically provided for in the text.
- 2.31 The Commissions consider that the Government has not, in its letter of 24 January 2020 to the House of Lords Sub Committee, set out a complete or adequate assessment of the relevant provisions of the Elections Bill in the context of their conformity with its commitment under Article 2(1) of the Protocol. The Government has only given very brief details of how it considers the relevant provisions of the Bill interact with its obligations under Article 2 (1) of the Protocol.

3. Conclusion and Recommendations

- 3.1 In conclusion, the Commissions are of the view that, were the changes proposed by the Elections Bill to pass into law in its current form, the provisions preventing EU citizens who come to reside in the UK after the end of the Brexit transition period from standing for election and voting in Northern Ireland District Council elections in the future, may amount to a breach of the UK's obligations under Article 2(1) of the Protocol.
- 3.2 The Commissions advise that the UK Government can ensure that Article 2(1) is not breached if it maintains the position that existed prior to the end of the transition period and allows all EU citizen categories who would have been eligible to stand or to vote in District Council elections to continue to be eligible.

Recommendations

- 3.3** The Commissions recommend that the UK Government sets out, in full, its assessment of the relevant provisions of the Elections Bill in the context of its conformity with its commitments under Article 2(1) of the Protocol.
- 3.4** In the absence of any convincing explanation as to how the provisions the Elections Bill complies with Article 2(1), the Commissions recommend that the Elections Bill should be amended to ensure compatibility with Article 2(1) of the Protocol.
- 3.5** Specifically, the Commissions recommend the following amendments to the Bill in order to avoid a potential breach of the “no-diminution” commitment under Article 2 of the Protocol:
- **Clause 13 of the Elections Bill, which gives effect to Schedule 8, should be amended to exclude Northern Ireland District Council elections from its application; and**
 - **Part 3 of Schedule 8 of the Elections Bill should be amended to remove Paragraphs 7, 8 and 9, thus restoring the status quo ante, and permitting all EU citizens lawfully resident in Northern Ireland to continue to be able to vote/stand for election in District Council elections in Northern Ireland.**

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Contact Us

For queries, please contact:

RMallon@equalityni.org

Eilis.Haughey@nihrc.org