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Human Trafficking and Article 2 of the Ireland/Northern Ireland Protocol

Alison Harvey, No.5 Chambers
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Table of Contents

1.	Introduction	6
	1.a. The cohort	6
2.	The EU and trafficking	7
	2.a. EU Legislation	9
	2.b. What rights of victims does Directive 2011/36/EU protect?	10
3.	The significance of the rights protected by the Directive	16
4.	The Directive in UK law after Brexit	17
	4.a. The Directive in the Nationality and Borders Bill	19
	4.b. Which provisions of the Nationality and Borders Bill might be at odds with the Directive?	21
	4.b.i Devolution	21
	4.b.ii Provisions of the Bill	22
5.	Other provisions of the Bill impacting rights of trafficked persons	26
6.	The protection to be afforded trafficked persons by the Belfast (Good Friday) Agreement 1998 and Article 2 of the Northern Ireland Protocol	27
	6.a. The Belfast (Good Friday) Agreement 1998	28
	6.b. The Protocol	29
	6.c. Whose rights? Equality between whom?	29
	6.d. Which rights? What is equality “of opportunity”?	32
	6.d.i Paragraph 1	32
	6.d.ii Paragraph 2	33
	6.d.iii Paragraph 3	36
	6.d.iv Paragraph 4	37
	6.d.v Reconciliation and Victims of Violence paragraphs 11 to 13	37
	6.d.vi Economic, Social and Cultural Issues	39
	6.e. Safeguards	39
	6.e.i Functions of the Northern Ireland Human Rights Commission	39
	6.e.ii The framework for safeguards	40
	6.f. The extent of the non-diminution commitment	41

1. Introduction

Have the rights of trafficked persons been diminished by the UK's withdrawal from the European Union? Will they be (further) diminished if the Nationality and Borders Bill becomes law? What if anything does Article 2 of the Protocol on Ireland/Northern Ireland to 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 have to offer those seeking to protect them?

1.a. The cohort

The widely accepted definition of trafficked persons is found in the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (known as the Palermo Protocol). Although it is a protocol to a Convention on "transnational" organised crime, the Council of Europe Convention on Action against Trafficking in Human Beings¹, which both the UK and Ireland have signed and ratified, covers both national and cross border movement of persons for their exploitation. The definition of trafficking it uses, which is based on the Palermo Protocol, is set out in Article 4:

- 4a "Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- b The consent of a victim of "trafficking in human beings" to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- c The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in human beings" even if this does not involve any of the means set forth in subparagraph (a) of this article;

1 Council of Europe Treaty Series 197.

- d “Child” shall mean any person under eighteen years of age;
- e “Victim” shall mean any natural person who is subject to trafficking in human beings as defined in this article.

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 defines the offence of human trafficking at Article 2. Like Directive 2011/36/EU, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 starts with the definition of the offence of human trafficking, at s 2, alongside definitions of slavery, servitude, forced and compulsory labour at s 1.

Under all these instruments a victim of human trafficking may be a national, a person exercising rights of free movement, a person with leave under immigration laws, an asylum seeker lawfully present but without leave, having claimed asylum on arrival or before their leave expired, or a person present without leave. Those who have entered the country may have done so under the control of their traffickers, or freely.

2. The EU and trafficking

The work of the European Union to combat trafficking in human beings is multi-faceted and extends far beyond legislation, as emphasised in the recitals to Directive 2011/36/EU. An examination of the review of past work in the European Commission’s Communication from the *Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025*² emphasises cooperation between law enforcement and judicial authorities, awareness raising campaigns, education and training and data collection. EU funding has been directed at facilitating joint investigations and prosecutions by national authorities, increasing the capacity of law enforcement and other authorities, identifying, seizing and confiscating criminal assets, enabling support and integration of trafficked persons.

The EU agencies involved in this work include the European Asylum Support Office, the European Police Office, the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, the European Monitoring Centre for Drugs and Drug Addiction, the EU Judicial Cooperation Unit (Eurojust), the European Institute for Gender Equality, the European

² Brussels, 14.4.2021 COM(2021) 171 final.

Border and Coast Guard Agency (Frontex), the EU Agency for Fundamental Rights (FRA), the EU Agency for Law Enforcement Training, and the European Foundation for the Improvement of Living and Working Conditions.

The Northern Ireland Department of Justice Organised Crime Task Force Modern Slavery Strategy 2021-2022³ states:

1.18 EU exit may have a bearing on how the Strategy is delivered. The UK and EU reached a Trade and Cooperation Agreement on 24 December 2020, which replicates most of the key criminal justice measures previously available to the UK. However, the impact of the new arrangements will continue to be monitored to ensure that any capability gaps are identified and addressed, including in respect of modern slavery and human trafficking. The OCTF Modern Slavery and Human Trafficking Subgroup will consider any trends or concerns that emerge, to inform the strategic response.

The terrain covered by “replicates most of the key criminal justice measures previously available to the UK” is complex. In March 2019, on the eve of Brexit, the UK filed formal notifications with the registry of the EU Council that it would opt in to the new Eurodac system and that it would accept the changes to Eurojust reconstituting it as the EU Agency for Criminal Justice Cooperation.

On 12 April 2019 the UK gave notification of its desire to participate in the European Criminal Records Information System (ECRIS), which

it had been agreed to expand to include data on convictions of third country nationals and stateless persons (ECRIS-TCN). Also, on that date it notified its proposal to apply the Prüm Convention, a treaty on cross-border cooperation which gives access to DNA profiles, fingerprint data and national vehicle registrations. Thus, these instruments fell to be considered in arrangements for Brexit.

In September 2021 the UK National Crime Agency and Europol signed a Working and Administrative Arrangement, and in December 2021 the Home Office and Eurojust did the same. These complement and implement the Trade and Cooperation Agreement to provide for the UK to continue to work with Europol and Eurojust.

Post Brexit, the UK is however out of Eurodac and ECRIS although it does continue to share criminal records data with the EU under new arrangements. The UK continues to share Prüm data under Title two of the law enforcement agreement. Title three of that agreement deals with the transfer, use and process of “passenger name record” data, drawn from flights between the EU and the UK. At the end of the interim period, the UK must delete all passenger name record data the moment individuals leave the UK. The initial interim period was nine months. This is being extended to 31 December 2022⁴, despite the European Data Protection Supervisor having earlier issued a non-binding opinion⁵ questioning the legality of aspects of these arrangements, including questions of limitation of purpose, accuracy of data, current relevance

3 Modern Slavery and Human Trafficking Strategy 2021-22 [accessed 26 December 2021].

4 https://www.eumonitor.eu/9353000/1/j4nvhdscs8bljza_j9vvik7m1c3gyxp/vlo8gf0go8z9 see <https://www.kildarestreet.com/debates/?id=2021-12-07a.295> [accessed 28 November 2021].

5 Opinion 3/21.

of data and the period for which data is stored, as well as on the length of the derogation period.

Without access to the Schengen Information System (SIS II) the UK is reliant on notices from Interpol's I-24/7 database, which has a less advanced interface with the UK's Warnings Index. The scope for decisions to be made on persons on the basis of incorrect or out of date information is thus increased⁶.

A glimpse of the limitations of the current approach is provided in the Department of Justice Northern Ireland Organised Crime Task Force Modern Slavery Strategy 2021-2022:

PSNI [*Police Service Northern Ireland*] has negotiated Joint Investigation Teams (JITs) that are in place with Scottish police and Romanian police for sexual exploitation investigations. Europol is consulted in the course of every investigation with a European and/or foreign national involvement, mainly through the Secure Information exchange system, SIENA.⁷

Counter-trafficking measures are discussed by both the UK and the EU as a seamless whole: thus prevention and prosecution are identified as contributing to protection, and protection of victims of trafficking as increasing the likelihood of successful prosecutions. Any diminution in the efficacy of the counter-trafficking measures thus has the potential to impact, inter alia, victims and respect for their rights.

2.a. EU Legislation

The key instrument is Directive 2011/36/EU. Ireland, and later the UK, opted into this Directive.

Neither the UK nor Ireland opted into Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities or Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. Ireland has not to date put forward proposals to opt into either. Rights under these instruments are not diminished by the UK's leaving the EU because they were not enjoyed when the UK was part of the EU save insofar as incorporated by instruments to which the UK is party. *The Court of Appeal in MN v Secretary of State for the Home Department* [2020] EWCA Civ 1746 held at paragraph 55:

The 2011 Directive replaces the earlier Framework Decision. It does not, however, replace the 2004 Directive, which remains in force as regards the matters covered by it (though not as regards the UK: see above). Accordingly, recital (17) to the 2011 Directive records that it “does not deal with the conditions of the residence of the victims of trafficking in human beings in the territory of the Member States”.

⁶ See the discussion in the House of Lords' European Union Committee Report Beyond Brexit: policing, law enforcement and security 25th Report of Session 2019-21 - published 26 March 2021 - HL Paper 250, Chapter 3.

⁷ Modern Slavery Strategy 2021-2022 available at https://www.justice-ni.gov.uk/sites/default/files/publications/justice/modern-slavery-strategy-27-05-v2_0.pdf [accessed 29 December 2021].

Nor, for the same reason, does the 2011 Directive provide for any recovery and reflection period: the only such period is that provided for at article 6.1 of the 2004 Directive. However, recital (7) to the 2011 Directive, which we quote below, makes it clear the 2004 Directive must be “taken into consideration” when implementing the Directive, and its provisions – including the requirement for a rest period – are referred to in it.

This paper is concerned with rights specific to trafficked persons, but they share rights with others. 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, applies to victims of human trafficking as it does to other crimes. Other provisions relevant to trafficked persons include obligations to remove illegal content set out in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, and 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.

Within the EU, oversight of these instruments is provided by the Court of Justice of the European Union as well as the European Commission, European Parliament, national rapporteurs and the EU Civil Society platform on the topic.

2.b. What rights of victims does Directive 2011/36/EU protect?

The 22 March 2011 Ministerial Statement announcing that the UK would opt-in to the Directive stated of the final text of the Directive “The new text still does not contain any measures that would significantly change the way the UK fights trafficking”⁸. The Minister told the EU Scrutiny Committee⁹:

In summary, UK participation would mean we would be required to: widen one existing offence; amend legislation relating to extra-territorial jurisdiction; make mandatory those measures which are currently discretionary (eg appointing special representatives to support child victims during police investigations and criminal trials); and set out the rights of victims to assistance and support. There are no new burdens on the private sector. “Administrative solutions for transposing some of the obligations may be acceptable, and we would discuss these with the Commission. However, if the Commission does not agree, we would need to legislate to give effect to these.

⁸ HC Deb, 22 March 2011, c 52WS.

⁹ Letter of 22 March 2011 from the Minister for Immigration (Damian Green) to the Chairman of the European Scrutiny Committee, see European Scrutiny Committee, 24th Report, Session 2010–11 HC 428–xxii.

Primary legislation would be required to implement some of the Directive's provisions. As such, we would need to find legislative time in a Programme Bill in the second session. All implementing legislation will need to be in force within two years of adoption and our decision to apply to opt into the Directive. "The total costs arising from the Directive have been estimated at approximately £810,000 per year, with £80,000 per year falling to operational policing as a result of potential activity on extra-territorial jurisdiction.

In a detailed annex to his letter he explained, as set out by the Committee in its report¹⁰ that:

- 3.24 The Minister considers that the Directive would not add new requirements to support victims beyond those which the UK already provides, in compliance with the 2005 Council of Europe Convention, but says that the UK may have to provide the support for a longer period of time. He adds, "The Government's new prime contracting funding model for support for victims of trafficking will enable the prime contractor to assess support needs on a case by case basis.
- 3.25 The Minister says that the UK is compliant in practice with the requirement to provide assistance and support, including access to legal counselling and representation, but that existing legislation may need "minor

amendment." He adds that the Directive does not require the UK to provide legal representation in cases where the victim of trafficking is not a party to criminal proceedings.

Protection of child victims of trafficking in criminal investigations and proceedings — Article 15

- 3.26 The Minister says that appointment of a representative to support and protect a child victim is already covered by practice guidance, but this will need to be enshrined in legislation.

Assistance, support and protection for unaccompanied child victims of trafficking — Article 16

- 3.27 The Minister indicates that the support stipulated in the Directive is already covered by practice guidance, but that secondary legislation may be needed to implement the right to assistance (for example, the appointment of a representative) where a child victim is involved in a criminal investigation or proceedings.

The Committee, which was very supportive of the decision to opt-in, perhaps tactically, did not take issue with the Minister's reading of the Directive, but it has proven too narrow, for example the stated belief that the Directive does not require the UK to provide legal representation in cases where the victim of trafficking is not a party to criminal

¹⁰ European Scrutiny Committee, 24th Report, Session 2010-11, op cit.

proceedings is clearly at odds with recital 19¹¹ to the Directive and the government conceded that trafficked persons should benefit from legal aid in immigration proceedings following a challenge, albeit without reference to the Directive in the published material¹². The extent of the obligations to provide guardians for trafficked children has been highly controversial and the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 makes provision for them at s 21.

Insofar as it is not, or ceases to be, the case, that domestic law fully implements the Directive and it is necessary to look to the provisions of the Directive, the test under EU law for a provision to have direct effect (that is, to be enforceable by individuals) is that it constitute a complete legal obligation, being clear, precise and unconditional¹³. Since 6 April 2013, the deadline for transposition, provisions of the Directive satisfying the test have had 'direct effect' under EU law. The matter of whether a provision has direct effect is for the courts, ultimately the Court of Justice of the European Union.

The recitals to the Directive help to explain the purpose and intent behind its provisions and can be used as an interpretative tool to assist in resolving ambiguities in it but they do not have any autonomous legal effect: 'the preamble to a community act has no binding

legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question¹⁴.

The first part of the Directive is concerned with the prosecution and punishment of traffickers. It does not create specific rights for victims: a State's obligation to punish offender is an obligation owed to all its citizens and prosecutions are in the name of the Crown not of a victim. The failure to punish an offender may, however, be relevant to a State's obligations to take preventative measures, and to afford protection to particular individuals subsequently exploited by a trafficker.

Article 8 concerns prosecution and application of penalties. It is oddly worded: "Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2". The authorities are entitled not to prosecute or to impose penalties, rather than the victims being entitled not to be prosecuted. The relevant documents as far as prosecution is concerned are the Public Prosecution Service for Northern Ireland Code for Prosecutors

11 Following the case of *R (LL) v Lord Chancellor* CO/3581/2017, a case on the interpretation of the Legal Aid Sentencing and Punishment of Offenders Act 2012, the UK government conceded the point for legal aid in England and Wales, where victims had been denied it. See Civil news: funding for victims of modern slavery and trafficking: Administrative Court endorses declaration clarifying when modern slavery and human trafficking victims are entitled to immigration funding, Legal Aid Agency 9 May 2018 <https://www.gov.uk/government/news/civil-news-funding-for-victims-of-modern-slavery-and-trafficking> [accessed 26 December 2021] and clarification of immigration funding in trafficking cases , Legal Aid Agency (undated) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716499/Clarification_of_immigration_funding_in_trafficking_cases.pdf [accessed 26 December 2021] <https://www.gov.uk/government/news/civil-news-funding-for-victims-of-modern-slavery-and-trafficking>

12 See <https://atleu.org.uk/news/legalaidimmigrationadvice> [accessed 26 December 2021].

13 Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1; Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

14 Case C-162/97, *Nilsson*, [1998] ECR I-7477, at paragraph 54.

and Victim and Witness Policy and Policy for Prosecuting Cases of Modern Slavery and Human Trafficking¹⁵. Penalties may take any form. The provision appears capable of having direct effect: a mandatory obligation to impose a penalty or to prosecute would fall foul of it.

Article 11 is entitled “Assistance and support for victims of trafficking in human beings. It requires that [at Article 11(1)], States take the necessary measures to ensure that assistance and support are provided to victims before, during and “for an appropriate period of time after the conclusion of criminal proceedings” to enable them to exercise the rights set out in the Directive and in Framework Decision 2001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.

Assistance and support must be provided to trafficked persons, not only to those involved in criminal proceedings, “as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3” [11(2)]. Its wider scope means that it creates a distinct obligation¹⁶. In the UK’s interpretation of its obligations, there is a decision-making “competent authority”, rather than all public authorities being responsible for identifying victims of trafficking in their areas of competence, and the “reasonable grounds” decision is a fixed stage of the decision-making procedure.

Assistance and support cannot be conditional on the victim’s willingness to cooperate in

any criminal investigation, prosecution or trial [11(3)]. States are obliged to take the necessary measures to establish appropriate mechanisms aimed at early identification [11(4)].

Assistance and support must be provided on a consensual and informed basis, and include “at least standards of living capable of ensuring victims’ subsistence” through measures such as the provision of appropriate and safe accommodation, material assistance, necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate [11(5)]. The information to be provided must cover asylum and any reflection and recovery period [11(6)]. States are obliged to “attend to” victims with special needs. Specific mention is made of those who are pregnant, are disabled, suffer ill health, have a mental health disorder, are pregnant, or are survivors of violence.

We can extract from this an obligation to make provision for early identification and to provide accommodation and subsistence and medical care in a manner that has regard to the special needs of the individual, which must thus also be identified. Obligations to provide information, and to ensure translation and interpretation can also be identified. The obligations cannot be conditional on cooperation with prosecution and support must be reviewed so once there are reasonable grounds for believing that the person might have been trafficked, with the support not automatically to cease on completion of any prosecution of the trafficker.

¹⁵ October 2021, <https://www.ppsni.gov.uk/sites/ppnsni/files/publications/PPS%20Policy%20for%20Prosecuting%20Cases%20of%20Modern%20Slavery%20and%20Human%20Trafficking.pdf> [accessed 26 December 2021].

¹⁶ *MN v The Secretary of State for The Home Department* [2020] EWCA Civ 1746 paragraph 65.

Article 12 obliges States to provide victims with access without delay to legal counselling, and, “in accordance with the role of victims in the relevant justice system”, to legal representation, including for the purpose of claiming compensation. These must be free of charge where the victim does not have sufficient financial resources.

States must ensure that victims receive appropriate protection on the basis of an individual risk assessment, inter alia, by having access to witness protection programmes or similar if appropriate [12(3)]. There is a particular obligation to take steps to protect those giving evidence including by avoiding unnecessary repetition of interviews during investigation, prosecution or trial; visual contact between victims and defendants including during the giving of evidence; the giving of evidence in open court; and unnecessary questioning concerning the victim’s private life [12(4)]. All these are obligations that appear capable of having direct effect.

Article 13 is entitled “General provisions on assistance, support and protection measures for child victims of trafficking in human beings”. It places states under obligations to provide child victims of trafficking with assistance, support and protection. It provides that in the application of the Directive the child’s best interests shall be a primary consideration.

It provides that in cases of age dispute, where “there are reasons to believe that the person is a child” the victim be presumed to be a child and receive immediate access to assistance, support and protection on that basis. Again, this appears to be an obligation capable of having direct effect.

Specific obligations to provide assistance and support to children are set out in Articles 14 and 15. The child is entitled to an individual assessment of need that takes “due” account of their views, needs and concerns and the State is obliged to take measures to ensure that following that assessment the child can benefit from specific actions to assist and support them in their physical and psycho-social recovery, “with a view to finding a durable solution for the child” [14(1)]. The obligations to provide an individual assessment and to support the child in their recovery appear capable of having direct effect. There is no obligation of result to provide a durable solution, but there is an obligation to take steps to do so.

“Within a reasonable time” the State must provide education for child victims and children of victims [14(1)]. What is a reasonable time is not specified but this is an obligation capable of having direct effect: courts are experienced in adjudicating on the questions of reasonableness.

States must appoint “a guardian or a representative” for the child victim of trafficking in human beings from the moment the child is identified by the authorities where, by national law, the holders of parental responsibility are, as a result of a conflict of interest precluded from ensuring the child’s best interests and/or from representing the child. Thus, this is not a generalised obligation to provide a guardian but rather one that pertains where parents are present, but there is a conflict of interest [14(2)]. Again, the obligation is capable of direct effect.

States are obliged “where appropriate and possible” to provide assistance to the child victim’s family members on the territory, in

particular applying Article 4 of 001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, which provides a right to information. There is a degree of imprecision but certainly the obligation to provide information is capable of direct effect.

Article 15 makes specific provision for the protection of child victims of trafficking in criminal investigations and proceedings. States must “in accordance with the role of victims in the relevant justice system,” appoint a representative for a child victim of trafficking where there is a conflict between them and the parents [15(1)]. States must “in accordance with the role of victims in the relevant justice system”, ensure that child victims have access without delay to free legal advice and representation, including for the purpose of claiming compensation, “unless they have sufficient financial resources” [Article 15(2)]. States must take steps in criminal proceedings and investigations involving child victims to ensure that interviews take place without unjustified delay, “where necessary,” in premises designed or adapted for that purpose; “where necessary” by or through trained professionals. The same person should “if possible and where appropriate”, conduct all the interviews with the child and the number of interviews should be “as limited as possible” and carried out only where strictly necessary. Child victims may be accompanied by a representative or, “where appropriate”, an adult of the child’s choice, “unless a reasoned decision has been made to the contrary in respect of that person” [15(3)]. Interviews with child victims and “where appropriate” child witnesses should be video-recorded such video recordings “may be used as evidence in criminal court proceedings” [15(4)]. There

must be a possibility of holding hearings in private and of the child victim not being present in the courtroom [15(5)]. These obligations are sufficiently specific to have direct effect.

Article 16 deals with unaccompanied child victims. Again, a durable solution based on an individual assessment of the best interests of the child is emphasised [16(2)]. Member States must ensure that “where appropriate”, a guardian is appointed [16(3)] and that a representative is appointed in criminal investigations and proceedings, “in accordance with the role of victims in the relevant justice system” [16(4)]. The circumstances in which it is appropriate to appoint a guardian or representative is open to debate but the obligation to do where those circumstances exist is capable of having direct effect.

Article 17 obliges States to ensure that victims of trafficking in human beings have access to existing schemes of compensation for victims of violent crimes of intent. The obligation is clear and precise and capable of having direct effect.

Provisions for prevention in the Directive are aimed more widely than at victims, and include potential victims. They recall, however, the preventative obligations under Article 4 of the European Convention on Human Rights [*Siliadin v. France* (application no. 73316/01), *C.N. v. the United Kingdom* – application no. 4239/08, *Rantsev v Cyprus and Russia*, application 25965/04). A person who becomes a victim may do so because a State has failed to give effect to these obligations.

Article 18 of the Directive envisages education and training to reduce demand, information and awareness-raising campaigns, research,

the promotion of regular training for officials in identification and dealing with victims and potential victims of trafficking in human beings. There are specific reporting obligations.

3. The significance of the rights protected by the Directive

A comparison of these measures with the Council of Europe Convention on Action against Trafficking in Human Beings reveals that the two instruments cover much of the same ground. The Court of Appeal in *MN v Secretary of State for the Home Department* [2020] EWCA Civ 1746 accepted [paragraph 98] the submission that “the Directive cannot be treated as no more than the adoption by the EU into its own legislation of the provisions of ECAT [*the Council of Europe Convention*]”. It went on to hold:

“But ECAT is plainly one of its principal foundations, and we do not believe that we should treat it as requiring a radically different approach to the support and protection of victims of trafficking unless there is a clear indication to that effect.”

In *Chowdury and Others v. Greece* application No. 21884/15, the European Court of Human Rights held [at paragraph 104] that the positive obligations on States under Article 4 of the European Convention on Human Rights must be interpreted in the light of the Council of Europe Convention on Action against Trafficking in Human Beings¹⁷. This was repeated in the 2021 cases of *V.C.L.* and *A.N.* v

UK (applications nos. 77587/12 and 74603/12) [at paragraph 150]. The latter case deals with the circumstances in which victims of human trafficking should not be prosecuted. The Court in that case highlighted States’ obligations to facilitate the identification of victims by qualified persons and assist them in their physical, psychological and social recovery [paragraph 153].

Directive 2011/36/EU expressly includes in its definition of the offence of trafficking at Article 2(3) “the exploitation of criminal activities” which the Council of Europe Convention does not. Its provisions as to the treatment of trafficked persons within the criminal justice system are more detailed than those on the face of the Council of Europe Convention.

Article 12(1)(e)⁷⁴ of the Council of Europe Convention provides that victims should enjoy:

“assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;”

Article 26 of the Council of Europe Convention provides:

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.

This is extremely high level and the provisions of the Directive offer superior protection.

¹⁷ See the important commentary by Dr *Vladislava Stoyanova Chowdury and others v. Greece*: further integration of the positive obligations under Article 4 of the ECHR and the COE Convention on Action Against Human Trafficking 28 April 2017 <https://strasbourgobservers.com/2017/04/28/chowdury-and-others-v-greece-further-integration-of-the-positive-obligations-under-article-4-of-the-echr-and-the-coe-convention-on-action-against-human-trafficking/> [accessed 26 December 2021].

Even if the two instruments were in identical terms however, the Council of Europe convention has not been incorporated into UK law. It does not, in the UK's dualist system, have direct effect. Reliance upon it before the UK courts and tribunals, is of necessity indirect, via Article 4 of the European Convention on Human Rights or by arguing expectations based on the guidance that has been drafted to give it effect.

In *R (Atamewan) v Secretary of State for the Home Department* [2013] EWHC 2727 (Admin), at paragraph 55 two concessions were made on behalf of the Home Office: that in so far as the Home Office guidance purported to give effect to the terms of the Council of Europe Convention and failed to do so, that would be a justiciable error of law and that it did purport to do so. The same concession was made, including before the Court of Appeal, in *R (PK (Ghana)) v Secretary of State for the Home Department* [2018] EWCA Civ 98. In *R (JP) v Secretary of State for the Home Department* [2019] EWHC 3346 (Admin) of 10 December 2019 the Home Office hinted at withdrawal of the concession and in *R (KTT) v Secretary of State for the Home Department* [2021] EWHC 2722 (Admin) of 12 October 2021 the Home Office withdrew the concessions.

The Court in KTT reviewed the authorities and found them to be applications of the principle in *JH Rayner (Mincing Lane) Limited v Department for Trade and Industry* [1990] AC 2 AC 418 that a case where the stated policy of a public body purports to give effect to a given provision in an international treaty

by indicating that decisions will be taken in accordance with that provision, the policy is the source of the relevant obligation and the court is entitled to interpret the treaty in question to decide whether the impugned parts of the policy correctly state the position under the treaty and/or whether a given decision is in accordance with the commitment to comply with the treaty [paragraph 22 of KTT).

It was therefore necessary to look at whether the policy documents committed to making the relevant decision in accordance with the requirements of the relevant articles of the Council of Europe Convention [paragraphs 36, 77,78 of KTT]. In KTT it was held that they did so and that the failure to comply with the requirements of Article 14(1)(a) of the Council of Europe Convention was a breach of domestic law.

Thus, each part of the guidance must be looked at separately and it is in any event open to the Secretary of State to rewrite her guidance, always mindful of the *pacta sunt servanda*¹⁸ obligation, as enshrined in Article 26 of the Vienna Convention on the Law of Treaties.

4. The Directive in UK law after Brexit

The question of whether the Directive formed part of retained EU law was expressly addressed in debates on the Immigration and Social Security Coordination (EU Withdrawal) Bill¹⁹. Lord McColl of Dulwich correctly pointed

¹⁸ "agreements must be kept". See the third recital to the Vienna Convention on the Law of Treaties, 1969, where it emphasises the legally binding character of Treaty obligations.

¹⁹ At Committee stage of the Bill in the House of Lords, debate on amendment 7, HL Db 7 September 2020 c 613-622.

out that the question of whether rights under Directive 2011/36/EC would remain recognised and available in domestic law after 31 December 2020 depended on whether rights under the directive fell within the definition in s 4(2)(b) of the European Union (Withdrawal) Act 2018 which requires that the rights in question are “of a kind recognised by the European Court or any court or tribunal in the United Kingdom”. He pointed out the lack of clarity caused by the words “of a kind”.

The Explanatory Notes to European Union (Withdrawal) Act 2018 set out that where a UK or EU court has recognised rights arising under directly effective provisions of directives, these would remain part of UK law. Lord McColl asked, what of rights in the directive that may meet the test for having direct effect but that had been recognised by the UK courts before exit day?

Further confusion was created by paragraph 6 of Schedule 1 to the Bill:

6(1) Any other EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures cease to be recognised and available in domestic law so far as—

- (a) they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, any provision made by or under the Immigration Acts (including, and as amended by, this Act), or

- (b) they are otherwise capable of affecting the exercise of functions in connection with immigration

In its briefing on the Bill²⁰ the Immigration Law Practitioners’ Association suggested that this could put protections for victims of trafficking in Directive 2011/36/EU, for example the protection against removal of a victim of trafficking because s/he never received sufficient support and assistance under Article 11, or because an investigation was never conducted, or the protection against removal during their reflection and recovery period, at risk of being disapplied in any context relating to immigration.

Lord McColl put on record that the Minister had arranged for a government position on the Directive to be sent in advance of the debate. He quoted it:

We do not consider that any directly effective rights which may exist under the EU Anti-trafficking directive 2011/36 conflict with or will conflict with the Immigration Acts or immigration functions (per the disapplication provision in para 6 of Schedule 1 to the ISSC [Immigration and Social Security Coordination (EU Withdrawal)] Bill).

The Minister repeated that assurance in the course of the debate. Lord McColl asked the Minister to put on record a list of the directly effective rights which will exist. He said:

Will all existing rights and obligations under the EU anti-trafficking directive

²⁰ Second reading briefing 20 May 2020, available at <https://ilpa.org.uk/wp-content/uploads/2020/05/20.05.13-ILPA-briefing-on-Immigration-Bill-second-reading-1.pdf> [accessed 28 December 2021].

remain part of domestic law following the end of the transition period, separate from any rights and obligations set out in the Modern Slavery Act, statutory guidance and the Council of Europe anti-trafficking convention? If her answer does not clearly address this broader question, how can this House, and trafficking victims, be reassured that the rights will not be disapplied by this Bill?

The Minister made clear that there was no such list of rights, and did not offer to create one.

In its briefing on the Bill the Immigration Law Practitioners' Association suggested that victims of trafficking could lose the protection against removal, for example because they never received sufficient support and assistance under article 11 of the Directive, because an investigation was never conducted.

Legal certainty is at the heart of respect for the rule of law. Lord Bingham in his book *The Rule of Law*²¹ had as his first principle "The law must be accessible, intelligible, clear and predictable".

Work in the European Union, where Article 2 of the Treaty makes reference to the rule of law as a founding principle of the Union, takes a similar approach. For example, the Communication from the Commission to the European Parliament, the European Council and the Council.

*Further strengthening the Rule of Law within the Union State of play and possible next steps*²² includes the rubric:

What is the rule of law?

The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the founding values of the Union. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law. These principles have been recognised by the European Court of Justice and the European Court of Human Rights.

The lack of legal certainty and the inability of those affected by the law to know what the law is, are a result of the UK's leaving the European Union.

4.a. The Directive in the Nationality and Borders Bill

What was, as the Bill entered the House of Lords, Clause 67, sets out:

- 67 Disapplication of retained EU law deriving from Trafficking Directive (1) Section 4 of the European Union (Withdrawal) Act 2018 (saving for rights etc under section 2(1) of the European Communities Act

21 Tom Bingham, 2011.

22 COM/2019/163 final. 3 April 2019.

1972) ceases to apply to rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from the Trafficking Directive so far as their continued existence would otherwise be incompatible with provision made by or under this Act.

- (2) “The Trafficking Directive” means Council 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.

The Explanatory Notes to the Bill provide:

There is one clause that may depending on the circumstances extend either across the UK or only to England and Wales or only to England: Clause 67 makes provision for the disapplication of retained EU law deriving from the Trafficking Directive insofar as its continued existence would be incompatible with provision made by or under the Bill. This Clause extends UK-wide insofar as any incompatibility is between the Directive and a provision that is reserved and extends across the UK. It does not extend to Scotland, Wales or Northern Ireland insofar as any incompatibility is between the Directive and a provision that is devolved in Scotland, Wales or Northern Ireland.

Tom Pursglove MP, Parliamentary Under Secretary of State, wrote to the Anti Trafficking and Labour Exploitation Unit on

4 November 2021 in response to its request that the Government provide the list that Lord McColl had requested:²³

We would agree that it is not clear what from the Directive, if anything, applies, and that brings little legislative certainty, so it is difficult for victims to interpret the legislation and their entitlements. We are therefore making clear in the Nationality and Borders Bill that to the extent that a provision of the Directive does apply in the UK; and where it is incompatible with a provision in this Bill it is disapplied. This does not affect the effect of ECAT or Article 4 of the ECHR.

The suggestion that Northern Ireland escapes the effect of Clause 67 as far as devolved matters are concerned is arguably not the whole story. The mechanism the clause provides for resolving disputes as to what the law is appears otiose given that s 5(1) of the EU (Withdrawal) Act 2018 is to the same effect:

- (1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.

Thus section 5(1) already provides power to repeal or amend retained EU law where this is not prohibited by the Withdrawal Agreement.

Neither that section nor Clause 67 of the Bill makes the law accessible. No victim of trafficking reading them will be any the wiser as to what their rights are. They provide, at best, a mechanism for resolving disputes.

²³ http://data.parliament.uk/DepositedPapers/Files/DEP2021-0850/Nationality_and_Borders_Bill_Committee_Stage_Letter.pdf [accessed 29 December 2021].

Debates on the clause in Commons' committee were not illuminating and made no reference to devolution. The Minister pointed out that the specific provision in the Directive about which he was being asked was an obligation to transpose a provision, the deadline for which had already passed, confusing the Shadow Minister and causing her not to pursue her point²⁴.

Thus, we appear to be in position where if a provision of law on a matter reserved is at odds with the Directive, clause 67 applies and it prevails, while if a provision of law on a matter devolved is at odds with the Directive it must be read subject to s 5(1) of the Withdrawal Act 2018 which, on its face, provides that laws enacted subsequent to withdrawal prevail.

A complicating factor is that parts of the Bill appear to stray into devolved matters where Northern Ireland is concerned, without acknowledging this, as discussed below.

4.b. Which provisions of the Nationality and Borders Bill might be at odds with the Directive?

All references are to HL Bill 82.

This Bill contains a number of measures with the potential to affect trafficked persons who are subject to immigration control both within Part 5 Modern Slavery and in other parts of the Bill.

4.b.i Devolution

Immigration is a reserved matter but trafficking in human beings for the most part²⁵ engages devolved powers. The relevant provisions in Northern Ireland are found in the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015. Seven clauses of the Nationality and Borders Bill extend only to England and Wales. Clauses 24, 56, 65 and 66 on civil legal services, including on the subject of trafficking, amend the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which extends only to England and Wales. Clause 46 makes provision for prisoners liable to removal from the United Kingdom. It amends the Criminal Justice Act 2003 which extends only to England and Wales. Clauses 59 and 63 make provision for the identification of potential victims of slavery or human trafficking by amending the Modern Slavery Act 2015, which extends only to England and Wales. Otherwise, the Bill extends to Northern Ireland without modification, albeit with some specific provisions such as s 75 *References to Justices of the Peace in relation to Northern Ireland*.

As set out below, there are provisions in the Bill extending to Northern Ireland that take a different approach to that taken in the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 and in so doing appear to arrogate to Westminster powers developed to Northern Ireland.

²⁴ Nationality and Borders Bill Deb, 2 November 2021, c545.

²⁵ Department of Justice Northern Ireland Organised Crime Task Force Modern Slavery Strategy 2021-2022: 1.31 Immigration and asylum are reserved matters. However, as there may be overlaps with modern slavery and human trafficking - which is on the whole a devolved matter - safeguards are in place to ensure that potential victims receive appropriate support.

Consequential powers at Clause 80 enable the Secretary of State to make provision by regulations in consequence of the Bill that amend, repeal or revoke any enactment, including Northern Ireland legislation. The explanatory notes to HL Bill 82 provide at paragraph 86 that these powers would by definition only be exercisable in consequence of provisions in the Bill, which are either reserved to the UK Parliament or which extend only to England and Wales and which are not within the legislative competence of Senedd Cymru. Paragraph 87 of the explanatory notes recalls the Sewel Convention whereby the consent of the legislature concerned will be sought before Westminster legislates on a matter devolved. The explanatory notes state at paragraph 88 that none of the provisions in the Bill involve the UK Parliament legislating for a matter that is within the legislative competence of a devolved legislature, and so the consent of devolved legislatures is not required under the Sewel Convention²⁶.

4.b.ii Provisions of the Bill

It is important to recall the specific protection afforded by the Directive. In the section Immigration Offences and Penalties clause 39 *Illegal Entry and Similar Offences* creates a new criminal offence of arriving in the UK without a valid entry clearance where required, in addition to the existing offence of knowingly entering without leave²⁷, the maximum penalty for which it increases to four years. The provision is designed to facilitate prosecution of those who arrive in but do not legally enter the UK. This creates new penalties and a new

criminal offence but does not fall foul of the limited protection in Article 8 of the Directive which is concerned to ensure that prosecution and the application of penalties are not automatic, and to preserve prosecutorial discretion.

Clause 57 *Provision of information relating to being a victim of slavery or human trafficking* gives the Secretary of State power to serve a slavery or trafficking information notice on a person who has made a protection claim or a human rights claim requiring the person to provide information relevant to their being identified as having been trafficked or enslaved within a set time frame. Late compliance with the requirement to return a notice must, in accordance with clause 58(2) must be taken into account, as damaging the person's credibility "unless there are good reasons why the information was provided late". The mandatory nature of the obligation to take the late provision of the information into account as damaging credibility is a penalty and may fall foul of the obligation in Article 8 of the Directive to ensure that the competent national authorities are entitled not impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being trafficked, albeit that the criminal nature of the activities would be only tangentially relevant.

It arguably reverses the positive duty on the State to identify the victim recognised in article 9 of the Directive. Negative inferences as to credibility must, not may, be drawn if

²⁶ See *R (Miller and another) v Secretary of State for Exiting the European Union*; Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review Reference by the Court of Appeal (Northern Ireland) - In the matter of an application by Raymond McCord for Judicial Review [2017] UKSC 5 paragraphs 136-152. The Court concluded that the Convention is not justiciable.

²⁷ 24(1)(a) of the Immigration Act 1971.

information is submitted late. They can only be rebutted where a statement is eventually provided and where the Secretary of State considers it to contain good reasons for the late provision. Thus adverse findings could be drawn where the Secretary of State holds that there is no good reason for the late submission even though the information provided is compelling.

The mandatory nature of the notice sits ill with the consensual and informed basis for assistance and support required by article 11(5) of the Directive and also with the obligation under that subsection to provide information, and translation and interpretation services where appropriate [11(5)] and to accommodate special needs. The information to be provided must cover asylum and any reflection and recovery period [article 11(6)]. States are obliged to “attend to” victims with special needs. Specific mention is made of those who are pregnant, are disabled, suffer ill health, have a mental health disorder, are pregnant, or are survivors of violence.

Under Article 11(2) assistance and support must be provided “as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been trafficked and specific obligations such as to provide interpretation and information thus do not bite directly when the notice is served. The obligation in Article 11(4) however to establish appropriate mechanisms aimed at early identification would suggest that the way the notice is operated must facilitate such identification and that this brings into play obligations to provide information and to facilitate translation and

accommodation and provide legal assistance, including free legal assistance (for which see below).

Article 12 obliges States to provide victims with access without delay to legal counselling, and, “in accordance with the role of victims in the relevant justice system”, to legal representation, including for the purpose of claiming compensation. These must be free of charge where the victim does not have sufficient financial resources.

Clause 59 Identification of potential victims of slavery or human trafficking does not extend to Northern Ireland but is interesting when read with the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

It redescribes (the Explanatory notes say “clarify”; they are inaccurate) a potential victim of trafficking, entitled to assistance and support as a person in England and Wales as a person in respect of whom there are reasonable grounds to believe the individual “is”, instead of “may be”, a victim of slavery or human trafficking.

Article 11(2) (read with recital 18), of the Directive uses the language of “a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3”. The European Convention used “is” at article 13(1) and “has been” at Article 11(2). So does the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015²⁸.

28 At 18(2)(b).

Thus it appears that the Directive may offer a superior level of protection to the Convention and to Northern Ireland legislation in this regard: “might have been” is closer to “may” than to “is”.

The clause also sets out that the standard of proof in a “conclusive grounds” decision is the balance of probabilities. The standard of proof is not set out on the face of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 but the balance of probabilities test does not appear to be at odds with the Directive. It was accepted to be the correct standard by the UK Court of Appeal in *MN*²⁹, where the Court of Appeal did not consider that the Directive provided support for a higher threshold³⁰.

Clauses 60 and 61 of the Bill, which extend to Northern Ireland are concerned with the recovery period for which provision is made in Article 13 the Council of Europe Convention. As set out above, with reference to the decision in *MN*, the UK did not opt into the Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities and the Directive does not deal with recovery and reflection periods or with conditions of residence But as identified by the Court of

Appeal in at paragraph 55 of *MN*, recital 7 requires that the 2004 Directive be “taken into consideration” when implementing the Directive.

It is arguable, for example that given that the UK has a reflection and recovery period, information on this required by Article 11(6) to be given should be given even though the UK’s reflection and recovery period does not have its legal basis in Directive 2004/81/EC, and that the content of the information to be given can be determined by reference to the text of the Directive.

The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 already makes provision for a recovery and reflection period of 45 days in s 18(4) for potential victims aged 18 and over who have been referred to the National Referral Mechanism³¹. As a matter of departmental policy, this is extended to potential victims of modern slavery, servitude and forced or compulsory labour aged 18 years and over, who have been referred to the national referral mechanism. The Justice Minister has committed to putting this support onto a statutory footing, subject to the legislative process, during the 2021/22 Assembly session³². While the clause may put recovery and reflection periods into primary legislation for the first time for England and Wales this is not the case for Northern Ireland and the recovery period in the Bill is shorter: 30 days³³.

29 *MN v The Secretary of State for The Home Department* [2020] EWCA Civ 1746 at 100.

30 *MN v The Secretary of State for The Home Department* [2020] EWCA Civ 1746 at paragraph 98.

31 This can be extended if a positive “conclusive grounds” decision is made or if a conclusive decision has not been made within the 45 days, see Modern Slavery and Human Trafficking Strategy 2021-22 at 1.24, https://www.justice-ni.gov.uk/sites/default/files/publications/justice/modern-slavery-strategy-27-05-v2_0.pdf [accessed 29 December 2021]. Report Pursuant to Sections 3(1), 3(6), 3(7), 3(8), 3(9) and 3(10) the Northern Ireland (Executive Formation etc) Act 2019 - Motion to Take Note, HL Deb, 9 September 2019, c 1366 per the Lord Morrow.

32 Modern Slavery and Human Trafficking Strategy 2021-22 at 1.25.

33 Section 60(30)(b)(ii).

Moreover, clause 61 *No entitlement to additional recovery period etc*, which also extends to Northern Ireland, provides that only one period of recovery will be provided to a potential victim, unless the Secretary of State considers it appropriate to provide a further recovery period in the particular circumstances of the case, or unless the further instance of exploitation occurred after the previous recovery period. The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 provides no such limitation to a sole recovery period.

Clause 62 sets out disqualifications on the grounds that a person is a threat to public order or has claimed to be a victim in bad faith. Such a person is not to benefit from a recovery period and need not be granted leave as a trafficked person. Leave granted to them may be revoked. The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 makes no such provision for disqualification. The definition of a person who is a threat to public includes those who have a prior conviction of 12 months or more.

The disqualification can be argued to be a penalty and in circumstances where it is imposed on public order grounds to be a penalty for involvement in criminal activities, thus engaging the protection of Article 8 of the Directive. It is not however a mandatory penalty: it sets out when leave must not be granted, not when it may, and it sets out when leave may, not must, be revoked. Subsection 2 provides that the Secretary of State must grant limited leave to remain if it is considered necessary for the purposes of assisting the person in their recovery from any physical or psychological harm arising from the relevant exploitation, enabling the

person to seek compensation in respect of the relevant exploitation, or enabling the person to cooperate with a public authority in connection with an investigation or criminal proceedings in respect of the relevant exploitation. It would contravene the Directive if operated in ways contrary to the obligations of the provision of assistance and support to victims under the Directive.

Clause 63 does not apply to Northern Ireland. It is concerned with assistance and support.

Clause 64 deals with sets out the circumstances in which the Secretary of State must grant temporary, limited leave to remain to persons found to be victims of modern slavery. As set out above, the Directive does not cover questions of residence permits. Nor does the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act. Nothing in the clause would prevent a trafficked person from being recognised as a refugee, granted humanitarian protection or given leave to stay on the basis that removal would breach their rights under, for example, Article 8 of the European Convention on Human Rights. In *(KTT) v Secretary of State for the Home Department* [2021] EWHC 2722 (Admin) it was held that a victim of trafficking who is also seeking asylum must be granted leave to remain while the claim for asylum is considered. The clause does not deal with that scenario.

Clauses 65 and 66 which deal with legal aid, do not apply in Northern Ireland. They provide for those receiving immigrating advice on matter within the scope of legal aid in England and Wales, or granted legal aid for immigration advice on an exceptional basis [clause 62] to receive legal advice on referral into the National Referral Mechanism. In

England and Wales there is no legal aid, save on an exceptional basis, for these pursuing immigration as opposed to protection claims and thus there may be trafficked persons who do not qualify under these provisions.

The approach taken in England and Wales of certain areas being in scope and certain areas not being funded is not taken. In Northern Ireland means-tested civil legal aid is available for advice and assistance on matters of Northern Ireland law and means and merits tested civil legal aid is available for advice and representation in the Supreme Court, Court of Appeal, High Court, and County Court.

None of the provisions described above are limited in their application to adults.

5. Other provisions of the Bill impacting rights of trafficked persons

This consideration is not exhaustive. Trafficked persons may be refugees or have rights to family life in the UK and be impacted by the Bill in the same way as others with protection claims or family in the UK. Here particular attention is given to measures that may have a particular detrimental effect on trafficked persons.

Clause 11 divides refugees into two groups, affording a lesser package of rights to those who have entered the UK unlawfully. This has the potential to impact the rights of those persons to private and family life under Article 8 of the European Convention on Human Rights.

Clause 21 – *Late compliance with priority removal notice: damage to credibility*, penalises late disclosure in a similar way to clause 58 on the potential slavery and trafficking information notices described above. Trafficked persons may conceal information through fear or be impeded from supplying it by the constraints upon them. It has the potential to impact the right to seek and enjoy asylum.

Clause 28 *Removal of asylum-seeker to safe third country* provides for removal to a country outside the UK, whether or not the person is a national with any victim repatriation assessment procedure such as is provided for under Article 16 of the Council of Europe Convention. It has the potential to impact the right to seek and enjoy asylum, as well as rights under Article 8 of the European Convention on Human Rights and potentially Article 3 also.

Clause 32 proposes the narrowing of the definition of who is a refugee for the Convention reason of membership of a particular social group, often the applicable “Convention reason” in cases where the person’s status as a victim of trafficking is material to their claim for internal protection. It requires that members of social group share both an innate characteristic, common background (“that cannot be changed”, an apparently meaningless additional condition), or a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and has a distinct identity in the country of persecution. Albeit that this is the definition in

the EU Qualification Directive³⁴, the House of Lords has held that to demand that a person fulfil both rather than either requirement is contrary to the Refugee Convention³⁵.

Clause 39 makes it a criminal offence punishable by up to four years imprisonment for an asylum seeker who requires entry clearance to arrive or enter without it, with no exceptions for those who have been trafficked. The criminal penalty would also apply to those intercepted (for example at sea). Victims of trafficking who are compelled to assist in facilitating the arrival of a person in the UK without entry clearance face could also face prosecution under Clause 40.

The special protections for trafficked children risk being impacted by changes to the procedure of age assessment in part 4 of the Bill. These clauses give the government the power to make regulations as how to assess age. Clause 49(6) provides that the standard of proof is the civil standard, a standard of proof of ‘balance of probabilities’ for age assessments, without indicating on whom the burden falls³⁶. Clause 49 provides a power to compel a local authority to assess the age of a child which could see such assessments become routine, subjecting children to them in cases where there should be no dispute, to the detriment of the trafficked child. Clause 50 allows the Secretary of State to make regulations specifying “scientific methods”

that may be used for the purposes of age assessment, risking subjecting children to invasive procedures with no therapeutic purpose. Where a child refuses to consent this must be taken into account as damaging their credibility [clause 51(7)]. Again, these are measures that put trafficked children, who may have had a history of physical and sexual abuse, at risk.

Article 13(2) of Directive 2011/36/EU provides “Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 14 and 15.”

6. The protection to be afforded trafficked persons by the Belfast (Good Friday) Agreement 1998 and Article 2 of the Northern Ireland Protocol

A number of rights of trafficked persons covered by legislation and methods of practical implementation of the European Union have been identified. Do the Belfast (Good Friday) Agreement and Article 2 of the Protocol on Ireland and Northern Ireland offer means of protecting those rights?

34 Council Directive 2004/83/EC of 29 April 2004 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, article 10(1)(d) (and see the recast Directive, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) also at 10(1)(d) The UK never opted in to the recast Directive.

35 Secretary of State for the Home Department v K, Fornah v Secretary of State for the Home Department [2006] UKHL 46, paragraph 16.

36 See the excellent briefing by the Refugee and Migrant Children’s Consortium for Committee stage of the Nationality and Borders Bill in the House of Commons: Nationality and Borders Bill – Committee Stage Evidence on new clauses NC29-37 on Age Assessments https://www.childrenslegalcentre.com/wp-content/uploads/2021/10/RMCC-briefing-Committee-stage-NC29_37-Age-assessments-Nationality-and-Borders-Bill.pdf [accessed 30 December 2021].

6.a. The Belfast (Good Friday) Agreement 1998

The multi-party agreement provides:

Rights, safeguards and equality of opportunity: Human Rights

1. The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:
 - the right of free political thought;
 - the right to freedom and expression of religion;
 - the right to pursue democratically national and political aspirations;
 - the right to seek constitutional change by peaceful and legitimate means;
 - the right to freely choose one's place of residence;
 - the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
 - the right to freedom from sectarian harassment;
 - the right of women to full and equal political participation.

Outside the chapter on rights, safeguards and equality of opportunity, the participants to the multi-party agreement:

- (v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities;

This is repeated in the inter-governmental agreement.

The multi-party agreement envisages “the protection and vindication of the human rights of all” and steps toward that end, including a bill of rights for Northern Ireland and a possible charter for the protection of the fundamental rights of everyone living in the island of Ireland. The agreement provides that:

The new Northern Ireland Human Rights Commission ([...]) will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland.

The agreement looks forward to the incorporation of the European Convention on Human Rights into the law of both the UK and Ireland, the UK having passed the Human Rights Act 1998 by that time. Ireland went on to enact the European Convention on Human Rights Act 2003.

6.b. The Protocol

Article 2 Rights of individuals: of the Protocol on Ireland/Northern Ireland to 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 provides:

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.

The European Union (Withdrawal) Act 2018 as amended by the EU (Withdrawal Agreement) Act 2020 inter alia effects changes to the Northern Ireland Act 1998 to give effect to the Protocol in domestic law.

Article 2 refers to the entirety of part six of the Belfast (Good Friday) Agreement, with its many references to human rights. It is given effect in UK domestic law by new s 7A of the European Union (Withdrawal) Act 2018. Paragraph 11B of Schedule 2 to that

Act provides for the devolved authorities, or Ministers of the Crown acting jointly with devolved authorities, to make regulations to implement the Protocol, or to supplement s 7A.

It is acknowledged in paragraph 8 of that document that the commitment applies to everyone within the jurisdiction, not only to citizens.

6.c. Whose rights? Equality between whom?

The European Convention on Human Rights, as a human rights treaty, protects the rights and freedoms of everyone within the jurisdiction of the High Contracting Parties³⁷. References to human rights are references to rights persons hold as human beings, regardless of nationality. The references to human rights in the Belfast (Good Friday) Agreement encompass everyone within the jurisdiction. While paragraph 1 of part six makes express reference to “civil liberties”, a phrase more ambiguous in its scope than ‘human rights’, the broader context of the agreement read as a whole makes clear that the rights protected in article 2 cannot be confined to citizens. Freedom of political thought and freedom of religion do not simply promise citizens, or particular communities, protection, they denote a type of society: one founded on the principles of the “the protection and vindication of the human rights of all”.

This is not to rule out any differential treatment on the grounds of immigration status. The European Court of Human Rights and the UK courts have recognised immigration control as a “legitimate aim” that can be used to justify

³⁷ Article 1.

the proportionate restriction of rights: whether under the rubric of “economic well-being”³⁸ or protecting of the rights and freedoms of others”.

As to equality of opportunity the Belfast (Good Friday) Agreement makes provision at paragraph 5(e) of part one for an Equality Commission to monitor a statutory obligation to promote equality of opportunity in “specified areas”. Paragraph three of part six lists these as “religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation” and this is reflected in s 75 of the Northern Ireland Act 1998 Statutory duty on public authorities, which encompasses equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation, between men and women, between persons with a disability and persons without and between persons with dependants and persons without. Notable omissions from this list are nationality and “any other status”.

I have described in my companion paper to this one, the contents of which I do not repeat here, how the line of cases starting with *Jykse Finans* Case C 668/15 delimits the possibility of claiming race discrimination under EU law by subsuming race and racism within ethnic origin, the head of discrimination identified by the referring court.

EU law prohibits discrimination on grounds of nationality within the scope of the treaties. Articles 18 and 45 of the Treaty

on the Functioning of the European Union is concerned with discrimination between nationals of member States, albeit that third country nationals may derive benefit from it as family members of a citizen of the Union. Differences of treatment between EU citizens and third-country nationals or between nationals from different third countries have been held to fall outwith the scope of the treaties³⁹.

Article 2(1) of the Protocol, makes a specific promise of non-diminution of protection against discrimination “as enshrined in the provisions of Union law listed in Annex 1”. By Article 13(3) of the Protocol the list in Annex 1 is to be read as referring to those instruments “as amended or replaced.”

The UK’s Government’s 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?⁴⁰ explains the “future facing” element of the commitment thus:

7. [...] in the event that certain provisions of EU law setting out minimum standards of protection from discrimination - those listed in Annex 1 to the Protocol - are updated or replaced by the EU, relevant domestic law in Northern Ireland will be amended, as necessary, to reflect any substantive enhancements to those protections (...) Enforcement will be a matter for UK courts, and there will not be any direct application in Northern Ireland of the EU law in Annex 1.

38 Berrehab v. the Netherlands (1988) 11 EHRR 322, paragraph 26.

39 See e.g. Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, Case 238/83. *Caisse d’Allocations Familiales de la Région Parisienne v Meade* [1984] ECR 2631; Case C47/91, *Ferrer Laderer*, [1992] ECR I-4097.

40 7 August 2020 available at <https://www.gov.uk/government/publications/protocol-on-irelandnorthern-ireland-article-2> [accessed 27 February 2021].

- . [...]
12. [...] we have committed to ensuring that, if the EU decides to amend or replace the substantive rights in those directives to improve the minimum levels of protection available, the corresponding substantive rights protections in Northern Ireland will also develop to take account of this. This will ensure that Northern Ireland will not fall behind minimum European standards in anti-discrimination law

The Withdrawal Act provides that UK courts and tribunals are not bound by any principles laid down or any decisions made by the Court of Justice of the European Union after 31 December 2020 but may have regard to decisions of the Court of Justice of the European Union after that date, as well as new EU law.

The “non diminution” commitment requiring the amendment of laws in Northern Ireland to reflect substantive enhancements to the protection afforded by the Directives listed in annex one must reflect the developing case law of the Court of Justice of the European Union on those instruments.

The extent of the protection afforded by the Directives to persons under immigration control is the subject of my companion paper which I do not repeat here.

Trafficked persons are likely to need to rely on gender, race or disability (including physical and mental health problems as a result of the abuse they have suffered) not on their status as immigrants or as victims of trafficking

when seeking to rely on the commitment to non-diminution in the context of equality of opportunity.

A society founded upon the principles of the “the protection and vindication of the human rights of all” is one which must grapple with the effects of immigration control on all. It affects not only those directly subject to it but their family members, their employers, those using their services, their friends and those dependent upon them. The mechanisms of control have the potential to affect the lives of all, for example or having to prove immigration status to obtain employment or to access social entitlements. In the words of Anuerin Bevan in 1952 in chapter five of *In place of fear* justifying giving all access to the National Health Service:

Are British citizens to carry means of identification everywhere to prove that they are not visitors? For if the sheep are to be separated from the goats both must be classified. What began as an attempt to keep the Health Service for ourselves would end by being a nuisance to everybody.

Article 2 of the Protocol is concerned with “rights, safeguards or equality of opportunity”, thus, like the Belfast (Good Friday) Agreement 1998 it makes a promise to the community as a whole as to how people will be treated. The immigration status of a trafficked person and the question of whether they arrived before or after Brexit do not affect their status as part of that community.

6.d. Which rights? What is equality “of opportunity”?

As to equality “of opportunity”, that can be dealt with shortly. It appears to do no more than refer to the distinction between equality of opportunity and equality of outcome. That appears to be the reading of the Equality Commission for Northern Ireland, which summarises its statutory remit⁴¹ on its website⁴² as:

- promote equality of opportunity and affirmative action;
- work towards the elimination of unlawful discrimination and harassment;
- keep relevant legislation under review;
- promote good relations between persons of different racial groups and good disability practice;
- oversee the effectiveness of statutory equality and good relations duties on public authorities.

Civil rights are not rights confined to citizens, they are the rights afforded persons within the jurisdiction albeit that immigration status may be relevant to the scope of those rights. In the context of the Belfast (Good Friday) Agreement, they are rights recognised by the UK and by Ireland.

The rights protected in part six Rights, Safeguards and Equality of Opportunity of the Agreement are not limited to those enumerated in paragraph one: the words “in particular” preface the list which is thus indicative and not exhaustive. The

commitment is to “the mutual respect, the civil rights and the religious liberties of everyone in the community”.

There is no agreed definitive, or indeed agreed indicative, list of the rights included with the Rights, Safeguards and Equality of Opportunity part of the Belfast (Good Friday) Agreement. None has yet been drawn up by the Northern Ireland Human Rights Commission, by the Equality Commission for Northern Ireland, or by the Joint Committee on the Withdrawal Agreement.

There is scope for thoughtful and intelligent academic debate on the question. The potential spectrum of rights runs from the contents of the EU Charter to little beyond the rights set out in paragraph one of the Agreement.

There is unlikely to be a definite answer to the question: the scope of the rights covered by the Agreement is most likely to be established through challenges including legal challenges and to be enumerated piecemeal, and that which is never challenged may remain unclear, although general principles may be derived from that case law.

With that in mind, the following comments focus on questions relevant to the rights of trafficked persons.

6.d.i Paragraph 1

The list of rights in paragraph one, cited above, is starting point. Of these, the rights freely to choose one’s place of residence and to equal opportunity in all social and economic activity, regardless of class, creed, disability,

41 See Northern Ireland Act 1998 ss 74, 78B.

42 <https://www.equalityni.org/HeaderLinks/About-Us/About-us-Who-are-we#gsc.tab=0> [accessed 28 December 2021].

gender or ethnicity appear most likely to affect trafficked persons as trafficked persons. They must be provided with “appropriate and safe” accommodation by the State under s 18(7) (a) of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 and housed by the State under s 18(7), and support provided to them under that section must reflect their special circumstances. An independent guardian for a child must contribute to a plan to safeguard and promote the future welfare of the child [s 21(7)(e)].

As set out above Article 14 of the Directive obliges the State to take measures to ensure that a child victim benefits from specific actions to assist and support them in their physical and psycho-social recovery, “with a view to finding a durable solution for the child” [Article 14(1), Recital 22]. The obligations to provide an individual assessment and to support the child in their recovery appear capable of having direct effect. There is no obligation of result to provide a durable solution, but there is an obligation to take steps to do so. Article 1 of the Directive obliges states to take into account the gender perspective, reference to which is first found in the third recital.

6.d.ii Paragraph 2

Paragraph 2 of part six is concerned with the European Convention on Human Rights, as well as the prospect of “additional” rights.

It provides for the incorporation of the European Convention on Human Rights and for Assembly legislation be struck down if incompatible with it. Incorporation was achieved by the Human Rights Act 1998 which applies, like the European Convention on Human Rights, to all within the jurisdiction of the UK government. The reference in paragraph two to “at least an equivalent level of protection of human rights” in Northern Ireland and Ireland is a reference to an aspiration of the Irish Government but the Northern Ireland Human Rights Commission and the Irish Human Rights and Equalities Commission consider that it is clear from the context of the provisions and from the establishment of the Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equalities Commission “that long-term North-South equivalence was the intention”⁴³.

The 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?*⁴⁴ states at paragraph 19:

In addition, as provided for in the Agreement, the Joint Committee of NIHRC and the Irish Human Rights and Equality Commission (IHREC) acts as a forum for the consideration of human rights issues on the island of Ireland. In the context of the Article 2 commitment, ECNI, NIHRC and IHREC

43 Joint Committee of the Northern Ireland Human Rights Commission and the, Irish Human Rights and Equalities Commission, Policy Statement on UK Withdrawal from the EU, 2018 https://www.ihrec.ie/app/uploads/2018/03/Joint-Committee-IHREC-NIHRC-Brexit-Policy-Statement_March-2018.pdf [accessed 3 March 2022].

44 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907682/Explainer__UK_Government_commitment_to_no_diminution_of_rights__safeguards_and_equality_of_opportunity_in_Northern_Ireland.pdf [accessed 2 March 2022].

will work together to provide oversight of, and reporting on, rights and equalities issues falling within the scope of the commitment that have an island of Ireland dimension.

While nothing in the text creates a freestanding right to equivalent protection of human rights in Ireland and Northern Ireland, paragraph two is concerned to ensure that all within the scope of the Agreement enjoy the protection of the European Convention on Human Rights.

The UK's Government's *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?*⁴⁵ further states:

3. The UK is committed to ensuring that rights and equality protections continue to be upheld in Northern Ireland. The key rights and equality provisions in the Agreement are supported by the European Convention on Human Rights (ECHR), which has been incorporated into Northern Ireland law pursuant to the commitment in the Agreement to do so. The Government is committed to the ECHR and to protecting and championing human rights. However, the Government also acknowledges that, in Northern Ireland, 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 Agreement.

For trafficked persons of particular relevance are rights under Article 4 of the European

Convention on Human Rights, the right to be free from slavery, servitude, forced or compulsory labour. Those rights include positive obligations [*Siliadin v. France* no. 73316/01, ECHR 2005-VII] including a the duty to put in place a legislative and administrative framework [*C.N. v. the United Kingdom*, no. 4239/08, 13 November 2012, paragraph 66; *Siliadin* paragraph 112; *C.N. and V. v. France*, no. 67724/09, 11 October 2012, paragraph 105, *Rantsev v. Cyprus and Russia*, no. 25965/04, (2010) 51 E.H.R.R. 1, paragraph 285, V.C.L. and *A.N. v. the United Kingdom*, nos. 77587/12 and 74603/12, 16 February 2021, paragraph 151] a duty to take operational measures [*Rantsev v. Cyprus and Russia*, paragraph 284, V.C.L. and *A.N. v. the United Kingdom*, paragraph 152)] such as to facilitate the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery [*V.C.L. and A.N. v. the United Kingdom*, paragraph 153], to provide relevant training for law enforcement and immigration officials [*Rantsev v. Cyprus and Russia*, paragraph 287] to facilitating the identification of victims by qualified persons and assist them in their physical, psychological and social recovery [*V.C.L. and A.N. v. the United Kingdom*, paragraph 153].

Article 4 places limits on the powers of States to prosecute trafficked persons [*V.C.L. and A.N. v. the United Kingdom*, paragraphs 158-159]. Failure to take preventative measures so that individuals become victim may violate the rights of those individuals [*Chowdury and Others v. Greece*, no. 21884/15 ECHR 2017, paragraphs 111-115, V.C.L. and *A.N. v. the United Kingdom* paragraphs 172-173 and 181-182].

45 7 August 2020 available at <https://www.gov.uk/government/publications/protocol-on-irelandnorthern-ireland-article-2> [accessed 27 February 2021].

Article 4 also imposes procedural obligation to investigate [*S.M. v. Croatia* [GC], no. 60561/14, 25 June 2020 at paragraph 306- 307, *Rantsev v. Cyprus and Russia*, paragraph 288, *C.N. v. the United Kingdom*] including to cooperate effectively with the relevant authorities in other States concerned in the investigation of events which occurred outside their territories [*Rantsev v. Cyprus and Russia*, paragraph 289] and to exercise due diligence when issuing visas [*T.I. and Others v. Greece*, [2019] ECHR 575]. In *Chowdury and others v. Greece* the refusal to bring proceedings in respect of twenty-one applicants on the grounds that they had lodged their complaints late, breached the procedural obligations imposed under Article 4 [paragraphs 117-121].

The incorporation of the European Convention on Human Rights by the Human Rights Act 1998 means that rights under Article 4 should not be diminished by Brexit. Should however, the government seek to depart from the standards of Article 4, for example by interpreting it restrictively in primary legislation as it has done for Article 8 (see below), Article 2 of the Protocol comes into play insofar as the right is also protected by the EU Trafficking Directive.

Article 13 of the European Convention on Human Rights, the right to an effective remedy for breaches of Convention rights, is not expressly incorporated into UK law. Where the rights of trafficked persons to an effective remedy are protected under the EU Trafficking Directive, Article 2 of the Protocol may come into play⁴⁶. The EU Trafficking

Directive in many parts shadows the provisions of the Council of Europe Convention Against Trafficking in Human Beings, to which the European Court of Human Rights has looked in considering Article 4⁴⁷. The Council of Europe Convention is more precise in protecting rights of victims to compensation but the protections offered by the EU Directive, have been relied on in the courts in the context of access to a remedy. For example in *Puthenveetil v Alexander and George* UKEATPA/0125/14/LA, where the Employment Appeal Tribunal relied on it to hold that failure to adjourn a hearing in the Tribunal to provide an opportunity to apply for legal aid, was an error of law⁴⁸.

Other articles of the Convention are in play. In *A.I. v. Italy*, 1 April 2021 [at paragraphs 103-104] a victim of trafficking was unable to exercise her right to contact with her two children and this breached Article 8 the right to private and family life. In *N.Ç. v. Turkey, N.Ç. v. Turkey*, no. 40591/11, 9 February 2021, paragraphs 133, failures in the course of the criminal proceedings violated N.Ç. rights under articles 3 (prohibition on torture inhuman or degrading treatment) and 8 of the Convention.

In its opinion 2/2013, the Court of Justice of the European Union, ruling on the EU's accession to the European Convention on Human Rights, followed the approach it had taken since the 2013 judgment in *Melloni* C 399/11: that where the EU has fully harmonised the law, the primacy of EU law prevents Member States having higher human rights standards. The Court held:

46 See *Hounga v Allen* [2014] UKSC 47 and see *Ajayi* [2017] EWHC 3098 (QB).

47 *Rantsev v Cyprus and Russia*, application 25965/04.

48 In that case the incompatibility of the family exemption in the National Minimum Wage regulations with the prohibition on discrimination on the grounds of sex in Article 157 of the EU Treaty was successfully relied upon.

189. In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited – with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR – to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.

See further paragraphs 191-192.

This ruling is in opposition the longstanding principle of human rights law that human rights standards are minimum standards, given expression in Article 53 of the European Convention on Human Rights.

While Article 53 means that the European Convention on Human Rights could not be used to undermine higher standards of protection given effect by the Charter of Fundamental Rights of the European Union it is necessary to find those rights protected in part six if the non-diminution provision is to bite on them.

The UK parliament's struggles to restrict the application of the European Convention on Human Rights to immigrants culminated in sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002, which apply in Northern Ireland. These do not purport to exclude persons subject to immigration control from the scope of

the Convention but do direct courts and tribunals as to how to interpret Article 8 of the European Convention on Human Rights in its application to them. Of particular relevance to trafficked persons is s 117C which mandates circumstances in which the public interest requires a person's deportation for the purposes of Article 8. The provision is relevant to trafficked persons convicted of criminal offences who do not have a need for international protection from persecution but are relying on Article 8 to resist deportation.

6.d.iii Paragraph 3

Paragraph 3 provides for a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation. This is now reflected in s 75 of the Northern Ireland Act 1998 which applies to all, regardless of immigration status. The Home Office is a public authority for the purposes of the section.

Disability is one of the special needs that must be attended to in the provision of assistance and support under Article 11(7) of the Directive. As explained above, gender is given special attention throughout.

Article 14(1) provides for access to education not only to child victims but to the children of victims.

As set out above, immigration status is not a freestanding ground under either paragraph 3 or s 75.

6.d.iv Paragraph 4

Paragraph 4 deals with the work of the Northern Ireland Human Rights Commission to create a Bill of Rights for Northern Ireland. The paragraph highlights a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and invites the Commission to consider a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors. It would arguably be in violation of the Agreement to reject proposals, for example for the protection of trafficked persons, out of hand on the grounds that they benefited migrants on an equal footing with others.

6.d.v Reconciliation and Victims of Violence paragraphs 11 to 13

Although this part of the Belfast (Good Friday) Agreement focuses victims of violence in Northern Ireland or in connection with the conflict there, it is not limited to them on its face. It makes provision for all victims of violence.

It is arguable that the non-diminution commitment is not limited to the rights of victims to a “remember as well as to contribute to a changed society” but also to have their suffering “acknowledged and addressed” and that services for them are supportive and sensitive to the needs of victims.

On the basis of the above analysis, the measures within Directive 2011/36/EU, the trafficking directive, that protect the rights of victims, acknowledge and address their suffering and protect their rights to remember and to contribute to society, should be

considered to fall within the scope of Article 2.

Victims of trafficking benefit from services specifically designed for them, as described above, but, on an equal footing with other victims of crime enjoy the protection of 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 forms part of retained EU law throughout the UK. This provides at recital 9:

(9) Crime is a wrong against society as well as a violation of the individual rights of victims. As such, victims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination of any kind based on any ground such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health.

And at recital 10:

(10) This Directive does not address the conditions of the residence of victims of crime in the territory of the Member States. 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. Reporting a crime and participating in criminal proceedings do not create any

rights regarding the residence status of the victim.

Article 1 provides:

1. The purpose of this Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.

Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings. The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status.

Residence status is not defined in the instrument; it is not limited to nationals of member States although it does provide additional protection to nationals of member States:

- 17 2. Member States shall ensure that victims of a criminal offence committed in Member States other than that where they reside may make a complaint to the competent authorities of the Member State of residence, if they are unable to do so in the Member State where the criminal offence was committed or, in the event of a serious offence, as determined by national law of that Member State, if they do not wish to do so.

Article 9 of Directive 2012/29/EU contains a number of measures to protect victims, including victims of violence. It obliges

Member States to provide necessary medical or other assistance to trafficked third-country nationals, who do not have sufficient resources and have special needs, such as persons with disabilities.

Not all instruments protecting victims have been retained and Article 2 of the Protocol is of particular relevance to those that are not retained: whether because they never formed part of retained EU law or because they cease to do so. Article 2 protects against the diminution of rights, safeguards and equality of opportunity as a result of withdrawal from the EU. It thus comes into play where a relevant right, safeguard or equality of opportunity has not been retained, or was initially retained but has subsequently been amended or repealed in a way that gives rise to such a diminution.. See discussion at 6f below.

Not all instruments protecting victims were retained after EU withdrawal. Among those not retained, regulation (EU) 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters, which provides for automatic intra-EU recognition of non-molestation orders, and Council Directive 2004/80/EC of 29 April 2004 relating to compensation to victims of crime, which required member States to have in place a national scheme for compensation to victims of crime, including victims of human trafficking, who already have a specific right to compensation under article 17 of Directive 2011/36/EU.

In considering these instruments it is necessary to take into account that paragraphs 11 – 13 of the Belfast (Good Friday) Agreement. Those paragraphs offer little in the way of express guarantees of protection of rights but can

be used as an aid to interpretation. Thus it is necessary to consider whether a particular measure acknowledges and addresses the suffering of victims of violence (paragraph 11), respects and protects a victim's right to remember and to contribute to a changed society (paragraph 12), which arguably encompasses measures supporting integration, and whether measures are supportive of, and sensitive to, the needs of victims (paragraph 12). In this context it is worth bearing in mind recital 7 to Directive 2011/36/EU: "This Directive adopts an integrated, holistic, and human rights approach to the fight against trafficking in human beings" and recital 14, which recalls that measures providing that victims should not be prosecuted, are designed to safeguard their rights. The approach outlined is reflected in the EU materials on trafficking⁴⁹.

6.d.vi Economic, Social and Cultural Issues

This section, numbered separately, focuses on matters such as social inclusion, including in particular community development and the advancement of women in public life, anti-discrimination and employment legislation.

The provisions of paragraphs one and two in this part have lapsed with the devolution of power to the Northern Ireland Assembly.

The commitment at paragraph 3 to linguistic diversity is not limited in scope to the pre-devolution period or to particular languages. It encompasses all the minority languages used in Northern Ireland and goes to rights to equality of opportunity. It can be argued that it is of relevance to the rights of trafficked

persons to interpretation and translation services "where appropriate" set out in Article 11(5) of the Directive and to the rights of trafficked persons under Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

6.e. Safeguards

6.e.i Functions of the Northern Ireland Human Rights Commission

The functions of the Northern Ireland Human Rights Commission are set out in paragraph 5 of Part 6 of the Belfast (Good Friday) Agreement 1998:

keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; providing information and promoting awareness of human rights; considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals doing so.

These functions are set out in s 69 of the Northern Ireland Act 1998. The section follows closely the words of the paragraph above but with some greater specificity: s 69(3) provides for the Commission advising the Secretary of State and the Executive Committee of the Assembly on legislative and other measures which ought to be taken to protect human rights, in response to requests or of its own motion (69(3)). Sub-section 69(7) requires the

⁴⁹ See https://ec.europa.eu/anti-trafficking/index_en [accessed 5 March 2022].

Commission to promote understanding and awareness of the importance of human rights in Northern Ireland and to that end it may commission research such as this paper or undertake educational activities (s 69(7)).

The Commission's concern is human rights in Northern Ireland, thus the rights of persons of all nationalities, and of any immigration status (or none). In its work under the Belfast (Good Friday) Agreement 1998, it cooperates with the Irish Human Rights and Equalities Commission.

6.e.ii The framework for safeguards

The UK's leaving the EU in no way affects its being a party to the European Convention on Human Rights but it has the potential to affect the way rights under the Convention, and other rights, are enforced.

The protection in Article 2 of the Ireland/Northern Ireland protocol extends to the non-diminution of the safeguards for the protection of human rights in Northern Ireland, including rights under the European Convention on Human Rights, to the extent underpinned by EU law.

By s 6(2) of the Northern Ireland Act 1998, it is outside the legislative competence of the Northern Ireland Assembly to pass laws that are incompatible with the Convention (s 6(2)(d)). It is also outside the competence of the Assembly to discriminate against any person or class of person on the ground of religious belief or political opinion (s 6(2)(e)) or to pass laws that are incompatible with Article 2(1) of the Protocol on Ireland /Northern Ireland to the Withdrawal Agreement (s 6(ca)).

It was outside the legislative competence of the Assembly to pass laws that are incompatible with EU law (s 6(2)(d)) but that provision was amended by s.12(5) of the European Union (Withdrawal) Act 2018 c. 16 with effect from December 31, 2020 to refer instead to the provisions of s 6A(1) of the Act on retained EU law :

- (1) An Act of the Assembly cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.

By s 11 of the Northern Ireland Act the Advocate General for Northern Ireland or the Attorney General for Northern Ireland is empowered to refer the question of whether a provision of a Bill would be within the legislative competence of the Assembly to the Supreme Court. They have no powers to refer UK legislation, including where it appears to affect a devolved area of competence⁵⁰.

Legal proceedings can be brought on the ground that any legislation is incompatible with the Convention (s 71(2)) by the Advocate General for Northern Ireland or the Attorney General for Northern Ireland as well as by the Northern Ireland Human Rights Commission (s 71(2A)).

Were the Advocate General or an Attorney General to formulate a policy not to bring incompatibility challenges where those affected were persons under immigration control it would be open to the Northern

⁵⁰ And see *R (Miller and another) v Secretary of State for Exiting the European Union*; Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review: Reference by the Court of Appeal (Northern Ireland) - In the matter of an application by Raymond McCord for Judicial Review [2017] UKSC 5 paragraphs 148-149.

Ireland Human Rights Commission to bring proceedings to challenge such a policy and it could also make use of its powers of assistance under s 70 of the Act to assist anyone wishing to challenge the policy.

6.f. The extent of the non-diminution commitment

The UK's Government's 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?⁵¹

10. To make out a case that a diminution of rights, safeguards or equality of opportunity has occurred, it will be necessary to evidence (i) that the right, safeguard or equality of opportunity provision or protection is covered by the relevant chapter of the Agreement; (ii) that it was enshrined or given effect to in the domestic legal order in Northern Ireland on or before the last day of the transition period; and (iii) that the alleged diminution occurred as a result of the UK's withdrawal from the EU, or, in other words, that the alleged diminution would not have occurred had the UK remained in the EU.

[]

14. [...] The Charter did not create any new rights, but was instead intended to catalogue the rights that already existed in EU law. Those rights, codified by the Charter, came from a wide variety of sources, including the treaties, EU

legislation and case law, that recognised fundamental rights as general principles. We have brought EU underlying rights and principles into our domestic legal regime by the EU (Withdrawal) Act 2018. As a result, where the rights and principles underpinning the Charter exist elsewhere in directly applicable EU law, or EU law which has been implemented in domestic law, or retained EU case law, that law will continue to be operational. In addition, the Act requires our domestic courts to interpret retained EU law that has not been modified in accordance with the general principles of EU law as those principles existed immediately before the end of the transition period.

15. In the context of the 'no diminution' commitment, this means that, to the extent that a substantive Charter right, as captured in retained EU or domestic law, is relevant to a right in the "Rights, Safeguards and Equality of Opportunity" chapter of the Agreement, that right cannot be diminished as a result of the UK leaving the EU.

This language recalls Lord McColl's questions to the Minister, cited above: what of the defectively effective provisions of the Directive that have not been given direct effect prior to Brexit?

The government's reading does not appear broad enough to encompass all diminution that might result from the UK's withdrawal from the Union. It arguably promotes a restrictive reading of Article 2.

⁵¹ 7 August 2020 available at <https://www.gov.uk/government/publications/protocol-on-irelandnorthern-ireland-article-2> [accessed 27 February 2021].

The language of “rights, safeguards or equality of opportunity” is certainly broad enough to cover any diminution of rights resulting from the loss of the measures of practical cooperation that are so integral to the protection of trafficked persons.

The language of paragraph 10 “that the alleged diminution would not have occurred had the UK remained in the EU” provides support for the argument that a but for test of causation will be applied but it would be overly sanguine to assert this rather than to make the case for it⁵².

Moreover, a “but for” test may generate different answers to the question of whether a diminution of a right, safeguard or of equality of opportunity would have occurred had the UK remained in the EU depending upon how the right, safeguard or opportunity is described. As described above, any diminution in the efficacy of the counter-trafficking measures has the potential to impact, inter alia, victims and respect for their rights, but the way in which the right is described is relevant to whether a diminution attributable to the Brexit is identified in the particular case.

An EU national trafficked to Northern Ireland can variously be described as having lost the right to exercise free movement in Northern Ireland, to have lost the right to exercise free movement in the country to which they were trafficked, or as having retained the right to free movement in member States of the EU. Litigants will have to make the case for

the description for which they contend. The courts in interpreting the non-diminution commitment can be expected to have regard to its appearing in a protocol to the Withdrawal Agreement and to read this in the light of the decision in *R (Miller and another) v Secretary of State for Exiting the European Union*; Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review Reference by the Court of Appeal (Northern Ireland) - In the matter of an application by Raymond McCord for Judicial Review [2017] UKSC 5 at 129 that devolution legislation did not require the United Kingdom to remain a member of the European Union.

52 A long line of tort cases refers running from *Barnett v Chelsea & Kensington Hospital*^{***} to. See eg *Titua International Ltd v De Villiers* [2017] UKSC 27. In criminal law see *R v White* In the Refugee law context, see Michelle Foster Causation in Context: Interpreting the Nexus Clause in the Refugee Convention [2002] Michigan Journal of International Law 23(2) 265-340 <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1360&context=mjil> [accessed 25 December 2021].



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