



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Windsor Framework Article 2 and the rights
of Refugees and Asylum-Seekers**

Briefing and Recommendations

November 2023

Contents

1.0 Introduction.....	3
2.0 Overview of Windsor Framework Article 2.....	4
'Keeping pace' obligation	5
When and how is Windsor Framework Article 2 engaged?	6
3.0 Article 2 and Refugees & Asylum-Seekers	7
Whose Rights?	7
Which Rights?	9
Underpinning EU law	11
4.0 Potential diminution of rights and recommendations.....	14
Illegal Migration Act 2023	15
Annex 1	18

1.0 Introduction

- 1.1 The withdrawal of the UK from the EU raised a wide range of human rights questions including implications for the right to seek international protection. With the Illegal Migration Act passed in July 2023, and the Nationality and Borders Act in 2022, these concerns came into sharp focus.
- 1.2 Article 2 of the Windsor Framework requires the UK Government to ensure that no diminution of the rights, safeguards and equality protections contained in the relevant part of the Belfast (Good Friday) Agreement 1998 occurs as a result of the UK's withdrawal from the EU.¹
- 1.3 The Northern Ireland Human Rights Commission (NIHRC) is a national human rights institution with 'A status' accreditation from the United Nations. The NIHRC, pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in NI. The NIHRC's mandate extends to all matters relating to the protection and promotion of human rights in NI. The NIHRC is also mandated, under Section 78A(1) to monitor the implementation of Article 2(1) of the Windsor Framework.
- 1.4 This briefing note accompanies the research paper drafted by Alison Harvey BL, published by the NIHRC, which explores the protections afforded to refugees and asylum-seekers under Article 2 of the Windsor Framework.² Article 2 is novel and complex, necessitating further exploration of the interrelation between EU and domestic law. NIHRC commissioned the research paper to explore the engagement of asylum and immigration law with the protection and safeguards of Windsor Framework Article 2. The briefing sets out NIHRC advice informed by the research, highlights key points in the research and signposts the reader to the detail in the report.

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

² Alison Harvey, 'Article 2 of the Windsor Framework and the rights of refugees and persons seeking asylum' (NIHRC, 2023)

1.5 The next section of this briefing note provides an overview of Windsor Framework Article 2 before section 3 summarises and endorses the main argument put forward for reading refugees and asylum seekers as part of the 'community' protected in the rights, safeguards and equality of opportunity chapter of the BGFA. This section also sets out the NIHRC's view, informed by the research, that the range of rights and safeguards protected in the relevant part of the BGFA encompasses rights particular to those seeking and granted asylum. Relevant EU law is also referenced. Section 4 goes on to consider the research findings on the potential diminutions of rights under the Illegal Migration Act 2023 and summarises NIHRC concerns.

2.0 Overview of Windsor Framework Article 2

2.1 Article 2 states:

1. 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 Framework, and shall implement this paragraph through dedicated mechanisms.

2.2 In Article 2, the UK Government commits to ensuring that certain rights, safeguards and equality of opportunity protections are not diminished as a result of the UK leaving the EU. Therefore, to fall within scope of Protocol Article 2, the human right or equality protection being relied upon must be covered by the relevant chapter of the Belfast (Good Friday) Agreement and have been underpinned by EU law including EU treaties, directives and regulations, in place on or before 31 December 2020. In most cases, the relevant EU law will be that which was binding on the UK on 31 December 2020.

'Keeping pace' obligation

2.3 In addition to the 'no diminution' commitment, Windsor Framework Article 2 requires the UK Government to "keep pace" with any changes made by the EU to the six EU main equality directives listed Annex 1, which improve the minimum levels of protection available, after 1 January 2021, including relevant case law of the Court of Justice of the EU (CJEU).³ Article 13(3) of the Protocol provides that where the Protocol refers to an EU law measure, including the six equality directives in Annex 1, "that reference shall be read as referring to a Union act as amended or replaced". Therefore, the UK Government is obliged to ensure that any amendment to, or replacement of, an Annex 1 Directive by the EU on or after 1 January 2021 which enhances rights and protections, is reflected in NI law. Article 13 might therefore be described as providing an evolving benchmark for protection against certain forms of discrimination in NI.

2.4 The UK Government has confirmed its commitment to dynamic alignment with the Annex 1 equality directives to "provide a reassurance that, at the very least, the minimum standard of rights protection required by the listed directives will continue to be relevant in NI" and this will "ensure NI will not fall behind minimum European standards in anti-discrimination law".⁴ Annex 1 includes:

- Racial Equality Directive;⁵
- Employment Equality (Framework) Directive;⁶
- Gender Goods and Services Directive;⁷

³ Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000; Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000; Directive 2004/113/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services', 13 December 2004; Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006; Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.; Directive 79/7/EEC, 'EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

⁴ NI Office, '[UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What does it Mean and How will it be Implemented?](#)' (NIO, 2020), at para 12.

⁵ Directive 2000/43/EC, 'Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

⁶ Directive 2000/78/EC, 'Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

⁷ Directive 2004/113/EC, 'Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services', 13 December 2004.

- Equal Treatment (Employment) Directive;⁸
- Self-Employment Equal Treatment Directive;⁹ and
- Equal Treatment in Social Security Directive.¹⁰

When and how is Windsor Framework Article 2 engaged?

2.5 To show that there has been a diminution of rights, safeguards or equality of opportunity protections, as set out in the relevant part of the Belfast (Good Friday) Agreement, resulting from the UK's withdrawal from the EU, there must be a right or safeguard which was underpinned by EU law and given effect in NI law on or before 31 December 2020.

2.6 If the answer to each of the questions below is yes, then a breach of Windsor Framework Article 2 has been identified. These questions are:

- (i) Does the right, safeguard or equality of opportunity protection fall within the relevant part of the Belfast (Good Friday) Agreement?
- (ii) Was the right, safeguard or equality of opportunity protection:
 - (a) underpinned by EU law binding on the UK on or before 31 December 2020?
 - (b) given effect in NI law, in whole or in part, on or before 31 December 2020?¹¹
- (iii) Has there been a diminution in the right, safeguard or equality of opportunity protection on or after 1 January 2021?
- (iv) Would this diminution have been unlawful had the UK remained in the EU?¹²

⁸ Directive 2006/54/EC, 'Directive of European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast)', 5 July 2006.

⁹ Directive 2010/41/EU, 'Directive of the European Parliament and of the Council on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.

¹⁰ Directive 79/7/EEC, 'Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

¹¹ Where UK law was out of alignment with EU law on 31 December 2020, the absence of a domestic implementing measure is not an insurmountable obstacle to demonstrating a diminution of rights contrary to Windsor Framework Article 2, provided the EU obligation existed and was capable of having direct effect on that date.

¹² For more detail, see NI Human Rights Commission and Equality Commission for NI, 'Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol', (NIHRC and ECNI, 2022).

2.7 In May 2023, the NI Court of Appeal set out a six-part test which is not dissimilar.¹³ Court rulings have also confirmed that Windsor Framework Article 2 has direct effect, meaning individuals can assert their rights under Article 2 before domestic courts.¹⁴

3.0 Article 2 and Refugees & Asylum-Seekers

3.1 This section considers the research findings and sets out the NIHRC views on three separate questions. First, whether and on what basis refugees and asylum-seekers are protected by the relevant part of the Belfast (Good Friday) Agreement. Secondly, whether the rights in question extend to rights particular to refugees and asylum-seekers such as rights associated with consideration of their applications, accommodation, and treatment of vulnerable individuals. This section then looks briefly at EU law, binding on the UK before Brexit, and identified as setting minimum standards below which the law in NI should not fall.

3.2 Before highlighting how the protections and safeguards of Windsor Framework Article 2 extend to refugees and asylum seekers, it is important to highlight that UK immigration law distinguishes between asylum seekers, refugees, individuals with humanitarian protection and individuals with discretionary leave to remain.¹⁵ Separated or unaccompanied children are also distinguished as a specific category of asylum seeker. These distinctions have practical implications.

Whose Rights?

3.3 In the research paper, Harvey points to the declaration of support by the signatories of the Belfast (Good Friday) Agreement in which they commit to building a society founded upon “the protection and vindication of the human rights of all” arguing that a society founded on such principles is one “which must grapple with the

¹³ *Society for the Protection of the Unborn Child Pro-Life Ltd v Secretary of State for NI* [2023] NICA 35, para 54.

¹⁴ See, for example, *In the Matter of an Application by AA for Judicial Review* [2023] NIKB.

¹⁵ For more details see NI human Rights Commission, ‘Response to Public Consultation on Draft Refugee Integration Strategy’, (NIHRC, 2022).

effects of immigration control on all.”¹⁶ In section 2, Harvey emphasises that immigration control 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 immigration status determines an individual’s access to goods and services.

- 3.4 The Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement makes explicit the signatories’ commitment to “the civil rights and the religious liberties of everyone in the community”. “Everyone in the community” is not confined to citizens or “people of Northern Ireland” as referenced in the constitutional issues section of the Belfast (Good Friday) Agreement.
- 3.5 International human rights treaties make clear that immigration status should not be a reason to exclude persons from the enjoyment of human rights albeit that immigration status may be relevant to the scope of those rights. Article 14 of the Universal Declaration of Human Rights states that, “everyone has the right to seek and enjoy in other countries asylum from persecution”. The UN Refugee Convention 1951 (the Refugee Convention) builds on this to include the right not to be penalised for being in or entering a country without permission where this is necessary to seek and receive asylum.¹⁷ The CoE Parliamentary Assembly has stated that “as a starting point, international human rights instruments are applicable to all persons regardless of their nationality or status”.¹⁸
- 3.6 Windsor Framework Article 2 protects everyone subject to the law in NI, regardless of immigration status. The UK Government’s ‘Explainer’ recognises that these protections and safeguards apply to “everyone who is subject to NI law – irrespective of whether that law has been passed by the NI legislature or Westminster”.¹⁹ The NI High Court has confirmed that the protections of the relevant chapter of the Belfast (Good Friday) Agreement are not limited to

¹⁶ Alison Harvey, ‘Article 2 of the Windsor Framework and the rights of refugees and persons seeking asylum’ (NIHRC, 2023) at 9.

¹⁷ Article 31, UN Refugee Convention 1951.

¹⁸ CoE Parliamentary Assembly ‘Resolution 1509: Human Rights of Irregular Migrants’, 27 June 2006.

¹⁹ NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 8.

the political context of Northern Ireland in 1998 and do not exclude asylum-seekers and refugees.²⁰ This argument is the foundation of Harvey's research paper and concurs with the NIHRC's analysis.

3.7 **The NIHRC advises that refugees and asylum seekers are protected by Article 2 of the Windsor Framework.**

Which Rights?

3.8 To understand the scope of protections afforded by Windsor Framework Article 2, we need to consider the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement.

3.9 The first section of this chapter of the Belfast (Good Friday) Agreement is entitled 'Human Rights' and opens with a general commitment to the "civil rights and religious liberties of everyone in the community". This is followed by a non-exhaustive list of rights "affirmed in particular".²¹ Within this human rights section is the UK Government's commitment to the incorporation of the ECHR with direct access to the courts and remedies for breach. In summary, **the chapter represents wide-ranging acknowledgement of and commitment to civil, political, economic, social and cultural rights and equality of opportunity, anticipating further legislation to entrench and safeguard those rights.**

3.10 Read in the context of the additional pledges on rights within this chapter, the general commitment of the Belfast (Good Friday) Agreement signatories, to the range of rights referenced within the chapter must be understood as embracing, as a minimum, those rights set out in the ECHR.²² In its Explainer the UK Government has confirmed that the "key rights and equality provisions in the

²⁰ *In the matter of an application by AA for Judicial Review* [2023] NIKB.

²¹ The UK Government has also recognised that the rights, safeguard and equality of opportunity protections in the Belfast (Good Friday) Agreement are not limited to the "affirmed in particular" rights. See paragraph 9 of the NI Office, 'UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in 0: What does it Mean and How will it be Implemented?' (NIO, 2020).

²² This relates to the scope of issues and EU law relevant to Article 2, rather than the question of whether Article 2 requires the UK to remain committed to the ECHR as considered in Social Change Initiative, 'Human Rights and Equality in Northern Ireland under the Protocol – A Practical Guide' (SCI, 2021); Christopher McCrudden, 'Parliamentary Scrutiny of the Joint Committee and the Application of the Northern Ireland Protocol – Evidence to the House of Commons European Scrutiny Committee' (ESC, 2020); and Sylvia De Mars, Aoife O'Donoghue, Colin Murray and Ben Warwick, 'Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement' (2018).

Agreement are supported by the ECHR". The Explainer further confirms that the UK Government acknowledges that "in NI, EU law, particularly on anti-discrimination, has formed an important part of the framework for delivering the guarantees on rights and equality set out in the Agreement".²³

- 3.11 The NIHRC and ECNI consider that the non-diminution commitment in Windsor Framework Article 2 encompasses the full range of rights set out in the ECHR, to the extent that they are underpinned by EU legal obligations in force on or before 31 December 2020.** Put another way, the Commissions consider that all EU law in force in NI on or before 31 December 2020 which underpins an ECHR right, falls within scope of the non-diminution commitment in Windsor Framework Article 2. In the context of the Belfast (Good Friday) Agreement, they are rights recognised by the UK and by Ireland.
- 3.12 ECHR rights of particular relevance to refugees and asylum-seekers include protections against slavery and forced labour (Article 4 ECHR), the right to liberty and security (Article 5 ECHR) and the right to a private and family life (Article 8 ECHR) as well as freedom from discrimination (Article 14 ECHR). Plus, the EU Charter on Fundamental Rights also continues to have relevance in the application and interpretation of those provisions of EU law which are relevant to the application of Article 2. Article 18 of the EU Charter protects the Right to Asylum and Article 47 sets out the right to an effective remedy and the right to a fair trial. These rights should inform the care and treatment of refugees and asylum-seekers including for example, the processing of claims, reception conditions, protection for vulnerable individuals access to justice.
- 3.13 NIHRC advises that rights particular to refugees and asylum-seekers are within the scope of the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement by virtue, in particular, of the general commitment to civil rights and to the incorporation of the ECHR into domestic law.**

²³ NI Office, 'UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What does it Mean and How will it be Implemented?' (NIO, 2020), at para 3.

Underpinning EU law

3.14 As outlined above, the NIHRC considers that the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement represents a wide-ranging commitment to human rights. The breadth of rights and protections addressed is important in determining the range of EU law relevant to, and within scope of, Windsor Framework Article 2. Informed by early drafts of Alison Harvey's research paper, as well as other research, legal opinions and analysis, the NIHRC/ECNI working paper on the scope of Article 2, includes a table that sets out the EU measures which the Commissions have identified to date as falling within the scope of the UK Government's commitment under Article 2 of the Windsor Framework.²⁴ We have also published a table setting out the associated underpinning domestic legislation that has transposed relevant EU Directives into law in NI.²⁵

3.15 Appendix 1 to the working paper includes a range of measures of potential relevance to refugees and asylum-seekers as members of the community. In addition, however, the NIHRC and ECNI identify a range of directives and regulations on asylum and refugees covering matters such as procedure and reception conditions.

3.16 As detailed further in section 5 of Harvey's research, the UK opted into a number of measures which include provisions underpinning the rights of refugees and asylum-seekers:

- the EU Temporary Protection Directive (2001/55/EC),²⁶
- the original EU Asylum Reception Directive (2003/9/EC),²⁷
- the EU Qualification Directive (2004/83/EC),²⁸
- the EU Asylum Procedures Directive (2005/85/EC),²⁹ and

²⁴ NI Human Rights Commission and Equality Commission for NI, 'Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol', (NIHRC and ECNI, 2022).

²⁵ NI Human Rights Commission and Equality Commission for NI, 'Table of EU Directives which underpin the Rights, Safeguards and Equality of Opportunity Provisions included in the Chapter of the Belfast ('Good Friday') Agreement of the same name and Implementing Domestic Legislation', 22 February 2023.

²⁶ Directive 2001/55/EC 'Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons', 20 July 2001.

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

²⁸ Directive 2004/83/EC 'Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted', 29 April 2004.

²⁹ Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005.

- the Dublin Convention and successor Regulations, the latest of which is Regulation (EU) No 604/2013 known as the Dublin III Regulation.³⁰

- 3.17 The EU Reception Directive sets out guidelines for the treatment of asylum seekers, including provisions for housing, food, healthcare, education, and employment, with particular attention to the needs of children. It also addresses the detention of asylum seekers and offers certain assurances related to freedom of movement, family reunification, education, employment, and basic support. However, the directive prioritises information about legal advisors over providing an explicit right to legal counsel.
- 3.18 The EU Qualification Directive offers an interpretation of Article 1(A) of the Refugee Convention and its Protocol³¹, outlining the criteria for identifying refugees and granting "subsidiary protection" or "humanitarian protection" to individuals who face human rights violations upon return but do not qualify for refugee status. The Directive ensures safeguards against deportation, access to pertinent information, maintenance of family unity, issuance of residence permits, employment opportunities, and educational access for both recognised refugees and those given international protection. Furthermore, it provides arrangements for lodging, integration initiatives, and aid for potential repatriation.
- 3.19 The EU Asylum Procedures Directive delineates the processes involved in handling asylum applications, with considerations for minors and survivors of torture. It guarantees the right to engage in asylum procedures, although applications might be restricted to designated locations. The directive also briefly touches on detention matters.
- 3.20 It is worth underscoring that the UK did not opt into all of the Common European Asylum System or, for example, later versions of the Reception Directive (2013) or the Qualification Directive (2011).

³⁰ Regulation 604/2013/EU 'Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)', 26 June 2013.

³¹ UN Refugee Convention 1951 and its 1967 Protocol.

- 3.21 The High Court of Justice in NI has confirmed that certain provisions of the Reception Directive are within the scope of Windsor Framework Article 2, subject to requirements of EU law that the provisions are sufficiently clear, precise and complete as to be capable of direct effect.³²
- 3.22 **For the reasons detailed above, the Commission advises that, as a consequence of Windsor Framework Article 2, the Procedures Directive,³³ the Qualification Directive,³⁴ the Reception Directive³⁵ and the Dublin III Regulation,³⁶ remain relevant for determining minimum standards of rights required for asylum-seekers and refugees in NI. EU Directives on Victims and Combating Human Trafficking are also relevant.³⁷**
- 3.23 Annex 1 of this paper lists some of the key pieces of domestic legislation affecting the rights of refugees and asylum-seekers. Further detail about the UK's and Ireland's approach to the Common European Asylum System, how the measures listed above were implemented in UK law before and after Brexit, is provided in the research paper at section 5 'The EU and Asylum: what rights does the Common European Asylum System protect?' and section 6 'The Common European Asylum System in UK law after Brexit'.

³² *In the Matter of an Application by AA for Judicial Review* [2023] NIKB

³³ Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005.

³⁴ Directive 2004/83/EC 'Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted', 29 April 2004.

³⁵ Directive 2003/9/EC, 'Council Directive laying down minimum standards for the reception of asylum seekers', 27 January 2003.

³⁶ Regulation 2013/604/EU, 'Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person', 26 June 2013

³⁷ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012; Directive 2011/36/EU, 'EU Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.

4.0 Potential diminution of rights and recommendations

- 4.1 The case studies chosen by Harvey in section 7 of her research paper, namely the Nationality and Borders Act 2022 and the Illegal Migration Act 2023, illustrate the practical application of Windsor Framework Article 2. In both cases, potential breaches of Article 2 have been identified as a result of a reduction in rights under the several directives as well as articles of the ECHR and the EU Charter. Relevant ECHR rights include, for example, protections against slavery and forced labour (Article 4 ECHR), the right to liberty and security (Article 5 ECHR) and the right to a private and family life (Article 8 ECHR) as well as freedom from discrimination (Article 14 ECHR). Relevant EU Charter of Fundamental Rights include Article 18 on the right to asylum and Article 47 on the right to an effective remedy and to a fair trial.
- 4.2 This section of the briefing note draws on the research to highlight the NIHRC's main concerns in line with our submissions to Parliament during the passage of the legislation.³⁸ Whereas the submissions set out the Commission's grave concerns in respect of a wide range of human rights requirements, what follows here is a summary of issues arising in respect of Windsor Framework Article 2, assessing compliance of the Act with minimum standards required under EU measures cited above in section 3 of this paper.
- 4.3 One of the issues raised by the NIHRC during the passage of these Bills was the absence of consideration of Windsor Framework Article 2 in the Explanatory or Human Rights Memorandum to the Bills.³⁹ Early consideration of the implications of Windsor Framework Article 2 is necessary in the development of policy and legislation.

³⁸ NI Human Rights Commission, 'Northern Ireland Human Rights Commission submission to House of Lords on the Illegal Migration Bill', (NIHRC, 2023).

³⁹ NI Human Rights Commission and Equality Commission for NI, 'Joint NIHRC / ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill', (NIHRC and ECNI, 2023); NI Human Rights Commission, 'Northern Ireland Human Rights Commission submission to House of Lords on the Illegal Migration Bill', (NIHRC, 2023).

Illegal Migration Act 2023

- 4.4 Under section 5(2) of the Illegal Migration Act, human rights and asylum claims will be declared inadmissible if the conditions in section 2 are met. This means automatic categorisation of applications without consideration of individual circumstances as required by Article 4(3) of the EU Qualification Directive and Article 8(2) of the EU Procedures Directive. Article 6(2) and recitals 13 and 22 of the EU Procedures Directive are also relevant as well as Articles 13 and 18 of the EU Qualification Directive.
- 4.5 Article 25 of the EU Procedures Directive lists seven cases where an asylum claim can be considered inadmissible. The approach taken to inadmissibility under section 5 of the Act, is outside the list of grounds in Article 25 and would appear to diminish the rights of asylum-seekers as a consequence.
- 4.6 The duty to remove an individual, under section 2 of the Act, applies even if the asylum seeker made a human rights claim, a claim related to human trafficking, a protection claim, or an application for judicial review. The NIHRC believes this may not be compliant with Article 7(1) of the EU Procedures Directive which provides for a right to remain in the State pending examination of an application.
- 4.7 The Home Secretary's broad powers of detention, combined with the lack of judicial oversight also raise questions of compliance with Windsor Framework Article 2. Section 13(4) of the Act provides that as regards detention in specified circumstances by immigration officials or the Secretary of State "the decision is final and is not liable to be questioned or set aside in any court or tribunal" during the first 28 days, except on very limited grounds. By contrast, Article 18 of the EU Procedures Directive requires states to ensure there is a "possibility of speedy judicial review" when an asylum applicant is held in detention and that no one should be held in detention for the sole reason that they are an asylum seeker. Article 47 of the Charter of Fundamental Rights of the EU grants protection against violation of any right or freedom arising under EU law.⁴⁰

⁴⁰ Due to Article 4 of the UK EU Withdrawal Agreement 2020, the Charter of Fundamental Rights remains relevant for interpreting provisions of the treaty, including the Windsor Framework, and EU law made

- 4.8 Article 39(1) of the EU Procedures Directive further provides that applicants for asylum shall have a right to an effective remedy before a court or tribunal in relation to a decision on their application for asylum, including a decision to consider an application inadmissible, a decision taken at a border or transit zone, or a decision under the European safe third country provisions of Article 36. The CJEU has emphasised the fundamental nature of the right to an effective remedy as per Article 47 of the EU Charter as underscored by Article 39 of the Directive.⁴¹ It is unclear how section 5 of the Act, in relation to inadmissibility or section 54, relating to restrictions on interim remedies, comply with this requirement.
- 4.9 The Act does not provide particular and explicit safeguards for persons at particular risk or individuals with specific needs. Article 17 of the EU Reception Directive and Article 20 of the EU Qualification Directive pertain to specific situations of vulnerable individuals, such as pregnant women and disabled people. All the EU measures specified above stipulate that “the best interests of the child shall be a primary consideration” when implementing relevant provisions.
- 4.10 Sections 22 and 25 of the Act provide for removal of, and withholding of support and assistance from, potential victims of human trafficking, contrary to the obligations in Article 11 of the EU Trafficking Directive.⁴² Consistent with the analysis in section 3 of this paper, victims of crime or human trafficking fall within the scope of relevant chapter of the Belfast (Good Friday) Agreement for three reasons: firstly, due to the commitment to the ECHR; secondly, due to the gendered element of human trafficking and thirdly, by virtue of the rights of victims included in the chapter.⁴³
- 4.11 NIHRC is concerned that the provisions referenced above, providing for automatic removal of individuals without consideration of their

applicable under the treaty’s provisions. See *In the Matter of an Application by AA for Judicial Review* [2023] NIKB; *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307.

⁴¹ *Samba Diouf v. Ministre du Travail, de l’Emploi et de l’Immigration*, Case C-69/10, 28 July 2011.

⁴² Directive 2011/36/EU, ‘EU Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011.

⁴³ See NI Human Rights Commission, ‘Submission to Department of Justice Consultation on Measures to Strengthen the Response to Modern Slavery and Human Trafficking’ (NIHRC, 2022); NI Human Rights Commission, ‘Submission to the Department of Justice’s Consultation on the Draft Modern Slavery and Human Trafficking Strategy’ (NIHRC, 2023).

particular circumstances, may result in breach of the principle of non-refoulement. The principle of non-refoulement forms an essential protection under international human rights law. It prohibits States from transferring or removing individuals from their jurisdiction when there are substantial grounds for believing that the person would be at risk of irreparable harm on return, including persecution, torture, ill-treatment or other serious human rights violations. Article 21 of the EU Qualification Directive requires States to respect the principle of non-refoulement, in line with Article 33 of the Refugee Convention. Moreover, the CJEU has affirmed that the EU Procedures Directive's primary objective is to ensure full compliance with the Refugee Convention and fundamental rights.⁴⁴

5.0 Conclusion

- 5.1 Windsor Framework Article 2 remains a new and complex area of law subject to ongoing research and legal analysis. While, as outlined above, early judgments have already made a contribution, it is anticipated that further legal rulings will clarify the scope of the provision including the range of rights protected, not least as a result of the own-motion case on the Illegal Migration Act being taken by the NIHR. The advice here is offered with that caveat.

⁴⁴ *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, 28 July 2011.

Annex 1

Below is a list of the various primary legislation that governs immigration broadly but also that affect asylum seeking and refugee protection.

- Illegal Migration Act 2023
- Nationality and Borders Act 2022
- Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020
- Immigration Act 2016
- Immigration Act 2014
- Borders, Citizenship and Immigration Act 2009
- Criminal Justice and Immigration Act 2008
- Tribunals, Courts and enforcement Act 2007
- UK Borders Act 2007
- Immigration, Asylum and Nationality Act 2006
- Asylum and Immigration (Treatment of Claimants etc) Act 2004
- Nationality, Immigration and Asylum Act 2002
- Immigration and Asylum Act 1999
- Special Immigration Appeals Commission Act 1997
- Asylum and Immigration Act 1996
- Asylum and Immigration Appeals Act 1993
- Immigration Act 1988
- British Nationality Act 1981
- Immigration Act 1971

Contact us

Please send any queries to Eilis.Haughey@nihrc.org

www.nihrc.org | info@nihrc.org | +44 (0)28 9024 3987

4th Floor, Alfred House, 19-21 Alfred Street, Belfast, BT2 8ED

