



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

**Briefing Paper & Draft Recommendations on  
Brexit, Health and its potential impact on  
Article 2 of the Windsor Framework**

**September 2023**

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## 1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC) is one of three A-status National Human Rights Institutions in the United Kingdom (UK). Established in 1999, 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 Northern Ireland (NI). The NIHRC's mandate extends to all matters relating to the protection and promotion of human rights in NI.
- 1.2 Under sections 78A-E of the NI Act, the NIHRC is also mandated, alongside the Equality Commission of NI, to monitor the implementation of Article 2(1) of the Protocol on Ireland/NI of the UK–European Union (EU) Withdrawal Agreement<sup>1</sup> (now Article 2 WF). Article 2 WF is a UK Government commitment to ensuring there is no diminution of the protections in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast (Good Friday) Agreement 1998 as a result of the UK's withdrawal from the EU.
- 1.3 The integrated nature of health provision on the island of Ireland means that the UK's withdrawal from the EU affects NI (and Ireland) in a way in which other parts of the UK (and other EU Member States) are not affected. Access to healthcare in NI is largely based on residency.<sup>2</sup> Previous research commissioned by the NIHRC and the Irish Equality and Human Rights Commission in 2018 and 2020, demonstrated that healthcare was prevailing issue of concern in relation to the UK's withdrawal from the EU.<sup>3</sup>
- 1.4 New research commissioned by the NIHRC and undertaken by Professor Tamara Hervey, Jean Monnet Professor of EU Law (City School of Law, University of London), identified a range of significant concerns relating to healthcare after the UK's withdrawal from the EU. The research combined doctrinal legal analysis with qualitative interviews and scenario analysis.<sup>4</sup>

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<sup>1</sup> 1 The Protocol on Ireland / Northern Ireland was renamed by 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. For clarity, we are referring to the Windsor Framework throughout this document. When Protocol appears in some quotes it should be understood as The Protocol on Ireland/NI.

<sup>2</sup> Health and Social Care NI, 'Access to health and social care guidance' (HSC, 2015), at 9.

<sup>3</sup> Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Discussion Paper on Brexit' (NIHRC and IHREC, 2018); Silvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Continuing EU Citizenship "Rights, Opportunities and Benefits" in Northern Ireland after Brexit', (NIHRC and IHREC, 2020).

<sup>4</sup> Tamara Hervey, 'Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol' (NIHRC, 2022).

1.5 This briefing paper draws on the research, setting out a number of NIHRC positions, alongside next steps in ensuring that access to healthcare is protected in NI and on the island of Ireland after the UK's withdrawal from the EU.

## 2.0 Context

2.1 In international law, the right to the highest attainable standard of health is set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>5</sup> The right to health must be progressively realised to the maximum available resources of the State.<sup>6</sup> The concept of progressive realisation creates an obligation on States to move "expeditiously and effectively" towards securing the highest attainable standard of health.<sup>7</sup>

2.2 The UN Committee on Economic, Social and Cultural Rights (CESCR) notes that the right to health includes the core components of availability, accessibility, acceptability and quality.<sup>8</sup> It further recognised that a minimum core obligation of the right to health is to ensure that health services are accessible on a non-discriminatory basis, particularly for vulnerable or marginalised groups.<sup>9</sup>

2.3 An important aspect of the progressive realisation of the right to health is the concept of non-retrogression. States should not allow the existing protection of economic, social and cultural rights to deteriorate unless there are strong justifications for such a retrogressive measure.<sup>10</sup> As such, the progressive realisation of the right to health and non-retrogression must be taken into account when interpreting domestic law, particularly where the language of the law is ambiguous.

2.4 The Windsor Framework recognises that EU law has provided a 'supporting framework' for the rights, safeguards and equality of opportunity protections in the Belfast (Good Friday) Agreement 1998. In Article 2 WF,

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<sup>5</sup> Article 12, UN International Covenant on Economic, Social and Cultural Rights 1966.

<sup>6</sup> Article 2, UN International Covenant Economic, Social and Cultural Rights 1966; E/CN.4/2000/4, CESCR General Comment 14: The right to the highest attainable standard of health', 11 August 2000, at para 12; E/1991/23, CESCR, General Comment 3: The nature of States parties' obligations (Article 2, para 1 of the Covenant), 14 December 1990.

<sup>7</sup> E/1991/23, CESCR, General Comment 3: The nature of States parties' obligations (Article 2, para 1 of the Covenant), 14 December 1990, at para 9.

<sup>8</sup> E/CN.4/2000/4, 'CESCR, General Comment 14: The right to the highest attainable standard of health', 11 August 2000, at para 12.

<sup>9</sup> Ibid, para 18.

<sup>10</sup> Office of the UN High Commissioner for Human Rights, '[Frequently asked questions on economic, social and cultural rights, Fact Sheet 33](#)' at 16; See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights 1986.

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.<sup>11</sup>

- 2.5 There are a number of reasons why Article 2 WF is engaged in the context of healthcare in NI. The Rights, Safeguards and Equality of Opportunities chapter of the Belfast (Good Friday) Agreement includes a general commitment to the “civil rights and religious liberties of everyone in the community”. The phrase “affirmed in particular” in this section in terms of the rights and equality protections included suggests a non-exhaustive list of rights involved, through which healthcare can also be engaged.
- 2.6 Alongside other socio-economic rights, the right to health relates to the foundations of human dignity and is connected to the full participation in society, including the exercise civil and political rights.<sup>12</sup> This is referred to as the ‘indivisibility’ of human rights, or the notion that human rights are interconnected and mutually reinforcing. The Belfast (Good Friday) agreement reflects the interdependent and indivisible nature of human rights as it guarantees everyone’s right to participation in society.<sup>13</sup>
- 2.7 The general commitment of the Belfast (Good Friday) Agreement signatories to civil rights and a range of rights referenced within the chapter, along with the UK Government commitment in that chapter to incorporate the ECHR into domestic law, leads the NIHRC to the view that Article 2 WF must be understood as embracing, as a minimum, those rights set out in the ECHR. Indeed, in its Explainer on Article 2, the UK Government has again acknowledged that “key rights and equality provisions in the Belfast (Good Friday) Agreement are supported by the ECHR”.<sup>14</sup> The NIHRC has therefore adopted a working assumption that the non-diminution commitment in Article 2 WF 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.<sup>15</sup>
- 2.8 The human rights and equality protections which are “affirmed in

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<sup>11</sup> NI Human Rights Commission and Equality Commission for NI, ‘NIHRC and ECNI Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol’ (NIHRC/ECNI, 2022).

<sup>12</sup> Mark Tushnet, ‘Civil Rights and Social Rights: The Future of the Reconstruction Amendments’ 25 *Loyola of Los Angeles Law Review* (1992) 1207.

<sup>13</sup> Tamara Hervey, ‘Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol’ (NIHRC, 2022), at 15.

<sup>14</sup> 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.

<sup>15</sup> NI Human Rights Commission and Equality Commission for NI, ‘NIHRC and ECNI Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol’ (NIHRC/ECNI, 2022).

particular” in the Rights, Safeguards and Equality of Opportunities chapter include “the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity”<sup>16</sup>, which could also be viewed through the lens of access to healthcare.

- 2.9 In order to show that there has been a diminution of rights, safeguards or equality of opportunity protections, 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. A diminution occurs where rights or safeguards are reduced, contrary to the relevant standards in EU law protected by Article 2 WF, e.g. by a change in law or policy on or after 1 January 2021.
- 2.10 In addition to the non-diminution obligation under Article 2, Article 13 WF includes a commitment by the UK Government that the law in Northern Ireland will ‘keep pace’ or dynamically align with any changes to specified EU law including the six EU Equality Directives listed in Annex 1 to the WF after 1 January 2021. Read with Article 2, this provides additional protection to the extent that rights or protections are enhanced under these measures.<sup>17</sup> Under Article 13, NI must also keep pace with any related case-law.

### 3.0 Common Travel Area Entitlements

- 3.1 For many people who access the health system through Health and Social Care NI (and the shared health services in Ireland), their right to access healthcare is unlikely to change after Brexit due to Common Travel Area (CTA) rules, which form the basis for access to healthcare for those British or Irish citizens who reside in the UK or Ireland.<sup>18</sup>

- 3.2 Nevertheless, as highlighted by previous research commissioned by the

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<sup>16</sup> Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

<sup>17</sup> 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.

<sup>18</sup> The Common Travel Area is a long-standing arrangement between the UK, the Crown Dependencies (Isle of Man, Guernsey etc.) and Ireland that pre-dates both British and Irish membership of the EU and is not dependent on it. Under the CTA, British and Irish citizens can move freely and reside in either jurisdiction and enjoy associated rights and privileges, including the right to work, study and vote in certain elections & access social security and health services.

NIHRC and IHREC, CTA entitlements are largely contingent on continued national legislation and/or guidance remaining in place.<sup>19</sup> Furthermore, confirmed by Prof. Hervey's research, these entitlements also "lack the external quality of EU law or Withdrawal Agreement law, the administrative arrangements that underpin EU law, and the consequences associated with non-compliance with EU law/Withdrawal Agreement law."<sup>20</sup>

- 3.3 The research at hand also provides clear examples that the residence-based element to accessing health, including accessing the all-Ireland integrated health facilities, can act as an obstacle for some residents on the island post-Brexit. Those with insecure immigration status<sup>21</sup> or those who present to the healthcare administrators as foreign non-residents,<sup>22</sup> all remain at risk of not being able to access healthcare in the context of the CTA entitlements being relied on to facilitate the 'all island' healthcare system.
- 3.4 **The NIHRC recommends that the Common Travel Area and rights associated with it are enshrined in law by a comprehensive bilateral treaty to maintain at least the same level of protection as existed on 31 December 2020. That treaty should be incorporated into domestic legislation.**
- 3.5 **The NIHRC recommends that the residency requirements for Common Travel Area entitlements relating to cross-border and all-island healthcare are reviewed to ensure that the rights of access are clear, comprehensible and generous.**

## 4.0 Frontier Workers

- 4.1 The Frontier Workers Permit Scheme (FWPS), which implements the UK's obligations in the Withdrawal Agreement, should secure access to healthcare after Brexit. Under the Withdrawal Agreement, those who qualify as frontier workers should be able to access healthcare in both their place of residence and their place of work ('the competent state').<sup>23</sup> Family

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<sup>19</sup> Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Discussion Paper on the Common Travel Area' (NIHRC and IHREC, 2018), at 11.

<sup>20</sup> Tamara Hervey, 'Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol' (NIHRC, 2022), at 23.

<sup>21</sup> Ibid. See also: Silvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Continuing EU Citizenship "Rights, Opportunities and Benefits" in Northern Ireland after Brexit' (NIHRC and IHREC, March 2020),

<sup>22</sup> Tamara Hervey, 'Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol' (NIHRC, 2022), at 27.

<sup>23</sup> Article 3(1)(a), Article 17 Regulation 883/2004, 'EU Regulation of the Parliament and of the Council on the coordination of social security systems', 29 April 2004.

members of frontier workers in the UK and Ireland are entitled to healthcare in the place of residence, however healthcare for family members in the competent state is limited to medical necessities during their stay in the state.<sup>24</sup>

- 4.2 Irish nationals working in NI as frontier workers have been advised by the UK Government that they do not need to apply for the FWPS, as they already have the right to work and reside in the UK, which is not reliant on rights deriving from EU law.<sup>25</sup> Irish nationals can still avail of the FWPS, if they wish to do so.<sup>26</sup> The provisions governing access to healthcare for these frontier workers who remain outside of the FWPS are found in the CTA rules.<sup>27</sup> However, there remains a lack of clarity on the relationship between the FWPS and the CTA rules incorporating healthcare. During the research, interviewees perceived that frontier workers are being “pushed towards” claiming CTA entitlements rather than claiming rights under the Withdrawal Agreement.<sup>28</sup> This is a concern given that, as set out in para 3.2 above, CTA entitlements provide less substantive protection than the Withdrawal Agreement.
- 4.3 It remains unclear whether frontier workers residing in Ireland and working in NI, who are not obliged to apply for the UK FWPS and whose rights are instead derived from the CTA, enjoy the same right to healthcare as before the UK’s withdrawal from the EU.<sup>29</sup> Furthermore, clarification is needed on whether these workers access healthcare in NI on the same basis as those protected under the FWPS.
- 4.4 **The NIHRC recommends that steps are taken to ensure that frontier workers to continue to enjoy at least the same rights as before the UK’s withdrawal from the EU. This includes clarifying the relationship between the Frontier Workers’ Permit Scheme and the CTA rules that govern access to healthcare for frontier workers and ensuring that those who are not obliged to apply for the Scheme are still able enjoy the same right to healthcare in their place of residence and their place of work as before Brexit.**

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<sup>24</sup> Articles 18(2), 19(1) and Annex III Regulation 883/2004.

<sup>25</sup> Immigration Act 1971, as amended by Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, section 2 (2); Home Office, ‘[Frontier Worker Permit Scheme Guidance: Version 2.0](#)’, at 9.

<sup>26</sup> Home Office, ‘[Frontier Worker Permit Scheme Guidance: Version 2.0](#)’, at 9.

<sup>27</sup> Regulation 6, Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015.

<sup>28</sup> Tamara Hervey, ‘Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol’ (NIHRC, 2022), at 26.

<sup>29</sup> The NIHRC has commissioned further research into the rights of frontier workers and their families in the context of rights after Brexit. The report is forthcoming and will be published in 2023.



## 5.0 Access to Cross-Border and All-Island Facilities

- 5.1 The shared health infrastructure on the island of Ireland should be accessible for all. From research interviews, evidence was presented where a person from the Black, Asian and Minority Ethnic Community (and national of an EU country) had given birth to a premature baby in NI and then faced difficulty accessing healthcare in Ireland and uncertainty as to whether she was able to go with her baby to the all-island paediatric cardiology unit in Dublin. At first, the hospital administrators were of the view that the mother would need to pay for any non-emergency aspects of her care. The situation was only resolved through the intervention of an NGO.<sup>30</sup>
- 5.2 Difficulties accessing all-island care were echoed during an event co-hosted by the Irish Human Rights and Equality Commission, the Equality Commission for NI and the NIHRC on rights after Brexit, in March 2022.<sup>31</sup> Participants stated that Brexit had also contributed to an exacerbation of pre-existing issues for third country nationals and their cross-border movement between NI and Ireland and in accessing all-island facilities. In April 2023, ECNI published a report on the impact of Brexit on migrant and minority ethnic people in NI. The report highlighted that migrant people continue to experience barriers to accessing healthcare that Brexit has further exacerbated, including “statutory services are poorly prepared for how Brexit impacts on rights and entitlements”.<sup>32</sup>
- 5.3 The lack of clarity on how to access shared facilities and the associated cross-border movement for those who are not UK or Irish nationals remains a concern for the NIHRC, as it represents a potential barrier to accessing healthcare. The NIHRC intends to investigate this further and will engage with the relevant NI and Irish health departments and the UK Home Office.
- 5.4 **NIHRC recommends that access to cross-border and all-island healthcare for EU and third-country nationals is clear, comprehensive, and enshrined in law.**
- 5.5 **NIHRC recommends that the UK and Irish governments:**

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<sup>30</sup> Tamara Hervey, ‘Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol’ (NIHRC, 2022), at 27.

<sup>31</sup> Equality Commission for NI, ‘[Commissions meet in the North West to discuss rights after Brexit](#)’ (ECNI, 2022).

<sup>32</sup> Equality Commission NI & Pivotal, ‘Impact of Brexit on Minority Ethnic and Migrant People in NI’ (ECNI, 2023), at 17.

- (i) clarify existing rules on accessing cross-border and all-island health services for EU and third-country nationals living in NI;**
- (ii) ensure there are no immigration or visa recognition barriers impeding their access to these services; and**
- (iii) guarantee that any new all-island or shared services are future-proofed to ensure there are no immigration or visa recognition barriers impeding access to these services.**

**5.6 The NIHRC recommends that the Department of Health provide clear, accessible and complete information on the right to healthcare post-EU withdrawal, including access to cross-border and island-of-Ireland services to ensure no diminution of the current provision and to protect the right to the highest attainable standard of healthcare.**

## **6.0 Access to Non-Emergency Healthcare for Vulnerable Non-Residents**

6.1 Since entitlement to healthcare in NI is largely residency based, there remain concerns over access to healthcare for non-resident vulnerable groups. Emergency healthcare and family planning services are available to everyone in NI irrespective of immigration status.<sup>33</sup>

6.2 Current legislation sets out an obligation to provide 'assistance and support', including 'assistance in obtaining healthcare services', for adults referred or about to be referred to the competent authority as potential victims of human trafficking.<sup>34</sup> Regulation 10 of The Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015 (as amended) provides that no charge may be made for health services where competent authorities deem that the person is a victim of human trafficking or that there are reasonable grounds for so believing. Operational guidance to the Regulations states that individuals who are determined to be victims of trafficking on reasonable grounds are exempt from healthcare charges during the recovery and reflection period (45 days). If the competent authority can conclusively confirm they are a victim of trafficking, they will continue to be exempt from all healthcare

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<sup>33</sup> Regulation 4(1), Provision of Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015.

<sup>34</sup> Section 18, Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015. Note also that section 25 of the Illegal Migration Act 2023 disapplies this obligation in respect of certain persons; provision not commenced at time of writing.

charges after that period. However, those who cannot be confirmed as victims of trafficking by the competent authority will be charged.<sup>35</sup>

- 6.3 In EU law, the Trafficking Directive provides protections for victims of human trafficking.<sup>36</sup> The Directive specifically obliges Member States to “take due account of” specific needs of victims “where those needs arise in particular from possible pregnancy, state of health, disability, mental or psychological disorders or serious forms of psychological violence, physical or sexual to which they have been subjected”.<sup>37</sup> As explained below, the Commission takes the view that the Trafficking Directive falls within the scope of Article 2 WF.
- 6.4 During the adoption of the Directive into UK law, the EU Commission stated that UK would need to add amendments to ensure that trafficked persons’ rights to assistance and support were upheld.<sup>38</sup> The UK never enacted such amendments. Before the UK left the EU, a trafficked person in NI could rely directly on the Directive to enforce their right to health for non-emergency issues, if domestic law did not adequately implement the Directive. It is the Commission’s view that even if the EU obligations had not been properly transposed into domestic law before 31 December 2020, the loss of directly effective EU rights can be challenged as a breach of Article 2 WF where those rights have not been made good in domestic law. In order to be considered ‘directly effective’, enabling an individual to claim its protection in court, the right in question must be sufficiently clear, precise and unconditional.<sup>39</sup>
- 6.5 Furthermore, the UK Nationality and Borders Act 2022 resulted in a further departure from the EU Trafficking Directive, disapplying rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from the Directive, where they are incompatible with a provision of the Act.<sup>40</sup> The Act is silent on healthcare obligations and entitlements and children’s rights.
- 6.6 In July 2023, the Illegal Migration Act received Royal Assent and ushered

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<sup>35</sup> Department of Health, ‘Operational Guidance - Health and Personal Social Services Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015’, (DoH, 2021), at paras 3.27-3.31.

<sup>36</sup> Directive 2011/36/EU, ‘EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011.

<sup>37</sup> Ibid, Article 11.

<sup>38</sup> Immigration Law Practitioners’ Association, ‘ILPA Submission to the Joint Committee on Human Rights: Human Rights Implications of Brexit’, (ILPA 17 October 2016), at paras 45-47.

<sup>39</sup> NI Human Rights Commission, ‘Working Paper: The Scope of Article 2(1) of the Ireland/ Northern Ireland Protocol’ (NIHRC, 2022), at para 5.10.

<sup>40</sup> Section 68, Nationality and Borders Act, 2022.

in problematic changes to the immigration rules in the UK that, in the Commission's view, are also a departure from the EU Trafficking Directive and the EU Victims Directive. In a submission to the UK Parliament House of Lords, the NIHRC expressed grave concerns that the Act will add to the significant regression of human rights protection to refugees, people seeking asylum and migrants in the UK.<sup>41</sup> The Illegal Migration Act presents further barriers to accessing healthcare in particular for unaccompanied children whose 'looked after' status is removed, victims of modern trafficking and refugees and people seeking asylum who have been denied access to asylum procedures and have been refused alternative form of leave to remain.<sup>42</sup>

- 6.7 The NIHRC believes that the Directives referenced above can be read as falling within the protection afforded by Article 2 WF for a number of reasons. First of all, the Belfast (Good Friday) Agreement provides that the "British Government will complete incorporation into NI law of the ECHR, with direct access to the courts and remedies for breach of the convention, including the power for the courts to overrule Assembly legislation on grounds of inconsistency".<sup>43</sup> The UK Government recently reaffirmed that "The key rights and equality provisions in the Agreement are supported by the European Convention on Human Rights".<sup>44</sup>
- 6.8 As stated above in para 2.7, the NIHRC and ECNI have therefore adopted the working assumption that the non-diminution commitment in Article 2 WF encompasses the full range of rights set out in the ECHR, to the extent that they are underpinned by EU law. Of particular relevance to trafficked persons is Article 4 of the ECHR: the right to be free from slavery, servitude, forced or compulsory labour. This includes positive obligations, including a duty on states to take operational measures, such as to assist victims in their physical, psychological, and social recovery.<sup>45</sup> The incorporation of the ECHR by the UK's Human Rights Act 1998 means that rights under Article 4 ECHR should not be diminished by Brexit. Should the government seek to depart from the standards of Article 4 (in this instance failing to provide non-emergency healthcare for trafficking victims), Article 2 WF comes into play insofar as the right is also protected by the EU Trafficking Directive.

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<sup>41</sup> NI Human Rights Commission, 'Submission to House of Lords on the Illegal Migration Bill' (NIHRC, May 2023), at para 2.8.

<sup>42</sup> Ibid, at para 5.21, para 6.6. and para 7.6.

<sup>43</sup> Belfast (Good Friday) Agreement 1998, at Rights, Safeguards and Equality of Opportunity.

<sup>44</sup> Northern Ireland 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.

<sup>45</sup> *V.C.L. and A.N. v. the United Kingdom*, at para 153.

- 6.9 Additionally, trafficking victims are captured within the commitment to civil and religious liberties of “everyone in the community”, under the rights safeguards and equality of opportunity chapter in the Belfast (Good Friday Agreement) 1998 (as discussed in para 2.6). The subsequent list of rights in this chapter includes the right to equality of opportunity. Article 1 of the EU Trafficking Directive notes that the Directive “introduces common provisions, taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof”.<sup>46</sup> Recitals to the Victims Directive acknowledge victims of human trafficking as victims of gender-based violence and discrimination.<sup>47</sup> The EU Trafficking Directive arguably comes under the scope of Article 2 WF under the right to equality of opportunity.
- 6.10 Finally, the relevant chapter of the Belfast (Good Friday) Agreement 1998 protects the rights of victims “to remember as well as to contribute to a changed society”. The UK Government has already accepted that the non-diminution commitment of the WF includes, but is not limited to, the EU Victims’ Directive.<sup>48</sup> The Victims’ Directive is closely linked to the Trafficking Directive in relation to specific areas of crime and protections afforded to victims<sup>49</sup> and does not distinguish between categories of victims.<sup>50</sup> Since the Trafficking Directive protects a subset of victims in NI, the NIHRC believes it should fall within the ‘non-diminution’ commitment of Article 2 WF.<sup>51</sup>
- 6.11 In practice, if a non-resident victim of trafficking is not able to access non-emergency services to the standard required by the Trafficking Directive, this would represent a potential diminution of rights under Article 2 WF,

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<sup>46</sup> Article 1, Directive 2011/36/EU, ‘Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011. See also Recital 3 of the Directive which identifies that men and women are often trafficked for different reasons, and therefore “assistance and support measures should be gender specific where appropriate”.

<sup>47</sup> Recital 17, EU 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: “Violence that is directed against a person because of that person’s gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment) [and]...trafficking in human beings.”

<sup>48</sup> Northern Ireland 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 13.

<sup>49</sup> European Parliament, ‘The Victims’ Rights Directive: European Implementation Assessment’, (EPRS 2017), at 97.

<sup>50</sup> Recital 17, Directive 2012/29/EU, EU Council Directive establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

<sup>51</sup> NI Human Rights Commission, ‘Response to Call for Evidence by the Joint Committee on Human Rights on the Nationality and Borders Bill’, (NIHRC, October 2021), at 25; NI Human Rights Commission and Equality Commission for NI, ‘Joint Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill’ (NIHRC/ECNI, January 2022), at para 3.2.

since the protection would not have been lost 'but for' the UK's departure from the EU. The NIHRC intends to further investigate this issue and will engage with the relevant government departments across NI and the UK.

- 6.12 From our engagement with stakeholders it appears there is a lack of clarity and confidence about the nature and limits of the rights and entitlements that potential and confirmed victims of human trafficking have in relation to accessing healthcare. The Commission is aware of anecdotal evidence of people encountering additional barriers to accessing healthcare, such as questions about immigration status whilst receiving medical attention.
- 6.13 The cumulative effect of the lack of clarity on the rights of victims of human trafficking and the hostile regime towards immigration might make people being reluctant to seek assistance including healthcare to which they are entitled. This in turn raises questions about the importance of communicating clearly with frontline staff about the rights of all victims of human trafficking and other people falling under the scope of Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015 (as amended).
- 6.14 **The NIHRC recommends that the Department of Justice review the support and assistance provided to potential victims of human trafficking and ensure that it remains in line with the requirements of the Human Trafficking Directive.**
- 6.15 **The NIHRC recommends that the Department of Health clarifies and promotes awareness amongst health practitioners, individuals, and representative groups of the rights of potential and confirmed victims of human trafficking and others falling within the scope of Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015 (as amended).**

## **7.0 Access to services for migrants post-Brexit**

- 7.1 While entitlement to healthcare is largely residency-based, the NIHRC has been made aware of reports of barriers to accessing healthcare for migrants, particularly when registering with GP services and an increase in cases post-Brexit where patients are charged for healthcare services, even where the patient is exempt under NI law.

- 7.2 By way of example, a woman with pre-settled status was charged for the delivery of her child and subsequently summoned to smalls claims court for failure to pay the charges. In another instance, a man with settled status was summoned to the small claims court after failing to pay for an appointment that he had been referred to by his GP, despite the GP being aware of his immigration status. Both cases were compounded by wider issues, including insufficient interpretation services and lack of cohesion between GP practices and health trusts, and were only resolved with the intervention of Migrant Centre NI.<sup>52</sup>
- 7.3 In April 2023, the Equality Commission NI published a report on the impact of Brexit on the rights of minority ethnic and migrant people in NI.<sup>53</sup> The report highlighted instances where EU migrants had been wrongly refused access to healthcare because their residency status under the EU Settlement Scheme had not been reflected in their online profile. In May 2023, the Independent Monitoring Authority published a report identifying that some unsuccessful applicants to the EU Settlement Scheme may have been wrongly charged for NHS treatment whilst the outcome of their application was still pending.<sup>54</sup>

In July 2023, the Home Office announced changes to the EU Settlement Scheme such that from September 2023 people with pre-settled status will automatically have their status extended by two years before it expires, if they have not obtained settled status already.<sup>55</sup> These changes to the Scheme follow the JR case<sup>56</sup> concerning the possible unlawful loss of rights, including access to health, if an applicant failed to either apply or re-apply for settled status under the EU Settlement Scheme.<sup>57</sup> The Home Office have announced that further detailed guidelines on the new changes will be made available.<sup>58</sup>

- 7.4 **The NIHRC recommends that the Department of Health and health trusts ensure effective steps to identify and minimise procedural barriers to migrant people, regardless of immigration status. This includes introducing guidance for healthcare professionals on**

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<sup>52</sup> Email correspondence between Migrant Centre NI and NI Human Rights Commission, 25 November 2022.

<sup>53</sup> Equality Commission for NI & Pivotal, 'Impact of Brexit on Minority Ethnic and Migrant People in Northern Ireland (ECNI, 2023)', at 17.

<sup>54</sup> Independent Monitoring Authority, 'Press release: EU citizens may have been wrongfully charged for NHS treatment, IMA finds', 10 May 2023.

<sup>55</sup> Home Office, 'News release: EU Settlement Scheme enhancements confirmed', 17 July 2023.

<sup>56</sup> *R v Secretary of State for the Home Department* CO/4193/2021.

<sup>57</sup> Independent Monitoring Authority, 'Press release: Independent Monitoring Authority successful in landmark High Court challenge against Home Office', 21 December 2022.

<sup>58</sup> Home Office, 'News release: EU Settlement Scheme enhancements confirmed', 17 July 2023.

**providing effective access, strengthening communication between GP services and health trusts and ensuring that patients are not wrongly charged for services.**

## **8.0 Access to knowledge**

- 8.1 As the research suggests, a fundamental aspect of human rights is that they must be knowable by ordinary individuals.<sup>59</sup> However, the evidence presented in the research demonstrates that frontline health staff currently lack clear information about the applicable law for patients accessing healthcare post-Brexit. Furthermore, patients, NGOs and other third sector organisation working in the field find it “difficult or impossible” to access the relevant legal texts.<sup>60</sup>
- 8.2 The research also warned that while there were currently few known examples of people being refused access to healthcare, the lack of information for patients trying to access medical treatment under various circumstances may further act as an obstacle to that access. This was illustrated through examples of mismatched official health and social care guidance relating to cross-border Directive on healthcare (which has since expired), that had not been updated in a consistent manner.<sup>61</sup>
- 8.3 The Health & Social Care website reflects the decision to close the Health Services Republic of Ireland Reimbursement Scheme and provides information on the possible routes for NI patients to access healthcare outside of NI.<sup>62</sup> The website reflects access to healthcare under the Trade and Cooperation Agreement. At the same time, the Health Service Executive (ROI equivalent) website still references the Northern Ireland Planned Healthcare Scheme allowing ROI patients to access healthcare in NI and has not been updated to reflect legislative changes.
- 8.4 The Department of Health has since confirmed that the operational guidance for the Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015 is up to date.<sup>63</sup> However, the regulations themselves were last amended in 2022 and cannot be further

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<sup>59</sup> Article VII, Conference on Security and Cooperation in Europe, Final Act, Helsinki 1975.

<sup>60</sup> Tamara Hervey, ‘Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol’ (NIHRC, 2022), at 38.

<sup>61</sup> Ibid.

<sup>62</sup> <https://online.hscni.net/our-work/travelfortreatment/>

<sup>63</sup> Department of Health, ‘Operational Guidance - Health and Personal Social Services Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015’, (DoH, 2021).



updated due to a lack of functioning Executive.<sup>64</sup> The Department of Health is currently undertaking a policy review on access to healthcare in NI for different groups of people.<sup>65</sup>

- 8.5 The NIHRC will continue to raise these concerns with the relevant departments in NI, Ireland and the UK.
- 8.6 **The NIHRC recommends that the Department of Health and health trusts clarify the official publicly available legal texts and guidance relating to healthcare and bring these up to date as a matter of urgency. In the absence of a functioning NI Executive, the NIHRC further recommends that the UK Government ensure the legal texts relating to healthcare are updated as a matter of urgency.**
- 8.7 **The NIHRC recommends that accurate information on access to healthcare on the island of Ireland, including rights and obligations, is accessible and disseminated in plain language.**

## 9.0 Conclusion

The NIHRC will continue to engage with stakeholders, relevant UK and NI government departments and EU officials on the issues set out above. It will also discuss next steps to ensure access to healthcare in NI and in relation to cross-border and all-island facilities. Further consideration is also being given to other areas of concern set out in the research, including the supply of medicines and medical products to NI after Brexit, which may merit future investigation.<sup>66</sup>

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<sup>64</sup> Meeting between the NI Human Rights Commission and the Department of Health, 12 October 2022.

<sup>65</sup> Meeting between the NI Human Rights Commission and the Department of Health, 12 October 2022.

<sup>66</sup> Tamara Hervey, 'Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol' (NIHRC, 2022), at 33.

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