NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Article 2 of the Windsor Framework and the rights of refugees and persons seeking asylum

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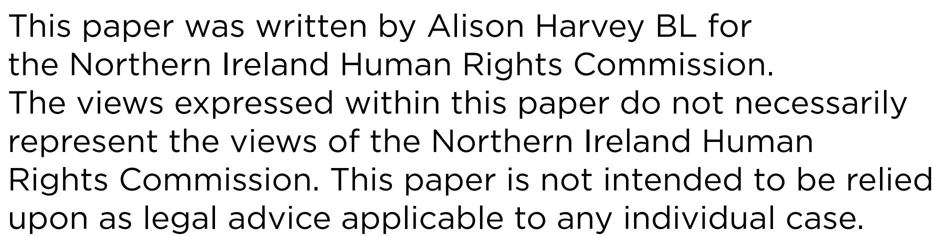
"It examines the scope of the rights protected and explains that **refugees and persons seeking international protection** form part of the cohort protected by these instruments."



This paper was written by Alison Harvey BL for the Northern Ireland Human Rights Commission. The views expressed within this paper do not necessarily represent the views of the Northern Ireland Human Rights Commission. This paper is not intended to be relied upon as legal advice applicable to any individual case.

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1. Introduction

Have the rights of persons seeking international protection been diminished by the UK's withdrawal from the European Union? What are the risks that they will they be (further) diminished? What, if anything, does Article 2 of what was 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 and is now the Windsor Framework[1], have to offer to them and to those seeking to protect them?

The second part of this paper provides an overview of the relevant provisions of the Belfast (Good Friday) Agreement and of Article 2 of the Windsor Framework. It examines the scope of the rights protected and explains that refugees and persons seeking international protection form part of the cohort protected by these instruments. The third part of this paper sets out the framework for the enforcement of, and promotion of respect for, the rights protected in Northern Ireland. The fourth part looks at how to identify whether, and if so to what extent, Article 2 of the Windsor Framework is engaged. The fifth part examines the rights protected under Common European Asylum System and identifies those to which the UK opted in. The impact of Brexit on the law on international protection in the UK is addressed in the sixth part.

The seventh, and final, part of the paper uses the Nationality and Borders Act 2022, the Temporary Protection Directive, and the Illegal Migration Act 2023 to illustrate the factors that must be taken into consideration when seeking to determine whether there has been a diminution of rights protected by the Belfast (Good Friday) Agreement, contrary to Article 2 of the Windsor Framework.

1 The Windsor Framework was formerly known as the Protocol on Ireland/Northern Ireland 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. The protection afforded by the Belfast (Good Friday) Agreement and Article 2 of the Windsor Framework and their implications for the protection of persons in need of international protection: which rights, and whose rights?

Do the Belfast (Good Friday) Agreement and Article 2 of the Windsor Framework offer means of protecting the rights of persons seeking and afforded international protection where those would otherwise be diminished as a result of Brexit?

The Northern Ireland Human Rights Commission and the Equality Commission of Northern Ireland have published a working paper: "The scope of Article 2(1) of the Ireland/Northern Ireland Protocol"[2], providing an initial assessment by the Commissions of Article 2, how it is engaged and what rights, safeguards and protections for equality of opportunity fall within its scope.

2.a The Belfast (Good Friday) Agreement

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.

2 December 2022. See https://nihrc.org/uploads/NIHRC-and-ECNI-Scope-of-Article-2-Working-Paper-1.pdf [accessed 29 April 2023].

"[E]veryone in the community", given the contents of this part of the agreement, is broader than persons of Northern Ireland. It is acknowledged in paragraph 8 of 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?*[3] that the commitment applies to everyone within the jurisdiction, not only to citizens and the government has not disputed before the courts that it extends to asylum-seekers and refugees before the courts[4]. The Irish government makes promises in respect of human rights to those within its jurisdiction, while at least some of the provisions on victims of violence appear to encompass all victims, wherever in the world they may be. But nothing suggests that it extends to persons outside Northern Ireland with no connection to the island of Ireland. See further the Northern Ireland Human Rights Commission and the Equality Commission of Northern Ireland working paper: "The scope of Article 2(1) of the Ireland/Northern Ireland Protocol"[5] and the discussion in 2.c below.

Outside chapter 6 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

3 7 August 2020 available at https://www.gov.uk/government/publications/protocol-on-irelandnorthern-ireland-article-2 and 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].

4 See *In the matter of an application by Aman Angesom for Judicial Review* (Case Ref. 22/006236), referenced in the April 2023 Northern Ireland Human Rights Commission submission to Joint Committee on Human Rights Inquiry on Illegal Migration Bill (HC 1241 HL Paper 208 of session 2022-2023) at paragraph 2.17.

5 *Ibid.*, paragraph 3.10.

the Human Rights Act 1998 at that time. Ireland went on to enact the European Convention on Human Rights Act 2003.

As to equality of opportunity, the Belfast (Good Friday) Agreement makes provision at paragraph 5(e) of part 1 for an Equality Commission to monitor a statutory obligation to promote equality of opportunity in "specified areas". Paragraph 3 of chapter 6 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".

Persons in need of international protection 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 refugees or persons in need of protection when seeking to rely on the commitment to non-diminution in the context of equality of opportunity.

2.b The Windsor Framework

Article 2 *Rights of individuals*: of the Windsor Framework 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) At 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 Windsor Framework in domestic law.

Article 2 refers to the entirety of part 6 of the Belfast (Good Friday) Agreement, with its many references to human rights. It is given effect in UK domestic law by section 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.

Article 2(1) of the Windsor Framework 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 Windsor Framework 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?*[6] explains the "future facing" element of the commitment thus:

6 *Op.cit.*

> 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.
>
> […]
>
> 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[7].

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 1 must, however, 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 equality directives listed in Annex 1 to persons under immigration control is the subject of my companion paper which I do not repeat here. I describe in that paper how the line of cases starting with *Jyske 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 are 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 treaties[8].

2.c Which rights of persons seeking and/or granted international protection fall within the scope of the Belfast (Good Friday) Agreement?

A society founded upon the principles of "the protection and vindication of the human rights of all" is one which must grapple with the effects of immigration control on all. 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 mechanisms of control have the potential

7 See the discussions in paragraphs 4.9 to 4.15 of the working paper: "The scope of Article 2(1) of the Ireland/Northern Ireland Protocol", op.cit.

8 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.

to affect the lives of all, for example, 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 Windsor Framework is concerned with "rights, safeguards or equality of opportunity", thus, like the Belfast (Good Friday) Agreement, it makes a promise to the community as a whole as to how people will be treated. The immigration status of a refugee, beneficiary of international protection or person seeking international protection and the question of whether they arrived before or after Brexit do not lessen their status as part of that community.

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 remit[9] on its website[10] 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 chapter 6 *Rights, Safeguards and Equality of Opportunity* of the Agreement are not limited to those enumerated in paragraph 1 : the words "in particular" preface the list which is thus indicative and not exhaustive.[11] The commitment is to "the mutual respect, the civil rights and the religious liberties of everyone in the community".

There is no agreed definitive list of the rights included with the Rights, Safeguards and Equality of Opportunity part of the Belfast (Good Friday) Agreement and there is scope for thoughtful and courteous academic debate on the question. The Northern Ireland Human Rights Commission and the Northern Ireland's Equality Commission's working paper: "The scope of Article 2(1) of the Ireland/Northern Ireland Protocol"[12] states that:

A definitive interpretation of Protocol Article 2 is not possible at this stage, as it will ultimately be subject to the determination of the courts and the

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

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

11 See the working paper: "The scope of Article 2(1) of the Ireland/Northern Ireland Protocol", *op.cit.* at 2.9.

12 *Op.cit.*

oversight bodies established by the UK-EU Withdrawal Agreement.[13] 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 case law. The Commissions anticipate in the working paper[14] that the rights protected could be held to include:

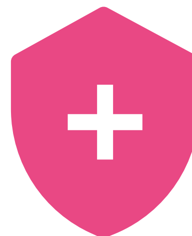
- Those rights protected the European Convention on Human Rights;
- Those set out in paragraph one of chapter 6 of the Belfast (Good Friday) Agreement;
- Rights not to be discriminated against and to equality of opportunity in both public and private sectors including on grounds of age, disability and sexual orientation;
- The full range of international human rights standards ratified by the UK.

While paragraph 1 of chapter 6 of the Belfast (Good Friday) Agreement 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". Persons seeking asylum and refugees are thus encompassed within the protection afforded by chapter 6. In Appendix 1 to the working paper: "The scope of Article 2(1) of the Ireland/Northern Ireland Protocol"[16] the Northern Ireland Human Rights Commission and the Equality Commission of Northern Ireland anticipate that rights underpinned by relevant EU law will be found to include rights included in a wide range of directives and regulations

2.d Summary

The European Convention on Human Rights, as a human rights treaty, protects the rights and freedoms of everyone within the jurisdiction of the High Contacting Parties[15]. 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.

In the field of international protection, "within the jurisdiction" is a limitation. Under the Refugee Convention the right to seek asylum in a State arises once a person is on the territory of that State.



Persons seeking asylum and refugees are encompassed within the protection afforded by chapter 6 of the Belfast (Good) Friday Agreement

13 *Op.cit*, paragraph 1.4.

14 *Op.cit.*

15 Article 1.

16 *Op.cit.*

on asylum and refugees covering matters such as reception conditions, including access to healthcare, the education of minors, and family unity in reception accommodation, detention, including conditions designed to meet special needs, access to, and content of, procedures and protection to be afforded and protection of the best interests of the child.[17]

That persons under immigration control, including those seeking internal protection, refugees and other beneficiaries of international protection, are within the scope of chapter 6 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 the proportionate restriction of rights: whether under the rubric of "economic well-being"[18] or "protecting of the rights and freedoms of others".

The implications of this analysis for persons seeking international protection, refugees and other beneficiaries of international protection requires detailed analysis of EU legislation and is considered below.

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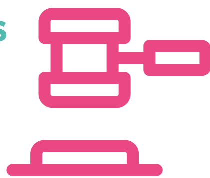

3. Protecting Rights

Before looking in further detail at the application of Article 2, it is useful to recall the framework for the protection of human rights in Northern Ireland.

3.a Functions of the Northern Ireland Human Rights Commission

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

> 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, both in response to requests and of its own motion (s 69(3)). Sub-section 69(7) requires the Commission to promote understanding and awareness of the importance of human rights in Northern

17 Discussed further in sections four and seven below.

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

Ireland, and to that end it may commission research such as this paper or undertake educational activities (s 69(7)).

Sections 78A - 78E of the Northern Ireland Act 1998, inserted by the European Union (Withdrawal Agreement) Act 2020 (c. 1)[19], require the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland to monitor implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland[20], and to promote understanding and awareness of the provision.[21] The Commissions may, to that end, bring judicial review proceedings for "breach (or potential future breach)" of Article 2(1).[22]

The Northern Ireland Human Rights 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, it cooperates with the Irish Human Rights and Equality Commission.

3.b 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 Windsor Framework 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)(c)). 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)).

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 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:

19 Section 42(7), and Schedule 3, paragraph 7 (with s. 38(3)).

20 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ CI 384/1 (WA).

21 Northern Ireland Act 1998, section 69 (1) and section 78A, as amended by European Union (Withdrawal Agreement) Act 2020, schedule 3.

22 Northern Ireland Act 1998, section 78C, as amended by European Union (Withdrawal Agreement) Act 2020, schedule 3.

(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.

Restrictions on legislative competence in section 6(2) of the Northern Ireland Act have been further amended to include reference to compatibility with Article 2 of the Protocol (now Windsor Framework). In the *Society for the Protection of the Unborn Child (SPUC)* case [2023] NICA 35, the Society challenged the Abortion (Northern Ireland) Regulations 2021. The fifth ground of challenge was that insofar as the regulations are intended to facilitate the implementation of the Abortion (Northern Ireland) Regulations 2020 made under the Northern Ireland (Executive Formation etc) Act 2019, which permit abortion on the ground of disability, they are *ultra vires* by reason of Article 2(1). The court held [para 54] that to establish a breach of Article 2 it was necessary to show that:

(I) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged;
(II) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020;
(III) That Northern Ireland law was underpinned by EU law;
(IV) That underpinning has been removed, in whole or in part, following withdrawal from the EU;
(V) This has resulted in a diminution in enjoyment of this right; and
(VI) This diminution would not have occurred had the UK remained in the EU.

The court found that multiple elements of the test were not satisfied in the case before it, including because a right included in the relevant part of the Belfast (Good Friday) Agreement was not engaged [paragraph 56], disability discrimination and the provision of abortion is not a matter within EU competence [paragraph 58], any diminution of rights (which it doubted), did not result from withdrawal from the European Union [paragraph 60].

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 competence[23].

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

23 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.

4. 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?*[24]states :

> 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.

What of the directly effective provisions of the directives of the asylum acquis 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.

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 persons seeking international protection and refugees and other beneficiaries of international protection.

24 7 August 2020, available at https://www.gov.uk/government/publications/protocol-on-irelandnorthern-ireland-article-2 [accessed 27 February 2021].

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 it[25].

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.

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.

5. The EU and asylum: What rights does the Common European Asylum System protect?

The Common European Asylum system comprises legislative instruments and practical cooperation currently organised around three main pillars[26]:

- efficient asylum and return procedures,
- solidarity and fair share of responsibility and
- strengthened partnerships with third countries.

As the names of these suggest the system is as much about dealing with those who claim protection but are found not to be in need of it as with providing protection. Much of the system is concerned with "border management".

The rights protected by the **Common European Asylum System** and described above can be grouped into:

25 A long line of tort cases refers running from *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] QB 428. In criminal law see *R v White* [1910] 2 KB 124. 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].

26 See European Commission, 'Common European Asylum System', available at https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system_en [accessed 1 March 2022].

1. Substantive rights to international protection: rights of persons on the territory to apply for, and to be given, protection and the content of the protection granted;

2. Procedural protection for persons on the territory in the handling of their claims for international protection, and related matters such as the determination of their age, including special protection for unaccompanied minors and survivors of torture.

3. Rights to certain standards of treatment while a claim for asylum is being considered: for example to food and shelter, to protection from arbitrary detention, including special protection for unaccompanied minors and survivors of torture

4. Some rights to family reunion with persons on the territory, including nationals, refugees, and persons seeking asylum.

The UK participated in the European Asylum Support Office, now the European Union Agency for Asylum[27] which provides operational and technical assistance to Member States. It participated in the Asylum, Migration and Integration Fund which was largely concerned with the management of "migration flows". It did not participate in the European Border and Coast Guard Agency (Frontex) but cooperated with it [28]. It participated in EUNAVFOR MED (Operation Sophia). It participated in the Immigration Liaison Officers network which allowed immigration officers from EU States to be posted in third countries.

The UK participated in a number of the readmission agreements with third countries providing for the readmission of those countries' own nationals who do not have a lawful basis of residence in the EU. The UK had asserted that its opt-in arrangements applied to some of the international agreements negotiated by the EU that underpin these readmission agreements but the Court of Justice of the EU was not persuaded[29]. The UK opted out of the Emergency Relocation Mechanism set up in solidarity with Italy and Greece, who were receiving numbers of persons seeking asylum disproportionate to the numbers claiming in other EU Member States.

EU work on asylum extends beyond these specialist agencies; for example the European Agency for Fundamental Rights (FRA) also does work in the areas of immigration and asylum.

5.a EU Legislation

The UK opted into the Temporary Protection Directive (2001/55/EC), the original Asylum Reception Directive (2003/9/EC), Qualification Directive (2004/83/EC), Asylum Procedures Directive (2005/85/EC), and the Dublin Convention and successor Regulations,

the latest of which is *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one*

27 See https://euaa.europa.eu/about-us/what-we-do [accessed 1 March 2022].

28 See https://fra.europa.eu/en/themes/asylum-migration-and-borders [accessed 5 March 2022].

29 See case 377/12, *European Commission v the Council of the European Union* (the Philippines case), Judgment 11 June 2014. See HL European Union Committee, The UK's opt-in Protocol: implications of the Government's approach (9th Report, Session 2014–15, HL Paper 136).

of the Member States by a third-country national or a stateless person (recast), known as the Dublin III Regulation.

The UK did not opt into the recast asylum directives, although obligations under parts of them were imported by its opt-in to Dublin III. All references in this paper are to the original directives, which bound the UK, unless expressly stated.

The UK did not participate in the Returns Directive 2003/86/EC or the Family Reunification Directive (92006/83/EC), both of which cover migrants and refugees, the latter making special provision for refugees, for example in Article 12 which prohibits states from imposing minimum residence or financial requirements on family reunification applications by refugees.

Ireland opted into the Qualification, Procedures, and Temporary Protection Directives but, like the UK, did not opt into the recast Directives. It did not opt into the original Reception Conditions Directive, but did opt in to the recast version (Directive 2013/33/EU). Ireland is party to the Dublin III Regulation.

The **Temporary Protection Directive,** long thought to be a dead letter, was activated as part of the EU's response to the war in Ukraine[30]. It is an exceptional measure to provide immediate and temporary protection to displaced persons (nationals, refugees and stateless persons with discretion to offer temporary protection to other residents) by diverting them from mainstream asylum procedures. The Directive obliges all EU Member states to provide minimum protection, including a residence permit for up to three years, access to employment, accommodation, benefits, health and education. It contains a "solidarity mechanism" whereby States can volunteer financial support to the States hosting the largest number of persons in need of protection, or agree, with the consent of the person concerned, to accept persons who have sought temporary protection in another State.

The **Reception Conditions Directive** sets standards for reception conditions such as housing, food, clothing, and access to health care, education or employment and makes special provision for children. It touches on the detention of persons seeking asylum. It gives limited guarantees as to freedom of movement, family reunion, access to education and employment, accommodation, and minimum standards of support and health care. It provides for information about, and communication with, legal advisors, rather than right to legal advice.

The **Qualification Directive** provides the EU law gloss on Article 1(A) of the Refugee Convention, read with its 1967 Protocol, the grounds for recognising a refugee, and makes provision as to the status granted, based on Articles 2 to 34 of the Convention. It also deals with protection, called "subsidiary protection" in the European Union and "humanitarian protection" in the UK, for those who would face breaches of their human rights on return, although they do not qualify for recognition as refugees. In Chapter 7 "Content of International Protection" it guarantees recognised refugees and those granted international protection, protection from refoulement, access to information about their status in a language they are likely to understand, support for family unity, residence permits, travel documents, access to employment, in the case of refugees under the same conditions as nationals, but with scope

30 On 3 March 2022 see EU agrees to grant temporary protection to those fleeing war in Ukraine https://ec.europa.eu/migrant-integration/news/eu-agrees-grant-temporary-protection-those-fleeing-war-ukraine_en [accessed 3 March 2022].

to impose additional restrictions on the beneficiaries of subsidiary protection. It provides for access to education, for minors on the same terms as nationals, for adults on the same terms as third country nationals legally resident. The Directive gives refugees access to benefits and health care on the same terms as nationals, but allows limits on such access by beneficiaries of subsidiary protection. It provides for unaccompanied minor refugees and beneficiaries of subsidiary protection to be provided with legal guardians and for efforts to be made to trace their families where this can be done safely. It provides for refugees and beneficiaries of international protection to have access to accommodation and to enjoy rights of free movement on the same terms as nationals lawfully resident. It provides for access to integration programmes and for support for those who wish to repatriate.

The **Asylum Procedures Directive** makes provision for the procedures to determine a claim for asylum, inclining in the cases of children and survivors of torture. It provides a right of access to asylum procedures, albeit that a person can be required to claim at designated place. It deals, briefly, with detention.

The **Dublin III Regulation** apportions responsibility for persons seeking asylum between Member States. Persons seeking international protection can be sent back to the first EU State they entered. Certain persons, such as minors, can move from the first EU State they entered to join family members, including persons seeking asylum. Dublin III provides for support with interpretation and translation in asylum procedures. It provides procedural guarantees, dealing with, for example, the conditions of a personal interview. It provides a right to access to legal representation in asylum procedures, but not to free legal representation. It makes special provision for unaccompanied minors and touches on age assessment. It provides that a claim for asylum, without more, cannot be the reason for detaining a person. It deals with data protection and with the role of European Asylum Support Office [31]. It also deals with concepts such as a "safe third country" and "safe country of origin", which have been addressed, with effect post Brexit, in the Immigration Rules[32].

These are the key instruments in the European asylum acquis. It is striking reading them how much latitude is afforded Member States and how heavily the guarantees are caveated.

The Dublin III Regulation was heavily dependent for its operation on *Regulation (EU) No 603/2013* (EURODAC Regulation).[33] This regulation governs a database of fingerprints to which law enforcement and immigration authorities across the EU have access. While used in criminal investigation it is also used to underpin Dublin Regulation transfers.

In March 2019, on the eve of Brexit, the UK filed formal notification with the registry of the EU Council that it would

31 Now the European Union Agency for Asylum

32 Home Office, Policy Paper: Statement of changes to the Immigration Rules HC 1043, 10 December 2020, amending HC 395.

33 'Regulation (EU) 603/2013' of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast)

opt in to the new Eurodac system. The UK then pursued maintaining access to EURODAC[34], although not to Dublin III arrangements, in the Brexit negations, but eventually abandoned this position. European instruments on asylum extend far beyond the key instruments listed above. The UK participated in all the following:

- Council Decision of 4 March 1996 on an alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis (96/198/JHA);
- Council Decision of 26 June 1997 on monitoring the implementation of instruments adopted concerning asylum (97/420/JHA);
- Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national;
- Council Decision of 5 October 2006 on the establishment of a mutual information mechanism concerning Member States' measures in the areas of asylum and immigration (2006/688/EC);
- Commission Decision of 29 November 2007 implementing Decision No 573/2007/EC of the European Parliament and of the Council as regards the adoption of the strategic guidelines 2008 to 2013 (2007/815/EC);
- Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office;
- Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national;
- Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC.

Within the EU, oversight of these instruments is provided by the Court of Justice of the European Union as well as the European Commission, and European Parliament.

34 Home Office response to the Lords EU Home Affairs Sub-Committee's Report on Brexit: refugee protection and asylum policy, 48th report of session 2017-2019, HL Paper 428, 16 October 2020.

Asylum seekers, refugees and stateless persons are also beneficiaries of measures for social security coordination, as set out in Article 48 of the Treaty on the Functioning of the European Union, Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council[35].

Social security coordination is dealt with in Part Two of the Agreement on the Withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community, Citizens Rights, in Title 3 *Coordination of Social Security Systems*[36]. Title 3 includes among the beneficiaries of the agreement reached, stateless persons and refugees residing in a Member State or in the United Kingdom. They benefit along with nationals from provisions preserving entitlements to benefits derived from reliance on and aggregation of periods of insurance, employment, self-employment or residence, in accordance with Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. The refugees and stateless persons benefiting are those residing in the UK with an entitlement on 31 December 2020, the end of the transition period and their family members, and who have continued to fulfil the conditions of entitlement since that time. For as long as the conditions of entitlement are fulfilled, entitlements continue.

See the discussion at part 7 below of which rights under all these measures may be protected by Article 2 of the Windsor Framework.

5.b Relationship with the Refugee Convention and the European Convention on Human Rights

The EU asylum acquis takes as its starting point the 1951 UN Convention relating to the status of refugees and its 1967 Protocol, and the European Convention on Human Rights.

The Refugee Convention sets standards for the definition of a refugee and for the rights to be afforded refugees. European States have interpreted its obligations as to the content of international protection as applying to persons once they are recognised as refugees and have set separate standards relating to persons seeking asylum, a group not dealt with separately under the Convention. The Convention does not contain detailed procedural protection and here it supplemented by the EU instruments.

As to the definition of a refugee, the second paragraph of the preamble to the Qualification Directive described the Common European Asylum System as:

> based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of

35 These are in addition to the reciprocal arrangements between Ireland and the UK which make provision for refugees, see the Convention on social security between the government of the United Kingdom of Great Britain and Northern Ireland and the government of Ireland, brought into force by The Social Security (Ireland) Order 2019 SI 2019/622; the Convention on social security between the government of the United Kingdom of Great Britain and Northern Ireland and the government of Ireland. The Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning the Common Travel Area and associated reciprocal rights and Privileges and the Convention on social security between the government of the United Kingdom of Great Britain and Northern Ireland and the government of Ireland, see the Social Security (Ireland) Order 2007, SI 2007/2122. The more favourable provisions prevail.

36 See Article 30.

> 28 July 1951 (Geneva Convention), as supplemented by the New York Protocol of 31 January 1967 (Protocol), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.[37]

The UK courts have considered what happens when the Qualification Directive appears to set lower standards than the Convention. In *Januzi*, decided prior to the deadline for implementation of the Qualification Directive, the House of Lords considered Article 8(1) and (2) of the Directive and observed:

> This is an important instrument, because it is binding on member states of the European Union who could not, consistently with their obligations under the Convention, have bound themselves to observe a standard lower than it required.[38]

Only eight days after the deadline for the implementation of the Qualification Directive, the House of Lords gave judgment in the cases of *K and Fornah.*[39] The cases involved the interpretation of the meaning of "a particular social group", persecution for membership of which, along with race, religion, nationality and political opinion, can be a reason for recognising a person as a refugee. Article 10(1)(d) of the Directive states:

> (d) a group shall be considered to form a particular social group where in particular:
>
> - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
>
> - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

The additional requirement that the group be perceived as different was not in line with UNHCR's position, set out at the time in the UNHCR *Guidelines on international protection*[40]*,* and UNHCR had criticised its inclusion in the Directive, saying that the two grounds should be alternative rather than cumulative[41]. The UK had been urged[42] not to transpose the word "and" but to use "or", which would have been in line with the leading UK cases on the definition of a particular social group,

37 See also the 8th paragraph of the Preamble which states "It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention…", the 16th paragraph describing the Directive as "guiding" Member States in their application of the Convention and the 17th which refers again to Article 1, as does, for example, Article 9 of the text of the Directive.

38 *Januzi (FC) et ors v Secretary of State for the Home Department* [2006] UKHL 5, at paragraph 17.

39 *Secretary of State for the Home Department v K, Fornah v Secretary of State for the Home Department* [2006] UKHL 46

40 *"Membership of a particular social group" within the context of Art. 1 A para. 2 of the Refugee Convention and/or its 1967 Protocol* HCR/GIP/02/02 7 May 2002.

41 UNHCR *Annotated Comments on the 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* January 2005.

42 See ILPA *Response to Home Office Consultation on the Implementation of the Refugee Definition Directive* August 2006. This also describes the 31 July 2006 meeting at the Home Office where the author of this paper, as ILPA's representative, among others argued against "and".

most notably the House of Lords own decision in *Shah and Islam*[43]

The UK had given effect to the Qualification Directive by enacting Regulation 1(2) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006[44], and the Statement of Changes to the Immigration Rules[45]. It had transposed the offending "and" but identified[46] the tension between the text of the Directive and UK caselaw. The proposed solution was to replicate the wording of Article 10 and then set out its interpretation the Asylum Policy Instructions. The Asylum Policy Instruction on *Assessing the Claim,* published the day before judgment was handed down in K *& Fornah* provided:

> Although the Qualification Regulations require decision makers to look for evidence of a common immutable characteristic and recognition of the group by surrounding society, in general this will not mean it is harder for an applicant to establish he/she is a member of a particular social group. [...] Even if an immutable characteristic shared by a group is not externally obvious (e.g., being gay), the group will quickly become recognised as a distinct group within society if, for example, the State authorities take steps to ban homosexual activity.

The House of Lords took a less convoluted approach. Lord Bingham, giving the leading judgment, set out the text of Article 10(1)(d) and also made reference to the Directive's expressly permitting Member States to apply standards more favourable to the applicant than the standards laid down[47]. He said:

> Read literally, this provision is in no way inconsistent with the trend of international authority...If, however, this article were interpreted as meaning that a social group should only be recognised as a particular social group for the purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than that laid down by international authority.

He cited the UNHCR *Comments* on the Article[48]. The principles of purposive interpretation are applied to read the Directive in a manner consistent with international law and with authority.

There was no dissent from this in the other (concurring) judgments and Lord Brown expressed his assent in terms[49]. This created a situation where EU law could raise standards of protection in the UK above those set out in the Refugee Convention, but could not diminish them.

43 Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals) [1999] UKHL 20.

44 SI 2006/2525.

45 Secretary of State for the Home Department, 'Statement of changes to the Immigration Rules' Cm 6918, September 2006.

46 *Op. cit*. Para 5.20.

47 Secretary of State for the Home Department v K, Fornah v Secretary of State for the Home Department [2006] UKHL 46, at paragraph 16. The reference to "standards more favourable" is a reference to Article 3 of the Directive, which qualifies this approach by a reference to those more favourable standards not being incompatible with the aims of the Directive.

48 *Op. cit.,* note 2.

49 Paragraph 118 of the judgment.

As to the European Convention on Human Rights, its protection against refoulement has emerged through caselaw (starting with *Soering v UK*[50] and thus it provides for the bare requirement of non-refoulement and is silent as to the protection to be granted to those who cannot be returned, save insofar as that can be inferred from other rights under the Convention. In *Limbuela*[51]it was held that where a person is awaiting a determination of a claim for international protection and thus cannot be expected to leave the UK, it would be a breach of Article 3, the prohibition on torture, inhuman and degrading treatment or punishment, to deny them food and basic sustenance. The same must apply to a person following determination of their claim if they cannot be returned. Provisions for the content of subsidiary protection in the EU Directives go beyond Convention rights.

6. The Common European Asylum System in UK law after Brexit

No agreement was reached on asylum policy in the Trade and Cooperation Agreement. Sections 2 to 7 of the European Union (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020, make provision for the retention of EU law in domestic law until it is modified by subsequent legislation. Sections 2-7 cover EU-derived domestic legislation, including legislation that implements EU directives[52], direct EU law such as regulations and provisions of directives having direct effect, and certain rights and powers available under section 2(1) of the European Communities Act 1972[53]. Retained EU law is divided into that which can be modified by secondary legislation ("minor" EU law) and that which requires primary legislation ("primary") EU law. Primary EU law cannot be struck down if it is incompatible with rights under the European Convention on Human Rights, but only declared incompatible with it[54].

Directly effective provisions of the Qualification, Procedures, and Reception Directives formed part of retained EU law, although most provisions of those instruments had been implemented in the UK by secondary legislation.

Insofar as it is not, or ceases to be, the case that domestic law fully implements a 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 constitutes a complete legal obligation, being clear, precise and unconditional[55]. The matter of whether a provision has direct effect is for the courts, ultimately the Court of Justice of the European Union.

50 ECtHR, 7 July 1989, Series A no. 161.

51 *R (Adam, Tesema and Limbuela)* v SSHD [2005] UKHL 66

52 2018 Act s 2.

53 2018 Act s 4.

54 See ILPA' s Jack Williams's 28 December 2020 "Retained EU law: a guide for the perplexed https://eurelationslaw.com/blog/retained-eu-law-a-guide-for-the-perplexed [accessed 12 March 2022].

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

Article 2 of the Windsor Framework is relevant where rights of refugees and persons seeking international protection have not been retained or cease to be retained in future. Article 2 protects against the diminution of rights, safeguards and equality of opportunity as a result of withdrawal of the UK from the EU and thus comes into play where a right, safeguard or where equality of opportunity has not been, or is no longer, retained.

The recitals to Directives help to explain the purpose and intent behind their provisions and can be used as an interpretative tool to assist in resolving ambiguities 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 question"[56].

While the Immigration and Social Security Coordination Act 2020 made substantial changes to UK immigration law, and the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 (SI 2019/745) cut a swathe through asylum law that would otherwise have been retained, the UK's Nationality and Borders Act 2022 was the first instrument to make changes to retained asylum law in primary legislation, the only vehicle by which "primary" as opposed to "minor" EU law can be modified. The 2019 regulations extend to Northern Ireland as do all provisions of the Act modifying legislation that extends to Northern Ireland. Directly effective provisions of directives are treated as primary EU law for the purposes of modification or repeal[57].

Paragraph 54 of, and Paragraph 3 in Part 2 of Schedule 1 to the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 (SI 2019/745) revoked the Eurodac regulation and the Dublin III Regulation and predecessor instruments. Three provisions of the Eurodac Regulation were saved in relation to data obtained from Eurodac by the UK before the regulations came into force.

Paragraph 55 of the 2019 regulations revoked any rights, powers, liabilities, obligations, restrictions, remedies and procedures which derived from precursors to Dublin III[58].

Paragraph 54 of, and Paragraph 3 in Part 2 of Schedule 1 to, the 2019 regulations revoked Council Decisions 96/198/JHA; 97/420/JHA; 2006/688/EC; Commission Regulation (EC) No 1560/2003;

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

57 EU (Withdrawal) Act 2018 s 7.

58 The Dublin Convention (97/C 254/01), the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway – declarations; (c)the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland; (d)the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention; (e)the Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland; (f) the Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland; (g)the Protocol to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway.

Commission Decision 2007/815/EC; Regulation No 439/2010, Commission Implementing Regulation (EU) No 118/2014 and Regulation (EU) No 516/2014.

Paragraph 55 of the 2019 regulations revoked the Displaced Persons (Temporary Protection) Regulations 2005 which give effect to the Temporary Protection Directive in UK law.

Paragraph 56 of the 2019 regulations revoked the Transfer for Determination of an Application for International Protection (Detention) (Significant Risk of Absconding Criteria) Regulations 2017[59]. These placed limits on the circumstances in which a person subject to the Dublin Regulation could be detained, and were passed subsequent to, and as a consequence of, the judgment of the Court of Justice of the European Union in *Policie R, Krajské editelství policie Ústeckého kraje, odbor cizinecké policie v Al Chodor* (Case C-528/15) [2017] 4 WLR 125 and of the Supreme Court in *R (on the application of Hemmati and others) (AP) (Respondents) v Secretary of State for the Home Department* [2019] UKSC 56 in which the Supreme Court held that the Home Office was not entitled to detain persons for removal under the Dublin III Regulation because of the failure, until 15 March 2017, to set out in law the requirements for such detention[60].

Legal certainty is at the heart of respect for the rule of law. Lord Bingham in his book, The Rule of Law,[61] 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*[62] 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

Lack of legal certainty and the inability of those affected by the law on asylum to know what the law is because they (and their lawyers) are struggling to identify (and to find) that which has been retained, are a result of the UK's leaving the European Union.

59 SI 2017/405.

60 See R*(Hemmati and others) v Secretary of State for the Home Department* [2018] EWCA Civ 2122

61 Tom Bingham (Penguin, 2011).

62 COM/2019/163 final. 3 April 2019

7. Has there been a diminution of rights of persons seeking and granted international protection after Brexit?

This final section works through each paragraph of the relevant chapter of the Belfast (Good Friday) Agreement considering the protection afforded by Article 2 of the Windsor Framework then uses two case studies to explore whether there has been a diminution of rights under either the Nationality and Borders Act 2022 or the Illegal Migration Act 2023.

7.a. Which rights of persons seeking and/or granted international protection might be diminished by the UK's leaving the EU?

7.a.i Rights under paragraph 1 of chapter 6 of the Belfast (Good Friday) Agreement

Rights of refugees and persons seeking international protection to free political thought, freedom and expression of religion; to pursue democratically national and political aspirations; and to seek constitutional change by peaceful and legitimate means are protected under EU law by general protection afforded to all within the jurisdiction, not by measures specific to persons seeking or granted international protection.

It might be thought that these rights of refugees and persons seeking international protection are uncontroversial and not in doubt. But Part 2 of the Borders, Citizenship and Immigration Act 2009 envisaged a form of leave "probationary citizenship leave" prior to becoming a British citizen during which a person had to earn their citizenship. The Guardian newspaper reported thus, the exchange with the then Minister for Immigration, Phil Woolas MP, which took place on Radio 4's "Today" radio news programme:

> At the weekend stories attributed to government sources suggested that immigrants who took part in anti-war demonstrations could jeopardise their chances of qualifying for citizenship.
>
> Asked about this on BBC Radio 4's Today programme, Woolas said: "We think it's right to say if we are asking the new citizen, as incidentally other countries around the world do, to have an oath of allegiance to that country, that it's right to try to define in some objective terms what that means. And clearly an acceptance of the democratic rule of law and the principle behind that we think is important and we think it's fair to ask that."
>
> But, when it was pointed out that demonstrating was not illegal, Woolas suggested that an applicant could also lose points not just for breaking the law – but also for engaging in certain activities that were legal.
>
> Sarah Montague, the presenter, asked: "Are you effectively saying to people who want to have a British passport, 'You can have one, and when you've got

> one you can demonstrate as much as you like, but until then don't'?"
>
> Woolas replied: "In essence, yes. In essence we are saying that the test that applies to the citizen should be broader than the test that applies to the person who wants to be a citizen. I think that's a fair point of view, to say that if you want to come to our country and settle, you should show that adherence."

Happily, section 9 *Requirements for naturalisation etc* of the Nationality and Borders Act 2022 removed all provisions making reference to probationary citizenship (sections 39 to 40 and relevant parts of s 41) from the 2009 Act[63] although the acquisition of citizenship is the subject of sections 31 to 35 of the Illegal Migration Act which presents not hurdles to surmount, but, subject to the human rights' proviso in s 36, impregnable barriers.

The right freely to choose one's place of residence is relevant to persons in need of international protection, particularly in the period pre recognition. Section 13 of the Nationality and Borders Act 2022 *Accommodation for asylum-seekers etc* builds on provisions in the Nationality, Immigration and Asylum Act 2002, never put into effect, for accommodation centres for persons seeking asylum. Section 30 of the 2002 Act empowers the Secretary of State to impose curfews on those in the centres. Section 26 of that Act envisages the provision of support on a no choice basis.

When one looks at the Reception Directive 2003/9/EC[64], the version by which the UK was bound as a member of the EU, however, all this is permissible under it. Article 7 provides:

> Article 7
> Residence and freedom of movement
>
> 1. Asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.
>
> 2. Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application.
>
> 3. When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.
>
> 4. Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national legislation.
>
> 5. Member States shall provide for the possibility of granting applicants temporary permission to leave the place of residence mentioned in paragraphs 2 and 4 and/or the assigned area mentioned in paragraph 1. Decisions

63 Section 9(3) with effect from 28 June 2022 for provisions specified in SI 2022/590 regulation 2 of, and Schedule 1 paragraph 8 to, the 2022 Act, subject to transitional and saving provisions specified in SI 2022/590 regulation 3 of, and Schedule 2 paragraph 3, of the 2022 Act.

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

shall be taken individually, objectively and impartially and reasons shall be given if they are negative.
The applicant shall not require permission to keep appointments with authorities and courts if his or her appearance is necessary.

6. Member States shall require applicants to inform the competent authorities of their current address and notify any change of address to such authorities as soon as possible.

Article 7 of the recast directive (2013/33)[65] is in similar terms.

Article 14 is also relevant, for example with its guarantees that, at 14(3) "Member States shall ensure, if appropriate, that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or by custom." Any separation of families, for example by the confining of certain members to accommodation centres, could be argued to be a violation of the right freely to choose one's place of residence.

Article 17 of the Reception Directive provides that Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers and also that education may be provided in the centres.

Thus, rights of persons seeking asylum to freedom of movement are not well protected under EU law.

Reception Directive Article 14(3): Member States shall ensure, if appropriate, that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them

Rights to documentation protected under Article 6 of the Reception Directive are arguably relevant to rights to freedom of residence, as they attest to a person's being lawfully in the territory and thus protect them from arbitrary detention.

Equality provisions merit consideration in the context of residence. In *R (DMA) v The Secretary of State for the Home Department* (Rev 1) [2020] EWHC 3416 (Admin) the Home Office was found to have failed to monitor its private contractors who provided housing to persons seeking asylum, resulting in lengthy delays in the provision of appropriate, or in some cases any, accommodation for disabled people.

Article 32 of the Qualification Directive 2004/83/EC[66] provides for recognised refugees and beneficiaries of subsidiary protection to have freedom of movement within the country on the terms are applicable to third country nations legally resident, rather than nationals. The UK currently treats refugees and beneficiaries of humanitarian protection in the same way as nationals.

As to the right to the right to equal opportunity in all social and economic activity, it is well established that discrimination involves not only a distinction between two groups, but a distinction that cannot be justified. In debates on the Bill which became

65 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

66 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.

the Nationality and Borders Act 2022, the government initially failed to muster adequate justification for denying persons seeking asylum and their adult dependants the right to work to persuade the House of Lords. The result was Clause 13 of HL Bill 187, *Changes to the Immigration Act 1971*, inserted as a result of a government defeat, which provided for persons seeking asylum to be given permission to work when a decision at first instance, or to treat a second claim as a "fresh claim" for asylum, had not been taken within six months and that that permission remain in force until their claim was finally determined. The clause provided that the terms on which persons seeking asylum could work should be no less favourable than those afforded recognised refugees in the UK. It was voted out at ping pong and did not make it into the Act.

a bar on access to the labour market would represent a diminution of rights under EU law

Article 11 of the Reception Directive requires member States to grant persons seeking asylum access to their labour market if a decision on an initial claim for asylum has not been taken within a year, provided that the delay in making the decision cannot be attributed to the person seeking protection. It allows Member States to decide the conditions for granting access to the labour market for the applicant. Member States are permitted to give priority to EEA nationals and to legally resident third-country nationals. Article 11 requires that permission to work continue through the appeals process until a negative decision on an appeal is notified. For litigation in Ireland on the point see *N.H.V. & anor -v- Minister for Justice and Equality* [2017] IESC 35.

Thus the House of Lords' amendment that led to the inclusion of Clause 13 in HL bill 187 aimed to make more inclusive provision than does EU law, but a bar on access to the labour market would represent a diminution of rights under EU law. The restrictive system the UK currently operates under paragraphs 360 – 360E of the Immigration Rules, whereby persons seeking asylum may work only in shortage occupations as declared and defined, is not prohibited by EU law, and indeed was introduced to comply with the Reception Directive[67]. Persons seeking asylum could endeavour to argue under UK law that the difference in treatment from other third country nationals is contrary to guarantees of equality in domestic law but would have to demonstrate that the differential treatment could not be justified.

Article 26 of the Qualification Directive provides for recognised refugees' rights of access to the labour market on the same terms as nationals but allows additional constraints to be placed on access to the labour market for beneficiaries of humanitarian protection. UK law, which affords equal rights to refugees and beneficiaries of human rain protection, is thus more inclusive than is mandated by EU law.

See further the discussion of the *Jyske Finans* case above as to the protection afforded by EU equality law in access to employment.

As to freedom from sectarian harassment, the term 'sectarian' in Northern Ireland is generally used to refer to political and religious differences between communities there and is unlikely that harassment toward refugees and persons seeking protection as such would be described as "sectarian".

67 HC 395 of 1993-4 as amended). See Asylum seekers: the permission to work policy, HC library briefing paper 1908 of 21 January 2021.

As to the right of women to free and equal political participation, Article 17 of the Reception Directive requires States to take into account:

> 1. [...] the specific situation of vulnerable persons such as [...] pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care.

Article 20(3) of the Qualification Directive is in identical terms. The Procedures Directive makes no reference to women or to gender. The sole reference to women in Dublin III is to the exchange of health data prior to a transfer. There is no reference in it to gender. Thus, it is to general EU law rather than specific provisions for persons seeking asylum and refugees that it is necessary to look in considering the protection of the rights of women.

7.a.ii Rights under paragraph 2 of Chapter 6 of the Belfast (Good Friday) Agreement

Paragraph 2 of chapter 6, Rights, Safeguards and Equality of Opportunity, of the Belfast (Good Friday) Agreement is concerned with the European Convention on Human Rights, as well as the prospect of "additional" rights.

Paragraph 2 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 2 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 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"[68].

The paper *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?* [69] 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 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 2 is concerned to ensure that all within the scope of the Agreement enjoy the protection of the European Convention on Human Rights.

68 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].

69 *op.cit.*

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?* paper [70] also 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.

In the working paper "The scope of Article 2(1) of the Ireland/Northern Ireland Protocol" the Northern Ireland Human Rights Commission and the Equality Commission of Northern Ireland record that:

> The Commissions are adopting a working assumption that the non-diminution commitment in Protocol 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 Protocol Article 2. [71]

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:

> 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 of the judgment.

This ruling is in opposition to 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, and further appears contrary to the express protection of Refugee Convention standards in the asylum *acquis*.

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

70 *op.cit.*

71 *op.cit.*, paragraph 3.4.

Union it is necessary to find those rights protected in chapter 6 if the non-diminution provision is to bite on them.

Rights protected in the European Convention on Human Rights of particular relevance for persons seeking international protection are:

The right to life (Article 2);
The right to be free from torture, inhuman or degrading treatment or punishment (Article 3);
The right to be free from slavery servitude and forced labour (Article 4);
The right to liberty (Article 5);
The right to private and family life (Article 8).

All these articles are relevant both to the question of how a person is treated in the UK and to whether they can be sent out of the UK.

For persons seeking or granted international protection, rights under Article 3, the right not to be subject to torture, inhuman or degrading treatment or punishment, are relevant both to the conditions in which they are accommodated, and the support provided to them, and to the circumstances in which they are deprived of their liberty under Immigration Act powers. The rights protected by Article 3 include positive obligations[72]. The UK has repeatedly been found to have breached the rights under Article 3 of mentally ill persons in immigration detention[73].

As to detention more generally, the Procedures Directive provides only at Article 18 *Detention* that:

> 1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.
>
> 2. Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.

Dublin III gives greater attention to detention. Recital 20 provides:

> (20) The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection. Detention should be for as short a period as possible and subject to the principles of necessity and proportionality. In particular, the detention of applicants must be in accordance with Article 31 of the Geneva Convention. The procedures provided for under this Regulation in respect of a detained person should be applied as a matter of priority, within the shortest possible deadlines. As regards the general guarantees governing detention, as well as detention conditions, where appropriate, Member States should apply the provisions of Directive 2013/33/EU also to persons detained on the basis of this Regulation.

Thus, the requirements of Directive 2013/33/EU, the recast reception directive, are imported, but only in respect of those facing a Dublin transfer. The recast Reception Directive contains much stronger provisions on detention than those in the original instruments. Of the *acquis* Recital 13 to Directive 2013/33/

72 *X and others v Bulgaria,* application no. 22457/16), Grand Chamber 2 February 2021.

73 See for example *S v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin), *BA v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin), *HA (Nigeria) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin), *D v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) *and S v Secretary of State for the Home Department* [2014] EWHC 50 (Admin).

EU provides that applicants "may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention". Recital 16 requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible and that detention does not exceed the time reasonably needed to complete the relevant procedures. Recital 18 provides that applicants who are in detention should be treated with full respect for human dignity. Substantive guarantees as to detention are found in Article 8.

Rights under Article 8 of the European Convention on Human Rights, rights to private and family life, are also relevant. Dublin III makes provision for family reunification. Recital 14 to Dublin III provides:

> (14) In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union, respect for family life should be a primary consideration of Member States when applying this Regulation.

Recitals 15 and 16 emphasise family unity.

Dublin III is often thought of as being focused on pushing persons back to the place where they first entered the EU, but it is also concerned with reuniting them with family in a single Member State.

Absent the protection of Dublin III there is no formal mechanism for persons seeking asylum in the UK to be reunited with family members in other States.

Article 8 of Dublin III provides for unaccompanied minors to be reunited with immediate family members or siblings who are "legally present" in a State. Or, where it is in their best interests, with relatives legally present who have the capacity to take care of them.

Article 9 of Dublin III provides for persons seeking asylum to be reunited with family members who are beneficiaries of international protection and Articles 10 and 11 for them to be reunited with family members who are seeking international protection, if the family members wish to be reunited. There are no provisions in Dublin III for adults to be reunited with family members who are not beneficiaries of international protection or seeking such protection. Family members are defined in Article 2 of Dublin III.

Article 15 of the Temporary Protection Directive makes provision for family members benefiting from temporary protection in different Member States to be reunited. As described, no provision is made for family reunion with persons who are not themselves beneficiaries of international protection. Article 29 of the Temporary Protection Directive provides that persons who have been excluded from the benefit of family reunification by a Member State shall be entitled to mount a legal challenge. Family members are defined in Article 15 of the Temporary Protection Directive.

The Reception Directive provides at Article 8 that member States shall take appropriate measures to maintain as far as possible family unity of members of a family within their territory seeking international protection, if this is what members of the family want. It provides at Article 19 for unaccompanied minors to be placed with relatives.

The focus of the Qualification Directive is family unity of refugees with family members in the State affording protection: it contains no right to be joined by family

members not already present. The UK did not opt into the Family Reunification Directive (92006/83/EC) which makes special provision for refugees.

Section 12 *Differential Treatment of Refugees* of the Nationality and Borders Act 2022 provides for lesser or no rights to family reunion, i.e. with family members not already present in the State, to be afforded refugees who did not come to the United Kingdom directly from a country or territory where their life or freedom was threatened in the sense of Article 1 of the Refugee Convention and/or did not present themselves without delay to the authorities on arrival. These reasons for denying family reunion are not present in EU law but given that there is no special protection for family reunion for recognised refugees in EU law as it applied to the UK and given the UK's opt out of the Family Reunification Directive, it is more likely that a successful challenge could be brought relying on Article 8 of the European Convention on Human Rights read with Article 14 therein, prohibiting discrimination in areas covered by Convention on the grounds of any other status.

Section 29 *Removal of asylum-seeker to safe third country* of the Nationality and Borders Act 2022, and Schedule 4 to the Act of the same name, provide for removal to a country outside the UK, whether or not the person removed is a national of that country. This has the potential to impact rights to private and family life under Article 8 of the European Convention on Human Rights.

Insofar as persons seeking asylum have fled slavery, servitude or forced labour, or become subject to it in the course of their flight or at destination in the UK, rights under Article 4 are relevant, see my companion paper on trafficking.[74]

Article 6 of the European Convention on Human Rights, the right to a fair trial, has been held to apply only in cases of criminal and civil law, and thus not to public law immigration proceedings. It may be relevant to, for example, claims by a person seeking protection in respect of accommodation, but not to the claim for asylum itself. (*Maaouia v France* 39652/98 [2000] ECHR 455 (5 October 2000). It would thus appear that to argue that the procedural rights of those seeking asylum are protected from diminution by Article 2 of the Windsor Framework, it is necessary to look at the consequences of the reduction in procedural protection, for example for human rights, rather than the loss of procedural protection *per se*.

The UK moved swiftly in the Nationality and Borders Act 2022 to reduce procedural protection for persons seeking asylum. Thus, section 16 *Asylum claims by persons with connection to safe third State: inadmissibility* provides for claims to be declared inadmissible not only where a person has been granted protection in another State, or made a claim for protection in that State, but where they could have made a clam for protection in that State.

The notes to Statement of Changes in Immigration Rules HC 1043, which filled the gap prior to the enactment of primary legislation, stated that the rules that implement Dublin III allowed claims to be treated as inadmissible only if the asylum applicant is accepted for readmission by the third country through which they have travelled or have a connection. The rules provided for applicants for international protection to be treated as

74 Human Trafficking and Article 2 of the Ireland/Northern Ireland Protocol, Alison Harvey, Northern Ireland Human Rights Commission, March 2022, available at https://nihrc.org/publication/detail/human-trafficking-and-article-2-of-the-ireland-northern-ireland-protocol [accessed 30 April 2023].

inadmissible based solely on whether they have passed through one or more safe countries to come to the UK as a matter of choice, and permitted the government to pursue avenues for removal of a person seeking asylum not only to the particular third countries through which they have travelled, but to any "safe" third country that may agree to receive them. This undercuts the protection afforded by Article 7 of the Procedures Directive which provides for a right to remain in the Member State pending the completion of the examination of the claim for asylum save where another "safe" State accepted responsibility, including under Dublin III.

The obvious reason for moving these measures from the Immigration Rules to primary legislation was to seek to immunise them from challenges under human rights legislation. The measures were expressly identified as paving the way for "offshore processing": sending persons to other countries for the consideration of their claim to be granted protection in the UK, as is done by Australia which sends persons seeking asylum to Nauru, where they are deprived of their liberty, sometimes for years. On 13 April 2022 the UK Government signed the Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement to strengthen shared international commitments on the protection of refugees and migrants[75] and in late May and early June 2022 made the first decisions to remove persons seeking asylum to Rwanda. The decisions were challenged the litigation is ongoing at the time of writing[76]. Meanwhile on 7 March 2023 the government presented to parliament the Illegal Migration Bill, which envisages offshore processing as the norm, rather than the exception, albeit that the logistics of this have yet to be addressed.

The Northern Ireland Human Rights Commission set out in its *Response to the UK Joint Committee on Human Rights' Call for Evidence on the Human Rights of Asylum Seekers in the UK* that the Procedures Directive protects the applicant's right to "be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision" and that the Procedures Directive, which sets minimum standards for the procedures for granting and withdrawing refugee status, falls within scope of Protocol Article 2[77]. In its *Submission to the Joint Committee on Human Rights Inquiry on Illegal Migration Bill*[78] the Commission criticised the government's failure to address compliance with Windsor Framework Article 2 in its Human Rights' memorandum to the Bill[79]. It recommended that the Secretary of State consider and detail her analysis of the compliance of the duty in the Bill to make arrangements for removal and other provisions of the Bill relating to the inadmissibility of protection claims, with Article 2 of the Windsor Framework.

75 See https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r [accessed 30 April 2023].

76 See *R(AAA (Syria) et ors) v Secretary of State for the Home Department*, UNHCR intervening [2022] EWHC 3230 (Admin) which also sets out a history of proposed removals.

77 Response of 19 December 2022, paragraph 3.7. Available at

78 April 2023.

79 *Op.cit.* paragraph 2.21. For the Human Rights Memorandum of 7 March 2023 see https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf [accessed 30 April 2023] There is now a second human rights' memorandum, of 25 April 2023. This does not address Article 2 either see https://publications.parliament.uk/pa/bills/cbill/58-03/0284/SuppECHRmemo.pdf [accessed 30 April 2023].

Section 19 of the Nationality and Borders Act 2022 *Asylum or human rights claim: damage to claimant's credibility* amends s 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (claimant's credibility) to mandate that a claimant's credibility is damaged in cases of late provision of evidence or actions not in good faith. Late provision of evidence may be a result of fear. The weight to be given evidence provided late is further addressed in section 26 *Late provision of evidence in asylum or human rights claim: weight.*

Under sections 20 to 25 on priority removal notices", which are not yet in force, persons liable to removal or deportation may be served with a "priority removal notice", failure to comply with which is deemed to damage their credibility and will result in their being subject to an expedited and truncated appeals process, with the jurisdiction of the Court of Appeal ousted, although judicial review remains available.

Appeal rights are restricted by the 2022 Act, for example section 28 *Claims certified as clearly unfounded: removal of right of appeal* removes both in-country and out-of-country rights of appeal, although not judicial review, for human rights and protection claims that are certified as clearly unfounded.

7.a.iii Rights under paragraph 3 of Chapter 6 of the Belfast (Good Friday) Agreement

Paragraph 3 of chapter 6, Rights, Safeguards and Equality of Opportunity, of the Belfast (Good Friday) Agreement 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.

Under Article 17 of the Reception Directive, the specific situation of *inter alia* disabled people, elderly persons and pregnant women must be taken into account in implementing the provisions of Chapter II of the Directive relating to material reception conditions and healthcare. Provision is made in Article 20(3) of the Qualification Directive for taking into account the specific situation of these persons in implementing Chapter VII of that Directive on the content of the protection granted. Disability and old age are relevant to provisions for family reunification under Article 16(1) of Dublin III and, to the transmission of information when a person is transferred under Article 31(1), which also makes reference, *inter alia*, to pregnancy. 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 Human Trafficking Directive.

As set out above, immigration status is not a freestanding ground under either paragraph 3 or s 75 of the Northern Ireland Act 1998.

7.a.iv Paragraph 4 of Chapter 6 of the Belfast (Good Friday) Agreement

Paragraph 4 of chapter 6 of the Belfast (Good Friday) Agreement 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.

7.a.v Reconciliation and Victims of Violence paragraphs 11 to 13 of Chapter 6 of the Belfast (Good Friday) Agreement

Although this part of the Belfast (Good Friday) Agreement focuses on 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.

Refugees and persons seeking asylum benefit on an equal footing with other victims of crime from the protection of the Victims Directive (2012/29/EU)

Refugees and persons seeking asylum benefit on an equal footing with other victims of crime from 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.

Article 1 of the Directive 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.

In considering these instruments it is necessary to take into account that paragraphs 11 – 13 of the Belfast (Good Friday) Agreement 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). This is of particular relevance in the context of

asylum reception conditions and detention of persons seeking asylum.

The Reception Directive provides at Article 17(1) for States to take into account the specific situation of persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence

in the national legislation implementing measures as to material reception conditions and health care. It caveats this at 17(2) with "2. Paragraph 1 shall apply only to persons found to have special needs after an individual evaluation of their situation."

Article 18 provides:

> 2. Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed.

Both these provisions thus provide specific protection for victims of violence as such.

Similar provision to that made in Article 17 of the Reception Directive is made in Article 20(3) of the Qualification Directive for taking into account the specific situation of persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence in implementing Chapter VII of that Directive on the content of the protection granted. Article 29(3) of the Qualification Directive provides that States shall provide, under the same eligibility conditions as nationals, adequate healthcare to beneficiaries of international protection who have special needs, including persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of inter alia torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict.

A history of torture, rape or other serious forms of psychological, physical or sexual violence is relevant to the transmission of information when a person is transferred under Article 31(1) of Dublin III. This is the only reference to victims of violence in Dublin III.

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 Human Trafficking Directive.

As set out above, immigration status is not a freestanding ground under either paragraph 3 of the Belfast (Good Friday) Agreement or s 75 of the Northern Ireland Act 1998.

The Temporary Protection Directive provides at Article 13 that Member States shall provide necessary medical or other assistance to persons enjoying temporary protection who have special needs, and includes reference to those who have undergone torture, rape or other serious forms of psychological, physical or sexual violence.

The Procedures Directive makes no special reference to victims of crimes of violence.

7.a.vi Economic, Social and Cultural Issues of Chapter 6 of the Belfast (Good Friday) Agreement

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 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.

The Reception Directive provides at Article 5 for information provided to persons seeking international protection about benefits, and the obligations with which they must comply relating to reception conditions, to be given "in writing and, as far as possible, in a language that the applicants may reasonably be supposed to understand", a fairly weak expression of the obligation.

Article 22 of the Qualification Directive requires States to provide persons recognised as being in need of international protection, as soon as possible after a protection status has been granted, with access to information, "in a language likely to be understood by them", on the rights and obligations relating to that status.

The Procedures Directive at Article 10(1)(a) requires that persons seeking international protection be informed "in a language which they may reasonably be supposed to understand" of the procedure to be followed, of their rights and obligations during the procedure, and of the possible consequences of not complying with their obligations and of not cooperating with the authorities. Article 10(1)(b) provides for persons seeking international protection to receive the services of an interpreter for submitting their case to the competent authorities "whenever necessary". Article 13 fleshes out these guarantees as they apply to the interview. Article 17(5)(a) makes special provision for persons required to undergo medical examinations in the course of age determination procedures, although it is phrased in terms of an obligation to unaccompanied minors, leaving hanging the obligations owed to those who are determined not to be under 18.

Recital 13 of Dublin III, the most developed instrument where language is concerned, refers to a person seeking protection having "the right to be informed of his/her legal position at decisive moments in the course of the procedure, in a language he/she can reasonably be supposed to understand" and Articles 10, 13, 17 and 27 give content to that obligation in particular situations and in relation to particular groups, such as unaccompanied minors.

The EU Charter provides:

> Article 18 Right to asylum
> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

Article 18 has not prevented the EU from operating, for example, "pushbacks" in the Mediterranean nor from implementing the EU-Turkey joint action plan of 29 November 2015[80] making the EU Turkey Statement of March 2016[81] which aimed to "end the irregular migration from Turkey to the EU" of persons seeking international protection.

80 See https://www.consilium.europa.eu/en/press/press-releases/2015/11/29/eu-turkey-meeting-statement/ [accessed 8 March 2022]

81 See https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ [accessed 8 March 2022]

Section 5(4) of the European Union (Withdrawal) Act 2018 provides that the Charter is not part of domestic law on or after Exit Day. That in itself is a diminution of rights: even if all the substantive rights contained in the Charter are to be found in other international instruments to which the UK is party few, if any, will have equally strong enforcement mechanisms. The Northern Ireland Human Rights Commission and the Equality Commission of Northern Ireland state in the working paper "The scope of Article 2(1) of the Ireland/Northern Ireland Protocol"[82] that in line with Article 4(4) and (5) of the Withdrawal Agreement, the interpretation and application of the rights protected by Article 2 must, as a minimum, conform with the body of Court of Justice of the European Union jurisprudence, including insofar as it relates to general principles and the EU Charter of Fundamental Rights, on 31 December 2020 and that any subsequent decisions of the Court of Justice of the European Union of relevance to Article 2, including insofar as it relates to general principles and the EU Charter of Fundamental Rights, should as a minimum be given due regard by judicial and administrative authorities.

The Nationality and Borders Act 2022 is the first primary legislation on asylum post Brexit and has power to displace retained EU law incompatible with it.

It is important to be aware that the UK did not opt into the recast instruments when considering whether the Act changes retained EU law. For example, section 35 *Article 1(A)(2): internal relocation* provides that in deciding whether a person can reasonably be expected to return to a safe place in the country fled, a decision maker "must disregard any technical obstacles relating to return to that part of that country." That mirrors the 2004 Qualification Directive but was omitted from the recast Directive (2011/95/EU), which the UK did not opt into. There is thus no diminution of protection in the UK as a result of Brexit.

The case studies below consider some examples of how UK standards post Brexit match up to EU law.

7.b Examining specific provisions for evidence of diminution of rights as a result of Brexit

7.b.i The Nationality and Borders Act 2002: definition of a refugee

The Explanatory Notes to the Bill that became the Nationality and Borders Act 2022 said:

> The UK's departure from the EU provides an opportunity to clearly define, in a unified source, some of the key elements of the Refugee Convention in UK domestic law.[83]

Nonetheless, the provisions of the Act generally stick to the definitions used in the 2006 regulations to give effect to and in EU law[84].

In section 5.b. above, the definition of "social group" was considered. The Act, in section 33 *Article 1(A)(2): reasons for persecution,* adopts the more restrictive language of EU law in terms of requiring both a characteristic that is innate or cannot, or should not, be changed and that the group be perceived as different

82 *Op. cit.* at 4.10.

83 Notes to HL Bill 82.

84 For details see UNHCR's UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22 of October 2021 https://www.unhcr.org/uk/615ff04d4.pdf [accessed 5 May 2023].

from the society surrounding it[85]. Lifting the language of EU law from the Refugee or Person in Need of International Protections (Qualification) Regulations 2006[86], originally passed to implement the Qualification Directive, makes binding the EU law definition in a way that the law did not, although it could have done, while the UK was a member of the EU. There is a fall in standards, but not as a result of Brexit: it could have been achieved pre-Brexit.

Generally, while leaving the EU may have prompted the UK to lift the definitions pertaining to its interpretation of Article 1(A) of the Refugee Convention into primary legislation, this could have been done so while the UK was a member of the EU. The Qualification Directive offered no greater protection as far as the definition of a social group is concerned, than that provided by section 33.

UNHCR nonetheless identified in the Nationality and Borders Bill some departures from standards for the content of international protection provided in EU law. Section 35 *Article 1(A)(2): internal relocation* imports the 'internal protection' provisions from the Qualification Directive. These relate to whether a person, persecuted in one part of the country fled, could reasonably be expected to find safety in another part. UNHCR identified that whereas the Directive which provides that EU Member States "may" determine that internal protection is available for an asylum-seeker,[87] section 35 requires decision makers to consider internal relocation[88].

7.b.ii Nationality and Borders Act: exclusion from protection

Section 38 *Article 33(2): particularly serious crime* amends s 72 of the Nationality, Immigration and Asylum Act 2002, a muddle of provisions in the Article 1(A) of the Refugee Convention providing for exclusion from recognition as a refugee, and provisions in Article 33(2) as to when a recognised refugee can be expelled from the country of protection for having committed a "particularly serious" crime. The same muddle is found in the Qualification Directive which bears the hallmarks of UK influence.

The effect of the amendments is to provide that those who have been convicted and sentenced to at least 12 months' imprisonment, are held to have been convicted of a "particularly serious crime". The section does not alter the ground for revocation of refugee status, which is that the person constitutes a danger to the community in the UK.

7.b.iii The Nationality and Borders Act 2022: content of protection granted

Section 12 *Differential Treatment of Refugees*, divides refugees into two groups, affording a lesser package of rights to those who entered the UK unlawfully[89]. If afforded protection, they get a new temporary protection status; must regularly be reassessed with a view to removal from the UK; have limited family reunion rights; and have no recourse to public funds except in cases of destitution. The effect of such measures has implications for the rights to rehabilitation afforded to minors who are victims of violence set out in Article 10(3) of the Reception Conditions Directive, whether they be refugees in their own right or the family members of refugees.

85 Qualification Directive, 2004/83/EC, Article 10(d).

86 See Explanatory Notes to HL Bill 82.

87 Directive 2004/83/EC, article 8(1).

88 See Explanatory Notes to HL Bill 82.

89 In force 28 June 2022 by S.I. 2022/590, regulations. 1(2), 2, Schedule. 1 paragraph 10 (with Schedule 2 paragraph 4(1)).

7.b.iv The Nationality and Borders Act 2022: safe countries of origin

Paragraphs 50 and 51 of the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 (SI 2019/745) revoked references to EU countries as safe countries of origin by virtue of EU membership although EU member States have been designated as safe countries of origin for the purposes of UK law in the Immigration Rules[90].

Section 15 of the 2022 Act *Asylum claims by EU nationals: inadmissibility* provides that claims from EU nationals be inadmissible save in closely defined exceptional circumstances. A consequence of this is that there is no right of appeal against the decision. Judicial review is still available to contend that exceptional circumstances do apply or that to refuse to admit the claim would breach human rights.

Section 15 reflects Protocol 24 (the Spanish Protocol) to the Treaty on European Union. That protocol provides that member states should be treated as "safe countries of origin" and accordingly their nationals should not, subject to its detailed provisions, be granted asylum by other member states. It was previously reflected in paragraphs 326E and 326F of the Immigration Rules (now deleted), which formed part of Part 11 ("Asylum") and were headed "Inadmissibility of EU asylum applications".

The measures proposed do not go beyond the Spanish Protocol and thus could have been enacted while the UK was part of the EU. The case of *ZV (Lithuania) v Secretary of State for the Home Department* [2021] EWCA Civ 1196 illustrates what is wrong with both UK and EU law rather than just UK law.

7.b.v Nationality and Borders Act 2022: age assessment

The special protections for refugee children that ran throughout the Common European Asylum System risk being impacted by changes to the procedure of age assessment in part 4 of the Act *Age assessments.* These sections give the government the power to make regulations as how to assess age. Section 50 *Age assessments: restrictions* subsection 50(6), and section 51 *Persons subject to immigration control: assessment for immigration purposes* at subsection 51(4) provide that the applicable standard of proof is the civil standard, without indicating on whom the burden falls[91]. Section 50 *Persons subject to immigration control: referral or assessment by local authority etc.* provides a power to compel a local authority to assess the age of a child, which could see such assessments become routine. Section 52 *Use of scientific methods in age assessments* 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

90 Statement of Changes in Immigration Rules HC 1043, amending HC 395.

91 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 NC 29-37 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].

purpose contrary to, for example the Euratom Regulation (2018/1046)[92]. Further, where a child refuses to consent to the medical intervention for determining their age, this must be taken into account as damaging their credibility. This is built on by s 58 of the Illegal Migration Act 2023 *Age assessments: power to make provision about refusal to consent to scientific measures.*

Despite the Euratom Regulation, the EU had not set its face against the use of ionising radiation to determine age. Article 17 of the Procedures Directive 2005/85/EC 5 permits the use of medical examinations to determine the age of unaccompanied minors seeking protection and focused on procedural guarantees. It provides "the decision to reject an application for asylum from an unaccompanied minor who refused to undergo this medical examination shall not be based solely on that refusal", thus it permits to be taken into account in assessing credibility. Article 25 of the recast Procedures Directive (2013/32/EU) is in similar terms. Just because the UK was not doing something prior to Brexit does not mean that it was prohibited from doing so by EU law.

7.b.vi Temporary protection

The Temporary Protection Directive, created after the war in Kosovo was thought by many to be a dead letter. In 2015, as many fled war in Syria, calls for it to be invoked fell on deaf ears[93]. Then suddenly it found new life as Europe faced another war very close to home: in Ukraine.

By the time that the Commission activated the Directive on 3 March 2022, the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 (2019/745) had revoked the regulations implementing the Directive in the UK: Displaced Persons (Temporary Protection) Regulations 2005 (SI 2005/2379) .

Under the Directive, it is for the European Commission to establish the presence in Europe of a "mass influx" of displaced persons such as to trigger the Directive, and to propose the beneficiaries. Article 3(1) of the Directive provides that a grant of protection under the Directive does not prejudge recognition as a refugee and Article 17(1) that persons enjoying temporary protection may apply for asylum at any time. Article 3(5) preserves the right of Member States to apply higher standards than those which it contains.

Those enjoying temporary protection in Member States are to be given residence permits for the duration of their stay and afforded at least the rights set out in the directive: to work, to accommodation, to heath care to education for children [94]. Special protection is provided for unaccompanied children[95].

Those to be admitted to the territory are to be given "every facility for obtaining

92 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012. See Nicholas Blake QC and Charlotte Kilroy, *In the matter of a proposed amendment to the Immigration Rules* (7 November 2007), Advice commissioned by the Children's Commissioner for England, accessible via https://www.lag.org.uk/article/203643/the-end-of-dental-x-rays-in-age-assessments [accessed 7 march 2022]. An opinion on the Commissioner Ionising Radiation (Medical Exposure) Regulations 2017 2017 No. 132 which gave effect to European Council Directive 2013/59/EURATOM

93 See Study on the Temporary Protection Directive Final report, Hanne Beirnes, Sheila Maas, Salvatore Petronella, Maurice van der Velden, January 2016, prepared for the European Commission.

94 Articles 12 to 154.

95 Article 16.

the necessary visas, including transit visas. Formalities must be reduced to a minimum because of the urgency of the situation. Visas should be free of charge or their cost reduced to a minimum"[96]. One can contrast the situation in the UK in which even the limited group of family members of British citizens and settled persons permitted to travel to the UK under the Ukraine Scheme must have entry clearance[97].

Member States must provide persons enjoying temporary protection with a document, in a language likely to be understood by them, in which the provisions relating to temporary protection, and which are relevant to them, are clearly set out[98] A Member State shall take back a person enjoying temporary protection on its territory if that said person remains on, or seeks to enter without authorisation onto, the territory of another Member State[99].

Provision is made for family reunion of those enjoying temporary protection in different States or those enjoying temporary protection with family members yet to enter the EU[100].

Provision is made for the circumstances in which temporary protection is needed and return is provided for[101], with provision that the enforced return of persons whose temporary protection has ended and who are not eligible for admission is conducted with due respect for human dignity[102] and that "compelling humanitarian reasons" militating against return is taken into account[103].

Article 29 of the Directive provides that persons who have been excluded from the benefit of temporary protection or family reunification by a Member State shall be entitled to mount a legal challenge in the Member State concerned.

There is however no express right of nationals or residents of a member State to be reunited with family members fleeing war or persecution under the Directive. With the example of Ukraine before us this omission now appears bizarre, albeit that the Family Reunification Directive (2003/86/EC), from which the UK had opted out, runs alongside it.

One group whose rights are arguably diminished by the Directive's not applying in the UK after Brexit are Ukrainians already in Northern Ireland, perhaps as workers, students or visitors. Another is that of Ukrainians seeking to reach the UK, but that group of beneficiaries cannot be defined with precision and is outside the jurisdiction. A third is those with connections to Ukraine in Northern Ireland, seeking to bring family and friends there. The first and the third group are within the scope of Article 2 of the Protocol the second do not appear to be so. Thus there is a potential breach of Article 2 in respect of the first and third group.

7.b.vii Illegal Migration Act 2023

The Illegal Migration Act directly addresses human rights protections in the context of asylum and is thus fertile terrain for identifying what protection Article 2 can offer in Northern Ireland compared to the rest of the UK.

96 Article 8(3).

97 See Home Office Ukraine Scheme, v. 4, 11 March 2022.

98 Article 9.

99 Article 11.

100 Article 15.

101 Articles 21 to 23.

102 Article 22(1).

103 Article 22(2).

The face of the Illegal Migration Bill as presented to parliament recorded that the government had been unable to make a statement of compatibility with the Convention rights[104]. The explanatory notes to the Bill stated[105] that the Bill is "capable of being applied compatibly with human rights". This is highly questionable for the reasons set out by the Northern Ireland Human Right Commission in *its Submission to the Joint Committee on Human Rights Inquiry on Illegal Migration Bill*[106] and in any event procedural protection to ensure that it is so applied is lacking.

Section 1 of the Act which extends to Northern Ireland[107] by section 1(5) disapplies section 3 of the Human Rights Act 1998. Section 3 requires courts "so far as it is possible to do so" to read and give effect to legislation in a way which is compatible with Convention rights. Section 3 is not a power to disregard the plain words of legislation, but a duty, where there are two possible meanings, to prefer that which is compatible with human rights.

Instead by section 1(5) the courts can be urged to construe the provision compatibly with the purpose of the Act, deterring unlawful immigration[108] This has the potential to lead to a diminution of rights in areas covered by the Bill which include removal, procedural protection, detention, the content of protection granted and age assessment, all areas addressed in the EU asylum *acquis*, as well as human trafficking.

Section 54, *Interim remedies* a late addition to the Bill, prohibits a court from granting an interim remedy has the effect of preventing or delaying, the removal of the person from the United Kingdom. Section 55 *Interim measures of the European Court of Human Rights* provides that when the European Court of Human Rights grants an interim measure under its rules of procedure (for example asking the UK not to remove someone until it has determined an application to it), the Minister has discretion to decide not to disapply the duty set out in section 2 *Duty to make arrangements for removal*. Section 2 imposes a duty on the Secretary of State to remove any person entering the UK unlawfully which, by section 2(5) includes any person who did not come directly to the UK from a country in which their life and liberty were threatened with "coming directly" interpreted literally. By section 5 *Disregard of Certain Claims, applications etc.* where a person meets the criteria in section 2 the Secretary of State must declare a 'protection claim' as defined[109], inadmissible[110].

Whether the Act is being applied compatibly with human rights is therefore within the gift of Ministers, rather than lack of compatibility being something that individuals can assert before the courts. This is at the very least a diminution of the procedural protection afforded by Article 2 read in the light of the EU asylum *acquis* in its turn read with the European Convention on Human Rights.

104 As defined in s 1(1) of the Human Rights Act 1998.

105 At paragraph 294.

106 *Op. cit.* April 2023. See also NIHRC Submission to the House of Lords on the Illegal Migration Bill, May 2023.

107 See Clause 65 Extent.

108 Section 1(1).

109 In s 82(2) of the Nationality, Immigration and Asylum Act 2002. See section 4 Unaccompanied children and power to provide for exceptions in that section.

110 Section 5(2).

The duty in section 2 to make arrangements for removal appears to be a deliberate attempt to reduce the substantive protections of the EU asylum *acquis* read with the European Convention on Human Rights. For example, Article 25 of the Procedures Directive sets out the criteria by which an application for asylum can be considered as inadmissible.

The Act envisages a situation where the government can remove a person despite the European Court of Human Rights, or a domestic court, being apprised of information suggesting that removal would breach the UK's obligations to respect human rights. Express prohibition on *refoulement* runs throughout the Procedures Directive.

In its submission to the Joint Committee on Human Rights on the Illegal Migration Bill, the Northern Ireland Human Rights Commission specifically recommended that the Committee ask the Secretary of State to consider and detail her analysis of the compliance of the Bill's provisions on detention and bail and access to judicial supervision of decisions on detention and bail with Article 2 of the Windsor Framework [111].

Section 11 *Powers of Detention* of the Bill creates new powers to detain pending consideration of removal and pending removal or release where an immigration officer suspects that a person is someone in respect of whom there is a duty to make arrangements for removal or where there would be such duty were the person not an unaccompanied minor. Protections against and limitations on detention for pregnant women[112], families[113], and unaccompanied children[114] are disapplied in respect of this new power of detention; instead, different provision is made for pregnant women and unaccompanied children within the section[115].

As discussed above, there is little provision in the directives of the original asylum *acquis* addressing detention but the duty to take into account the special situation of pregnant women and children runs throughout all reception procedures, whether involving detention or not[116].

There is thus potential for reliance on Article 2 to prevent a diminution in the protection of rights under Articles 3 (torture, inhuman and degrading treatment), 5 (liberty) and 8 (right to private and family life).

Section 13 *Powers to grant immigration bail* bars persons detained under the powers in section 11 from challenging the lawfulness of their detention before the courts save by applying for a writ of *habeas corpus* or being granted bail by the First-tier Tribunal (Immigration and Asylum Chamber) for the first 28 days of their detention under section 10 powers. Moreover, it bars judicial review challenges to detention during that period save where the Secretary of State or an immigration officer is alleged to have acted in bad faith or to have committed a fundamental breach of the principles of natural justice.

111 op.cit, paragraph 4.2. See also NIHRC Submission to the House of Lords on the Illegal Migration Bill, May 2023, see https://nihrc.org/publication/detail/submission-to-the-house-of-lords-on-the-illegal-migration-bill [accessed 28 October 2023].

112 Immigration Act 2016, s 60(8).

113 Immigration and Asylum Act 1999, s 147.

114 Schedule 2 to the Immigration Act 1971, at paragraph 18B.

115 Subsections 11(2)(d)-11(2)(k).

116 Article 17 of the Reception Directive.

Article 18(2) of the Procedures Directive provides that where a person is held in detention there shall be a possibility of speedy judicial review and thus Article 2 of the Windsor Framework can be relied upon to protect rights to liberty under Article 5 of the European Convention on Human Rights which would otherwise be diminished by the provisions.

That unlawful detention cannot be challenged by judicial review where the Secretary of State or an officer immigration officer has got the has got the facts, or the law, wrong creates clear potential for reliance on Article 2 to prevent a diminution in the protection of rights under Articles 3 (torture, inhuman and degrading treatment), 5 (liberty) and 8 (right to private and family life).

The Commission also drew particular attention to the requirement that "the best interests of the child shall be a primary consideration" when implementing relevant provisions set out in the Procedures Directive, the Qualification Directive, the Reception Directive and the Dublin III Regulation[117] to the extent that these standards were binding on the UK on 31 December 2020. All of these measures stipulate that "the best interests of the child shall be a primary consideration" when implementing relevant provisions[118] . The Commission recalled the requirement in Article 4 of the Withdrawal Agreement that that treaty be interpreted in line with EU norms. It invites the Joint Committee on Human Rights to ask the Secretary of State to consider and detail her analysis of the compliance of the provisions affecting children, including unaccompanied minors, with Article 2 of the Windsor Framework.

Finally the Commission recommended that the Joint Committee ask the Secretary of State to consider and detail her analysis of the compliance of the modern slavery provisions with Article 2 of the Windsor Framework. Some survivors of modern slavery and human trafficking will be seeking international protection.

7.c Summary

These examples demonstrate that it is necessary to look closely not only at the scope of Article 2 of the Windsor Framework but at the extent of protection provided by EU law both pre and post Brexit. Because the directives that form part of the asylum *acquis* have been recast, and only Ireland remains bound by the versions of the Qualification and Procedures directives relevant to Article 2 of the Windsor Framework, there is likely to be limited new jurisprudence from the Court of Justice of the European Union on these. Nonetheless, some decisions of the Court of Justice of the European Union on the recast directives will illuminate the meaning of both the original and recast directives, and jurisprudence on Dublin III, and possibly on the Temporary Protection Directive, is to be anticipated. EU instruments relevant to protection of persons seeking, and beneficiaries of, international protection extend far beyond the asylum *acquis*.

117 Articles 18, 19, Reception Directive; Article 17 Procedures Directive; Article 20, Qualification Directive; Article 6, Dublin III Regulation.

118 Articles 18, 19, Reception Directive; recitals and Article 17 Procedures Directive; recitals and Article 20, Qualification Directive; recitals and Article 6, Dublin III Regulation.

Notes

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