



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

**Submission to Joint Committee on Human  
Rights Inquiry on Illegal Migration Bill**

**April 2023**

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## 1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(1) of the Northern Ireland (NI) Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in NI. The NIHRC is also mandated, under section 78A(1) to monitor the implementation of Article 2(1) of the Windsor Framework,<sup>1</sup> to ensure there is no diminution of rights protected in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast (Good Friday) Agreement 1998 as a result of the UK's withdrawal from the EU. In accordance with these functions, the following evidence is submitted to the Joint Committee on Human Rights (Joint Committee) in response to its inquiry into the Illegal Migration Bill (the Bill).
- 1.2 This NIHRC welcomes the opportunity to respond to the Joint Committee's inquiry. In this response, the NIHRC does not address the full range of its concerns with each of the provisions due to time constraints. However, a comprehensive analysis of the Bill will be available in the coming weeks to inform upcoming Parliamentary stages.

## 2.0 General Comments

### Foundational human rights principles

- 2.1 Article 14 of the Universal Declaration of Human Rights states that, "everyone has the right to seek and enjoy in other countries asylum from persecution". The UN Refugee Convention 1951 (the Refugee Convention) builds on this to include the right not to be penalised for being in or entering a country without permission where this is necessary to seek and receive asylum.<sup>2</sup>
- 2.2 In terms of focusing on refugees, people seeking asylum and migrants that have arrived on boats, the UN Refugee Agency has observed that differential treatment determined by refugees and

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<sup>1</sup> The Windsor Framework was formerly known as the Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement and all references to the Protocol in this document have been updated to reflect this change. (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).

<sup>2</sup> Article 31, UN Refugee Convention 1951.

people seeking asylum mode of arrival into the UK is manifestly incompatible with the Refugee Convention.<sup>3</sup> It states that:

most people fleeing war and persecution are simply unable to access the required passports and visas. There are no safe and “legal” routes available to them. Denying them access to asylum on this basis undermines the very purpose for which the Refugee Convention was established.<sup>4</sup>

2.3 Thus, the UN Refugee Agency concludes that, in its current form, the Bill amounts to an asylum ban which is a clear breach of the Refugee Convention by “extinguishing the right to seek refugee protection in the UK for those who arrive irregularly, no matter how genuine and compelling their claim may be, and with no consideration of their individual circumstances”.<sup>5</sup>

2.4 The CoE Parliamentary Assembly has stated that:

...as a starting point, international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants need protection and are entitled to certain minimum human rights in order to live in a humane and dignified manner. These rights include certain basic civil and political rights and social and economic rights.<sup>6</sup>

2.5 The NIHRC shares the significant concern for the number of people who resort to dangerous Channel crossings to seek safety and protection in the UK. However, the NIHRC is gravely concerned by the current draft of the Bill and the general direction of recent developments that seek to diminish the rights of refugees, asylum seekers and migrants who arrive to the UK by irregular means.<sup>7</sup>

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<sup>3</sup> UN Refugee Agency, ‘Statement on UK Asylum Bill’. Available at: <https://www.unhcr.org/uk/news/press/2023/3/6407794e4/statement-on-uk-asylum-bill.html>.

<sup>4</sup> UN Refugee Agency, ‘Statement on UK Asylum Bill’. Available at: <https://www.unhcr.org/uk/news/press/2023/3/6407794e4/statement-on-uk-asylum-bill.html>.

<sup>5</sup> Ibid.

<sup>6</sup> Parliamentary Assembly ‘Resolution 1509 (2006) Human rights of irregular migrants’, 27 June 2006.

<sup>7</sup> See: Nationality and Borders Act 2022; Home Office, ‘Memorandum of Understanding (MoU) 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’, (Gov.UK, 2022); Home Office, ‘New Plan for Immigration’, (Gov.UK, 2022).

- 2.6 The UK Government has obligations under the international human rights framework to which it has committed. In accordance, refugees, asylum seekers and migrants are entitled to respect for their human rights and to receive minimum standards of treatment while in the UK, regardless of their motivation and mode of arrival. Yet, this Bill seeks to ignore that anyone who may be in need of protection should have the opportunity to have their claim fairly and comprehensively assessed. It also significantly hinders the ability to meaningfully challenge removal from the UK in most cases.
- 2.7 Unlike what is portrayed in the current draft of the Bill, human rights protection is not limited to migrants, including refugees and people seeking asylum, that are fleeing persecution or conflict. This approach frames certain groups of rights holders, in this case certain migrants, as less entitled to rights protection than others. Taking this divisive approach, by way of example, excludes from protection migrants attempting to reunite with their families, those affected by natural disasters or environmental degradation, those fleeing inhumane treatment such as forced labour, modern slavery and human trafficking. It also excludes migrants who leave their home country because they have limited or no access to social or economic rights, thereby facing poverty, destitution, or barriers to healthcare. Thus, the current draft of the Bill creates an implied hierarchy of rights-holders and adopts an unjustified blanket approach to particular groups, both of which are contrary to the foundational human rights principles of inalienability, universality and proportionality.
- 2.8 **The NIHRC recommends that the present Bill should be revised to ensure that the principles of inalienability, universality and proportionality are embedded throughout, including in the language used, to prevent the demonisation and unjustifiable denial of human rights protection to particular groups of migrants.**

### **Removal to a third country**

- 2.9 The way in which the current draft of the Bill proposes to remove criminalised refugees, people seeking asylum and migrants who arrive irregularly to a third country is also gravely concerning. This

could increase the risk that individuals are removed to places where they may experience serious human rights violations. The UK has obligations under Article 1 of the European Convention on Human Rights (ECHR) to “secure to everyone within their jurisdiction the rights and freedoms” contained within the ECHR. The European Court of Human Rights (ECtHR) has consistently held that the removal of migrants and people seeking asylum could engage ECHR Articles 2 (right to life) and 3 (freedom from torture, inhuman or degrading treatment) where substantial grounds have been shown for believing that the person in question, if deported, would face a “real risk” of being subjected to treatment contrary to Articles 2 or 3 in the destination country.<sup>8</sup>

- 2.10 International refugee protection law does not rule out the possibility of transfer to a third safe country if Refugee Convention rights will be respected there. However, in addition to being human rights compliant, from a practical perspective, transfer to a third country requires countries to co-operate together to share responsibility and allocate responsibility for determining asylum claims. However, the UK is not part of any formal agreement, and its bilateral arrangement with Rwanda does not meet the standards set out in the Refugee Convention and was considered by the UN Refugee Agency to be an abdication of international responsibility.<sup>9</sup>
- 2.11 Furthermore, it is unclear how the current Bill intends to increase the Home Office’s capacity to remove people in this regard. Despite increasing the number of refugees and people seeking asylum declared inadmissible to the UK asylum system, the Home Office retains responsibility for accommodation and support while each case is processed.
- 2.12 The UK Government’s focus should instead be on strengthening the UK’s asylum system, by improving case processing and reception conditions, and enhancing cooperation with other countries to expand safe pathways both in and out of the UK. This would accelerate the integration of individuals granted refugee status and

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<sup>8</sup> *Soering v UK* (1989) ECHR 17; *Al Saadoon and Mufdhi v UK* (2010) ECHR 279; *Othman (Abu Qatada) v UK* (2012) ECHR 817.

<sup>9</sup> UN Refugee Agency, ‘Press Release: UN Refugee Agency opposes plan to export asylum’, 14 April 2022; UN Refugee Agency, ‘UNCHR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers Under the UK-Rwanda Arrangement’ (UNCHR, 2022).

facilitate the swift return or transfer of those who are deemed to have no legal basis to stay.<sup>10</sup>

**2.13 The NIHRC recommends that the purpose and provisions of the current Bill require immediate and thorough reassessment, which should take place through meaningful engagement. The result should ensure that all refugees, people seeking asylum and migrants arriving to the UK are processed and accommodated in compliance with human rights obligations, with particular focus on if, when and how individuals are transferred to a third country.**

### **Compliance with the 'no diminution of rights' commitment in Article 2 of the Windsor Framework**

2.14 The NIHRC is considering compliance of the Bill with the UK Government's commitment under Article 2 of the Windsor Framework to ensure no diminution of protections in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast (Good Friday) Agreement 1998, as a result of the UK's withdrawal from the EU.

2.15 The NIHRC takes the view that the rights of asylum-seekers and refugees fall within the protection of the relevant chapter of the Belfast (Good Friday) Agreement and that therefore a number of EU standards, which were binding on the UK on 31 December 2020, remain binding in Northern Ireland.

2.16 The first section of this chapter of the Belfast (Good Friday) Agreement is entitled 'Human Rights' and opens with a general commitment to the "civil rights and religious liberties of everyone in the community". This is followed by a non-exhaustive list of rights "affirmed in particular".<sup>11</sup> Within this human rights section is the UK Government's commitment to the incorporation of the ECHR with direct access to the courts and remedies for breach. The breadth of rights and protections addressed is important in determining the range of EU laws relevant to, and within scope of, Windsor Framework Article 2. In summary, the chapter represents wide-

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<sup>10</sup> Ibid.

<sup>11</sup> The UK Government has also recognised that the rights, safeguard and equality of opportunity protections in the Belfast (Good Friday) Agreement are not limited to the "affirmed in particular" rights. See paragraph 9 of the NI Office, '[UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What does it Mean and How will it be Implemented?](#)' (NIO, 2020).

ranging acknowledgement of and commitment to civil, political, economic, social and cultural rights and equality of opportunity, anticipating further legislation to entrench and safeguard those rights.

2.17 The UK Government's 'Explainer' document on Windsor Framework Article 2 acknowledges that its protections apply to everyone who is "subject to the law in Northern Ireland".<sup>12</sup> Asylum-seekers are part of the community, subject to the law in NI and are therefore protected by the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement. In court proceedings ongoing at the time of writing, the Home Office has not disputed the argument that the protections of the relevant chapter of the Belfast (Good Friday) Agreement extend to asylum-seekers and refugees.<sup>13</sup>

2.18 Read in the context of the additional pledges on rights within this chapter, the general commitment of the Belfast (Good Friday) Agreement signatories to the range of rights referenced within the chapter must be understood as embracing, as a minimum, those rights set out in the ECHR.<sup>14</sup> In its Explainer the UK Government has confirmed that the "key rights and equality provisions in the [Belfast (Good Friday)] Agreement are supported by the ECHR". The Explainer further confirms that the UK Government acknowledges that "in NI, EU law, particularly on anti-discrimination, has formed an important part of the framework for delivering the guarantees on rights and equality set out in the [Belfast (Good Friday)] Agreement".<sup>15</sup> The Commissions are adopting a working assumption that the non-diminution commitment in Windsor Framework Article 2 encompasses the full range of rights set out in the ECHR, to the extent that they are underpinned by EU legal obligations in force on or before 31 December 2020. Put another way, the Commissions consider that

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<sup>12</sup> NI Office, '[UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What does it Mean and How will it be Implemented?](#)' (NIO, 2020), at para 8.

<sup>13</sup> *In the matter of an application by Aman Angesom for Judicial Review* (Case Ref. 22/006236)

<sup>14</sup> This relates to the scope of issues and EU law relevant to Article 2, rather than the question of whether Article 2 requires the UK to remain committed to the ECHR as considered in Social Change Initiative, '[Human Rights and Equality in Northern Ireland under the Protocol – A Practical Guide](#)' (SCI, 2021); Christopher McCrudden, '[Parliamentary Scrutiny of the Joint Committee and the Application of the Northern Ireland Protocol – Evidence to the House of Commons European Scrutiny Committee](#)' (ESC, 2020); and Sylvia De Mars, Aoife O'Donoghue, Colin Murray and Ben Warwick, '[Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement](#)' (2018).

<sup>15</sup> NI Office, '[UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What does it Mean and How will it be Implemented?](#)' (NIO, 2020), at para 3.



all EU law in force in NI on or before 31 December 2020 which underpins an ECHR right, falls within scope of the non-diminution commitment in Windsor Framework Article 2.

- 2.19 A number of ECHR rights are engaged by the Bill, bringing into scope relevant EU law as outlined below. Relevant ECHR rights include, for example, protections against slavery and forced labour (Article 4 ECHR), the right to liberty and security (Article 5 ECHR) and the right to a private and family life (Article 8 ECHR) as well as freedom from discrimination (Article 14 ECHR).
- 2.20 The NIHRC, along with the Equality Commission for NI, have identified the Reception Directive,<sup>16</sup> the Procedures Directive,<sup>17</sup> the Qualification Directive<sup>18</sup> and the Dublin III Regulation<sup>19</sup> as relevant to Windsor Framework Article 2. These measures address, for example, free movement, accommodation, detention including conditions designed to meet special needs, family unity, access to healthcare, the best interests of the child and education of minors. The Procedures Directive includes specific provisions on access to judicial review where an applicant for asylum is held in detention and a right to an effective remedy in respect of a decision to consider an application in admissible.<sup>20</sup> EU Directives on Victims and Combating Human Trafficking are also relevant.<sup>21</sup> A published appendix to the Commissions' working paper sets out relevant transposing legislation.<sup>22</sup>
- 2.21 Given this analysis, failure to address compliance with Windsor Framework Article 2 in the Human Rights memorandum to the Bill is

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<sup>16</sup> Directive 2003/9/EC, 'Council Directive laying down minimum standards for the reception of asylum seekers', 27 January 2003.

<sup>17</sup> Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', of 1 December 2005.

<sup>18</sup> Directive 2004/83/EC 'Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted' 29 April 2004.

<sup>19</sup> Regulation 2013/604/EU, 'Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person', 26 June 2013

<sup>20</sup> Article 18 and 39, Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', of 1 December 2005.

<sup>21</sup> Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012; Directive 2011/36/EU, 'EU Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.

<sup>22</sup> NIHRC and ECNI '[Table of EU Directives which underpin the Rights, Safeguards and Equality of Opportunity provisions included in the Belfast \(Good Friday\) Agreement chapter of the same name and implementing Domestic Legislation](#)' (NIHRC and ECNI, 2022)

a matter of concern.

**2.22 The NIHRC recommends that the Committee explore with the Secretary of State what steps she has taken to assure herself that the Bill complies with Article 2 of the Windsor Framework and that the Human Rights Memorandum to the Bill be amended to set out in detail an assessment of the compliance of the Bill with Article 2 of the Windsor Framework.**

### **Clause 1(5): Disapplication of section 3 of the Human Rights Act 1998**

2.23 Section 3 of the Human Rights Act 1998 requires UK courts and public authorities to read and give effect to legislation in a way that is compatible with the European Convention on Human Rights (ECHR) so far as it is possible to do so. The NIHRC is extremely concerned by clause 1(5) of the Bill which seeks to remove ECHR considerations from decision-making in respect of the extensive powers contained within the Bill.

2.24 The NIHRC has consistently highlighted that integrating human rights considerations into public sector decision-making leads to better outcomes.<sup>23</sup> However, throughout the Bill and Explanatory Notes, emphasis is placed on reducing the responsibility of government and public authorities to protect the rights of refugees, people seeking asylum and migrants who arrive to the UK irregularly. Clause 1(5) suggests a willingness to provide public authorities with more freedom to act in ways which are, potentially, incompatible with the UK's human rights obligations.

2.25 Further, if implemented, clause 1(5) would deny access to justice in the domestic courts for any human rights violations in respect of the Bill. While individuals may apply to the European Court of Human Rights (ECtHR), this creates additional barriers to those already facing significant disadvantage and such individuals may be prevented from accessing justice due to the financial costs and the

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<sup>23</sup> NI Human Rights Commission, 'Response to Public Consultation on the Home Office's New Plan for Immigration', (NIHRC, 2021); NI Human Rights Commission, 'Response to the consultation on Human Rights Act Reform: a Modern Bill of Rights', (NIHRC, 2022).

length of time taken by court proceedings.

2.26 Clause 1(5) appears to be informed by the same rationale which underpinned the UK Government's Bill of Rights Bill, that disapplying or repealing section 3 would ensure UK courts "can no longer alter legislation contrary to its ordinary meaning".<sup>24</sup> However, the Independent Review of the Human Rights Act found that section 3 was applied in a very limited number of cases, which strongly indicated that "the courts are not using section 3 to trespass on to the territory of the legislature".<sup>25</sup>

2.27 Even if section 3 was disapplied, senior courts are free to make a declaration of incompatibility under section 4 of the Human Rights Act. The Independent Review of the Human Rights Act found that where declarations of incompatibility have been made, the government and Parliament have in every case ultimately legislated to remedy the incompatibility.<sup>26</sup> This could place an additional and unnecessary legislative burden on government and Parliament.

**2.28 The NIHRC recommends that clause 1(5) of the current draft of the Bill is removed and that continued access to domestic courts for human rights violations is ensured.**

## 3.0 Duty to Make Arrangements for Removal

### **Clauses 4, 5, 15 and 21: Retrospective effect**

3.1 Clauses 4, 5, 15 and 21 of the current draft of the Bill propose that the duty to remove persons who arrive in the UK irregularly will apply to persons who arrived on or after 7 March 2023. This potentially engages Article 7 ECHR which provides that:

no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was

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<sup>24</sup> UK Parliament, 'Written Statement made on 22 June 2022: Introduction of the Bill of Rights'. Available at: <https://questions-statements.parliament.uk/written-statements/detail/2022-06-22/hcws129>.

<sup>25</sup> The Independent Human Rights Act Review, 2021. Available at: <https://publications.parliament.uk/pa/jt5802/jtselect/jtrights/89/8907.htm>

<sup>26</sup> Ibid.

committed.

3.2 Thus, Article 7 ECHR unconditionally prohibits the retrospective application of the criminal law where it is to an accused's disadvantage. The principle of non-retroactivity of criminal law applies both to the provisions defining the offence and to those setting the penalties incurred. The guarantees in Article 7 are absolute, with no derogation permissible under any circumstances.<sup>27</sup>

3.3 Further, the principle of non-retroactivity is infringed in cases of retroactive application of legislative provisions to offences committed before those provisions came into force. Therefore, it is prohibited to extend the scope of offences to acts which previously were not criminal offences.

**3.4 The NIHRC recommends that the retrospective application of the Bill is amended to take account of Article 7 ECHR and the principle of non-retroactivity.**

3.5 Clause 4(2) of the Bill provides that where a person meets the criteria in Clause 2 the Secretary of State must declare a 'protection claim' inadmissible. For example, Article 25 of the EU Procedures Directive sets out the criteria by which an application for asylum is considered as inadmissible.<sup>28</sup> The Commission will be reviewing Clause 4 and other relevant provisions of the Bill in light of EU Procedures Directive.

**3.6 The NIHRC recommends that the Committee ask the Secretary of State to consider and detail her analysis of the compliance of Clause 4 and other provisions of the Bill relating to the inadmissibility of protection claims with Article 2 of the Windsor Framework.**

## 4.0 Detention and bail

4.1 Further to the explanation above under general comments, the Commission advises that, as a consequence of Windsor Framework

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<sup>27</sup> Article 15(2), European Convention on Human Rights 1950.

<sup>28</sup> Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', of 1 December 2005.

Article 2, the EU Procedures Directive remains relevant for determining the minimum standard of rights required in Northern Ireland, to the extent that those measures were binding on the UK on 31 December 2020.<sup>29</sup> For example, Article 18 of the Directive provides that where an applicant is held in detention,<sup>30</sup> Member States shall ensure that there is a possibility of speedy judicial review and that no one should be held in detention for the sole reason that they are an asylum seeker. In addition, all EU law relevant to the UK-EU Withdrawal Agreement must be interpreted in line with EU norms which include the EU Charter of Fundamental Rights, including Article 18 on the right to asylum and Article 47 on the right to an effective remedy and to a fair trial. The Commission will be reviewing the Bill's provisions on detention, bail and access to judicial supervision of such decisions in light of these provisions.

**4.2 The NIHRC recommends that the Committee ask the Secretary of State to consider and detail her analysis of the compliance of the Bill's provisions on detention, bail and access to judicial supervision of such decisions with Article 2 of the Windsor Framework.**

## 5.0 Children

### Clause 3: Unaccompanied children

- 5.1 Article 3 of the UN Convention on the Rights of the Child (UN CRC) requires the child's best interests to be a primary consideration in all actions concerning them. Article 22 of the UN CRC explicitly requires States to ensure that the rights set out in the UN CRC extend, without exception, to refugee children and children seeking asylum.
- 5.2 Children who have become temporarily or permanently separated from their parents, relatives or caregivers are dependent on state authorities to uphold their rights. Of all refugees, people seeking asylum and migrants, unaccompanied children are among the most vulnerable to violence, abuse and exploitation.<sup>31</sup>

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

<sup>30</sup> See paragraph 3.8 and 3.9 in relation to admissibility of application for asylum.

<sup>31</sup> UNHCR, 'High Commissioner's Dialogue on Protection Challenges: Children on the Move' 28 November 2016, at paras 14 -18.

- 5.3 The UN Committee on the Rights of the Child emphasises that the “ultimate aim in addressing the fate of unaccompanied and separated children is to identify a durable solution that addresses all their protection needs”.<sup>32</sup> Determining a child’s best interests and seeking a durable solution depends on an assessment of the individual circumstances of that child.
- 5.4 The current draft of the Bill prevents children from making an asylum claim where they arrive to the UK irregularly. As a result, it denies such children the opportunity to seek protection and stability within the UK. As set out above, the Bill’s blanket policy in respect of people who arrive to the UK irregularly contravenes foundational principles of human rights and, in the context of children, further contravenes obligations under the UN CRC.
- 5.5 For the reasons detailed above in general comments, the Commission advises that, as a consequence of Windsor Framework Article 2, the Procedures Directive,<sup>33</sup> the Qualification Directive,<sup>34</sup> the Reception Directive<sup>35</sup> and the Dublin III Regulation,<sup>36</sup> remain relevant for determining minimum standards of rights required for asylum-seekers and refugees in NI, 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.<sup>37</sup> Moreover, all EU law relevant to the UK-EU Withdrawal Agreement must, under Article 4 of that Agreement be interpreted in line with EU norms which include the Charter of Fundamental Rights of the EU, Article 24 on the rights of the child being particularly relevant in this regard.

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<sup>32</sup> <sup>32</sup> CRC/GC/2005/6, UN Committee on the Rights of the Child, General Comment No.6 (2005) Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, at para 79.

<sup>33</sup> Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, of 1 December 2005.

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

<sup>35</sup> Directive 2003/9/EC, ‘Council Directive laying down minimum standards for the reception of asylum seekers’, 27 January 2003.

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

<sup>37</sup> Articles 18, 19, Reception Directive; Recitals and Article 17 Procedures Directive; Recitals and Article 20, Qualification Directive; Recitals and Article 6, Dublin III Regulation.

**5.6 The NIHRC recommends that any action on behalf of refugee, asylum seeking and migrant children, including unaccompanied children, who arrive in the UK by any means should be guided by principles enshrined in international human rights law.**

**5.7 The NIHRC recommends that the Committee 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.**

## **6.0 Modern Slavery**

### **Clauses 21 -28: Modern slavery**

6.1 Clauses 21-28 of the current draft of the Bill deny victims of modern slavery who have arrived in the UK irregularly access to existing support. The Bill also proposes to stop victims using such claims to prevent their removal. The right to be protected against slavery and servitude, as provided for by Article 4(1) of the ECHR, is absolute and cannot be interfered with under any circumstances. The ECtHR has held that trafficking in human beings falls within the scope of Article 4<sup>38</sup> and has emphasised States' duty to protect victims.<sup>39</sup>

**6.2 The NIHRC recommends that clauses 21-28 of the current draft of the Bill are removed and that victims and potential victims of modern slavery and human trafficking continue to receive adequate support, in compliance with Article 4 ECHR.**

6.3 Further to the explanation above under general comments, the Commission advises that, as a consequence of Windsor Framework Article 2, the Victims' Directive<sup>40</sup> and the Human Trafficking Directive,<sup>41</sup> remain relevant for determining the minimum standard

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<sup>38</sup> *Rantsev v Cyprus and Russia* (2010) ECHR 22, at para 284.

<sup>39</sup> *V.C.L. and A.N. v. the United Kingdom* (2021) ECHR 132, at para 151.

<sup>40</sup> [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

<sup>41</sup> [Directive 2011/36/EU](#) of the European Parliament and of the Council of 5 April 2011 on **preventing and combating trafficking** in human beings and **protecting its victims**, and replacing Council Framework Decision 2002/629/JHA

of rights required in NI, to the extent that those measures were binding on the UK on 31 December 2020. The rights of victims of crime and human trafficking fall within the scope of the relevant chapter of the Belfast (Good Friday) Agreement for three reasons: first, the chapter embraces the rights protected in the ECHR, including Article 4 on the prohibition of slavery and forced labour; secondly, due to recognition of human trafficking as a form of 'gender-based violence'<sup>42</sup> and thirdly due to the inclusion of victims' rights within the chapter. The Commission is considering the compliance of Clause 4 and Clauses 21 to 28 with these Directives.

- 6.4 By way of example, Articles 8 and 9 of the of the Victims' Directive detail the support and assistance that must be provided to potential victims and Article 1 states that "The rights set out in this Directive shall apply to victims in a non-discriminatory manner, **including with respect to their residence status**". This point is also emphasised in the recitals which state: "Member States should take the necessary measures to **ensure that the rights set out in this Directive are not made conditional on the victim's residence status in their territory** or on the victim's citizenship or nationality" (emphasis added in both cases).
- 6.5 Article 2 of the Human Trafficking Directive stipulates that "The **consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant**" where trafficking has occurred by any of the means set out including coercion, deception, fraud or giving or receiving payments (emphasis added). Article 8 requires that authorities be entitled not to prosecute or impose a penalty on victims of human trafficking for their involvement in criminal activities they have been compelled to commit as a consequence of being trafficked.
- 6.6 The NIHRC recommends that the 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.**

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<sup>42</sup> Recital 17, Victims Directive 2012/29/EU – full citation at n.30



## 7.0 Other Issues

### Clause 49: Interim measures

- 7.1 Clause 49 of the current draft of the Bill proposes for the Secretary of State to be empowered to make provision about interim measures indicated by the ECtHR as they relate to the removal of persons from the UK under the Bill by way of regulations. This clause broadly reflects a similar proposal within the UK Government's Bill of Rights Bill.
- 7.2 Under the ECHR, the ECtHR has jurisdiction to issue interim measures to any State Party "to preserve an asserted right before irreparable damage is done to it".<sup>43</sup> Such measures are, when issued, legally binding on States, by reason of States' undertaking in Article 34 of the ECHR "not to hinder in any way the effective exercise" by a victim of a claim before the ECtHR to be a victim.<sup>44</sup>
- 7.3 The Belfast (Good Friday) Agreement 1998 created a duty on the UK Government to incorporate the ECHR into NI law "with direct access to the courts, and remedies for breach of the... [ECHR]".<sup>45</sup> If enacted this clause would empower the Home Secretary to deny an essential safeguard to some of the most disadvantaged individuals in the UK.
- 7.4 The NIHRC recommends that compliance with Article 34 ECHR and Rule 39 of the European Court of Human Rights is ensured within the Bill, for example by removing clause 49 of the current Bill.**

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<sup>43</sup> Rule 39 of the ECtHR Rules of Court provide for the issue of interim measures to any State Party to the Convention.

<sup>44</sup> *Mamatkulov and Askarov v Turkey* (2005) ECHR 64.

<sup>45</sup> The Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

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