

Submission to the House of Lords on the Illegal Migration Bill

June 2023

1 Introduction

- 1.1 The Equality Commission for Northern Ireland (“the Commission”) is an independent public body established under the Northern Ireland Act 1998. Its powers and duties derive from a number of equality statutes providing protection against discrimination on the grounds of age, disability, race, religion and political opinion, sex and sexual orientation. Its remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998.
- 1.2 The Commission, along with the Northern Ireland Human Rights Commission (NIHRC), as the dedicated mechanism, has a mandate to monitor, advise, report on, promote, and enforce the UK Government’s commitment under Article 2(1) of the Ireland/Northern Ireland Protocol, now known as the Windsor Framework, to the UK-EU Withdrawal Agreement, 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 (‘GFA’) as a result of the UK’s withdrawal from the EU.
- 1.3 The Commission provides this submission to the House of Lords on the Illegal Migration Bill, in advance of the Report stage of the Bill. This briefing focuses only those matters which fall within the scope of our role and remit of the Equality Commission, including as the dedicated mechanism. Aligned to our remit, our comments relate to the implications of the Bill in terms of the potential implications for refugees, asylum seekers

and migrants in Northern Ireland (NI). Further, it refers to the version of the Bill as amended in the House of Lords in Committee (HL Bill 148).

2 General comments

Compliance with international human rights obligations

- 2.1 In general, the Commission has consistently made clear to the UK Government (UKG) the importance of ensuring that it complies with its obligations under international human rights Conventions, such as the UN Convention on the Elimination of all forms of Racial Discrimination (UNCERD), the UN Convention on the Rights of the Child (UNCRC), the Framework Convention for the Protection of National Minorities (FCNM), and the UN Convention on the Rights of Persons with Disabilities (UNCRPD)¹.
- 2.2 We note that the Joint Committee on Human Rights' (JCHR) report on the Bill concluded that various provisions of the Bill are not compatible with the European Convention on Human Rights (ECHR) or with numerous other binding legal obligations on the UK.²
- 2.3 We also note that the NIHRC has indicated that it is gravely concerned that the Bill will add to the significant regression of human rights protections to refugees, asylum seekers and migrants in the UK.³
- 2.4 In addition, we note that the Law Centre NI (LCNI) has stated that the Bill is likely to breach the UKG's international obligations under the Refugee Convention, the ECHR, the Convention against Trafficking, and the UNCRC.⁴

¹ For example, in relation to the UNCRPD, Article 11 on situations of risk and humanitarian emergencies requires State Parties to the convention to 'take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict [and] humanitarian emergencies'.

² [House of Commons House of Lords Joint Committee on Human Rights. Legislative Scrutiny: Illegal Migration Bill. Twelfth Report of Session 2022-23. 6 June 2023](#), para 80

³ NI Human Rights Commission [Submission to the House of Lords on the Illegal Migration Bill](#). May 2023

⁴ Law Centre NI. [Illegal Migration Bill: Briefing for House of Lords, June 2023](#)

- 2.5 Further, we note that the Home Secretary, was unable to make a declaration under section 19(1)(a) of the Human Rights Act 1998 that the Bill's provisions are compatible with the ECHR and has indicated that the Government nevertheless wishes Parliament to proceed with the Bill. We note that Clause 1(5) of the Bill disapplies section 3 of the Human Rights Act 1998 (HRA), which requires the courts to read and give effect to legislation, so far as it is possible to do so, in a way which is compatible with Convention rights.
- 2.6 We further note that the JCHR has stated that: "Disapplying section 3 HRA removes a valuable protection against human rights violations and will mean that some of those who wish to enforce their rights are unable to do so effectively in domestic courts".⁵
- 2.7 Further, we are concerned that in certain areas, outlined below, the Bill will reduce existing rights and protections for refugees and asylum seekers, including for those who are children, victims of trafficking and modern slavery, and women and girls.
- 2.8 We note that the JCHR has indicated that it heard that the Bill is likely to have a disproportionate impact on vulnerable groups, including victims of trafficking and modern slavery, children, and LGBTQIA+ people.⁶
- 2.9 Further, we consider it is vital that the outworking of the Bill does not lead to increased trauma for refugees and asylum seekers, particularly vulnerable individuals. It is clear from the findings of recent research commissioned by the Commission on the impact of Brexit on minority ethnic and migrant people in NI (2023), that evidence from research participants reveals that the asylum process can be humiliating and traumatic and can potentially re-traumatise vulnerable people, and that the asylum process is a lengthy, stressful and insecure experience which can risk re-traumatising people who have fled conflict.⁷

⁵ [House of Commons House of Lords Joint Committee on Human Rights. Legislative Scrutiny: Illegal Migration Bill. Twelfth Report of Session 2022-23. 6 June 2023](#) page 9

⁶ Ibid.

⁷ Pivotal, [Impact of Brexit on Minority Ethnic and Migrant People in Northern Ireland](#). (ECNI, 2023) page 107

Recommendations

2.10 The Commission recommends that:

- the UKG ensures that the provisions of the Bill are compatible with its obligations under international human rights Conventions;
- the Bill is amended to remove the disapplication of section 3 HRA (clause 1(5)).

Compliance with the ‘no diminution of rights’ commitment in Article 2 of the Windsor Framework

2.11 In general, the Commission’s view is that the rights of asylum-seekers fall within the scope of the UKG’s commitment in Windsor Framework Article 2 and are protected by the Rights, Safeguards and Equality of Opportunity chapter of the GFA. Further, the UKG must ensure that the rights of refugees, asylum seekers and migrant people in NI that fall within the scope of Windsor Framework Article 2 must not be diminished as a result of Brexit.

2.12 The UKG’s ‘Explainer’ document on Windsor Framework Article 2 acknowledges that its protections apply to everyone who is “subject to the law in NI”.⁸

2.13 As made clear in the joint working paper on the scope of Windsor Framework Article 2⁹, published by the Commission together with the NIHRC, there is a commitment in the relevant chapter of the GFA to protect the “civil rights and religious liberties of everyone in the community”. Also as made clear in the working paper, we 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 European Convention on Human Rights (ECHR), to the extent that they are underpinned by EU legal obligations in force in NI on or before 31 December 2020. To date, we have identified that this

⁸ 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.

⁹ Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, [Working Paper: The Scope of Article 2\(1\) of the Ireland/ Northern Ireland Protocol](#), (ECNI and NIHRC, December 2022)

commitment is underpinned by the following EU law relating to asylum seekers: the Procedures Directive¹⁰ and the Dublin III Regulation¹¹.

- 2.14 Further, in relation to the ‘right to equal opportunity in all social, and economic activity regardless of class, creed, disability, gender or ethnicity’, which is affirmed “in particular” in the relevant chapter of the GFA, we have identified that this right is underpinned by the following EU law relating to asylum seekers: the Reception Directive¹² and the Qualification Directive¹³. We also consider that the “right to freely choose one’s place of residence” is underpinned by the Reception Directive.
- 2.15 It is vital that the Bill’s provisions do not reduce the rights of asylum seekers and refugees under these Directives, that fall within scope of Windsor Framework Article 2. We have set out more detail on relevant provisions relating to these Directives in the sections below.
- 2.16 We note that the Bill proposes amendments to the modern slavery legislation so that potential or confirmed victims of trafficking or modern slavery who are subject to the arrangements for removal duty would be disqualified from certain provisions. In relation to the rights of victims protected under the relevant chapter of the GFA, we have identified the Victims Directive¹⁴ and the Human Trafficking Directive¹⁵ as falling within scope of Windsor Framework Article 2. It is essential that the Bill’s provisions do not reduce the rights for

¹⁰ Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, of 1 December 2005.

¹¹ 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

¹² Directive 2003/9/EC, ‘Council Directive laying down minimum standards for the reception of asylum seekers’, 27 January 2003.

¹³ 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.

¹⁴ 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.

¹⁵ 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.

victims of trafficking or modern slavery under these Directives, that fall within scope of Windsor Framework Article 2.

2.17 This includes no reduction of rights relating to women (including pregnant women), children, and disabled people, within scope of the above-mentioned Directives.

2.18 Again, we have set out in more detail below relevant provisions in these Directives.

Explanatory Memorandum: Consideration of compliance with Windsor Framework Article 2

2.19 Further, we are concerned that the Explanatory Notes to the Bill make no reference to any consideration being given to ensuring compliance with Windsor Framework Article 2. The Commission has previously recommended that this should be the case regarding all relevant legislation. It is also of the view that compliance with Windsor Framework Article 2 should be considered from the earliest stages in the development of policy and legislation.

2.20 We welcome that the HL Sub-Committee on the Protocol wrote to the Home Office Minister on 11 May 2023 raising the concerns of the Commission and the NIHRC in relation to the Bill.¹⁶ However, to date a reply from the Minister has not been received.

Recommendation

2.21 **The Commission recommends that:**

- **the UKG ensures that the provisions of the Bill are compatible with its obligations under Windsor Framework Article 2;**
- **the Home Secretary sets out, in detail, in the Explanatory Memorandum to the Bill, what consideration was given to compliance with Windsor Framework Article 2 in the development of the Bill. Any assessment of the proposals' compliance with Article 2 should not be limited to the impact of the**

¹⁶ [Letter from the House of Lords European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland to the Parliamentary Under-Secretary \(Home Office\) 11 May 2023](#)

proposals on the substantive rights, but should also include the remedial dimensions of those rights.

3 Detention and Bail

- 3.1 We are concerned that the Bill proposes to reduce existing limitations and safeguards regarding the detention of migrants, refugees, and asylum seekers, including as regards children and pregnant women, as well as their ability to challenge their detention in courts.
- 3.2 We note that clauses 10 and 11 of the current draft of the Bill confer a power to detain adults, families and children for as long as “is reasonably necessary” regardless of whether there is anything preventing a removal from being carried out¹⁷. Clause 11 provides the Home Secretary with a wide discretionary power to determine what is a reasonable period to detain an individual for the purposes of their removal.
- 3.3 In addition, under clause 10, the Bill seeks to disapply limitations on the detention of pregnant women for no more than 72 hours (or seven days under personal authorisation by a Minister of the Crown). Under the Bill, pregnant women could be detained for any period considered reasonably necessary.
- 3.4 We note that both the NIHRC¹⁸ and the LCNI¹⁹ have raised concerns that it is likely that the widespread powers of detention within the current draft of the Bill would significantly increase the number of people being detained in the UK.
- 3.5 This is of concern particularly in the context that research (2023) commissioned by the Commission on the impact of Brexit on minority ethnic people and migrant people in NI, has raised that the outsourcing of detention centres in the UK has been criticised for inconsistent standards, with some

¹⁷ The Bill refers to regardless of whether there is anything that for the time being prevents the examination or removal from being carried out. Clause 11, 1(b).

¹⁸ NI Human Rights Commission [Submission to the House of Lords on the Illegal Migration Bill](#). May 2023

¹⁹ Law Centre NI. [Illegal Migration Bill: Briefing for House of Lords, June 2023](#)

outsourced detention centres being accused of providing destitute conditions and even abuse.²⁰

- 3.6 We note that the JCHR has indicated that “given the current capacity of the immigration estate and limited scope for removals to third countries, we share concerns that detaining greater numbers could give rise to the need to use unsuitable facilities, with risks for human rights”. It also states that abandoning many of the limitations and safeguards against inappropriate or unjustified detention, particularly for children, families and pregnant women, increases the likelihood that these rights will be infringed”.²¹
- 3.7 We are concerned that the Bill (clause 12) will also restrict the ability of the courts to supervise the legality of detention under the Bill. We note that the JCHR has indicated that: “Depriving those detained under the Bill the opportunity to make a bail application to a Tribunal, or a judicial review application in the High Court, even if it is only for the first 28 days of detention, would severely restrict judicial supervision”.²²
- 3.8 In the context of the UKG’s obligations under Windsor Framework Article 2, we draw attention, in particular, to the following EU measures, to the extent that those measures were binding on the UK on or before the end of the Brexit transition period (31 December 2020).
- Article 18 of the EU Procedures Directive²³ places an obligation on Member States to ensure that as regards applicants for asylum held in detention, there is a possibility of speedy judicial review. Further, Article 39 of the EU Procedures Directive provides that applicants for asylum shall have a right to an effective remedy before a court or tribunal for a decision on their application for asylum, including a decision to consider an application inadmissible, and a decision taken at a border or transit zone.

²⁰ Pivotal, [Impact of Brexit on Minority Ethnic and Migrant People in Northern Ireland](#). (ECNI, 2023) page 105

²¹ [House of Commons House of Lords Joint Committee on Human Rights. Legislative Scrutiny: Illegal Migration Bill. Twelfth Report of Session 2022-23. 6 June 2023](#) para 193

²² *Ibid.*, para 211

²³ 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 17 of the Reception Directive²⁴ and Article 20 of the EU Qualification Directive²⁵ impose obligations on Member States to take into account the specific situation of vulnerable persons, including, for example, minors, unaccompanied minors, older people, pregnant women and disabled people.
- Article 21 of the EU Reception Directive²⁶ provides that decisions relating to Article 7 of the Directive may be subject to an appeal within procedures laid down in national law. It also states that “at least in the last instance the possibility of an appeal or a review before a judicial body shall be granted”. Article 7 relates to ‘residence and freedom of movement’, including powers to confine an applicant for asylum to a particular place.

3.9 Further, 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.

Recommendation

3.10 **The Commission recommends that the UKG ensures that the Bill does not reduce the existing limitations and safeguards regarding the detention of refugees and asylum seekers, and their ability to challenge their detention in courts, and ensures that these provisions in the Bill comply with its obligations under Windsor Framework Article 2, and its international human rights obligations.**

²⁴ Directive 2003/9/EC, ‘Council Directive laying down minimum standards for the reception of asylum seekers’, 27 January 2003.

²⁵ 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.

²⁶ Directive 2003/9/EC, ‘Council Directive laying down minimum standards for the reception of asylum seekers’, 27 January 2003.

4 Children

- 4.1 We are concerned about the Bill's implications for children, including unaccompanied children.
- 4.2 The Bill places a new duty on the Home Secretary to make arrangements to remove persons who enter or arrive in the UK irregularly, who have not "come directly" from a territory where their life and liberty was threatened. This removal duty extends to victims of trafficking and slavery.
- 4.3 We note that this removal duty extends to children and that as regards unaccompanied children, the Secretary of State has a power (not a duty) to make arrangements to remove them.
- 4.4 We note that both the NIHRC and the LCNI have raised concerns in relation to the impact of the Bill on children, including unaccompanied children. For example, the NIHRC notes that the Bill (Clauses 2 to 4) proposes to prevent children from making an asylum claim when they arrive in the UK through an unofficial route. It notes that although clause 3 of the Bill temporarily exempts an unaccompanied child from the Home Secretary's duty to remove, it reaffirms the Secretary of State's power to do so once the child has turned 18 years old.²⁷
- 4.5 The NIHRC has also raised that the Bill's clauses relating to accommodation and support for unaccompanied children (clauses 15-20) would, in effect, place unaccompanied children outside of the UK's existing child protection systems.²⁸
- 4.6 The LCNI has raised concerns that the potential impact of the Bill includes that children risk being denied the right to seek refuge or protection as victims of human trafficking; subject to detention powers without any statutory time restrictions.²⁹
- 4.7 The JCHR has also indicated that they "are particularly concerned by the Bill's implications for children, who are affected by every aspect of this Bill".³⁰ These concerns include

²⁷ NI Human Rights Commission [Submission to the House of Lords on the Illegal Migration Bill](#). May 2023 para 5.1

²⁸ Ibid, para 5.18.

²⁹ Law Centre NI. [Illegal Migration Bill: Briefing for House of Lords, June 2023](#)

³⁰ [House of Commons House of Lords Joint Committee on Human Rights. Legislative Scrutiny: Illegal Migration Bill. Twelfth Report of Session 2022-23. 6 June 2023](#) page 7

as regards the support that will be provided to unaccompanied children in the care of the Home Office.

- 4.8 The UKG should ensure that the Bill is in compliance with its obligations to protect the best interests of children under the UNCRC.
- 4.9 In the context of the UKG's obligations under Windsor Framework Article 2, we draw attention, in particular, to the requirements set out in the EU Procedures Directive³¹, the EU Qualification Directive³², the EU Reception Directive³³, and the EU Dublin III Regulation³⁴, to the extent that these standards were binding on the UK prior to the end of the Brexit transition period (31 December 2020). All of these measures stipulate that "the best interests of the child shall be a primary consideration" when implementing relevant provisions.
- 4.10 As noted above, we also draw attention to Article 17 of the Reception Directive which impose obligations on Member States to take into account the specific situation of vulnerable persons, including minors and unaccompanied minors.
- 4.11 Further, 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 24 on the rights of the child.

Recommendation

- 4.12 **The Commission recommends that the UKG ensures that the Bill does not reduce existing rights and protections for children of refugees and asylum seekers, including unaccompanied children seeking asylum, and ensures that the Bill's provisions relating to these rights are compliant**

³¹ Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', of 1 December 2005.

³² 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.

³³ Directive 2003/9/EC, 'Council Directive laying down minimum standards for the reception of asylum seekers', 27 January 2003.

³⁴ 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

with Article 2 of the Windsor Framework and its international human rights obligations.

5 Victims of Trafficking and Modern Slavery

- 5.1 We are concerned about the potential effect of the Bill on victims of modern slavery and human trafficking.
- 5.2 We note that the removal duty placed on the Home Secretary extends to victims of trafficking and slavery who have entered or arrived in the UK irregularly and indirectly, subject to some exceptions³⁵. Further, as highlighted by the JCHR, the Bill prevents victims of trafficking or slavery who are subject to the ‘removal duty’ from accessing protections and entitlements that would otherwise be available to them as a matter of law.³⁶ This includes disapplying the requirement of support and assistance for persons who fall foul of the ‘removal duty’.
- 5.3 Further the JCHR has raised concerns about the implications of the Bill for victims of human trafficking. It has, for example, stated that it was of the view, that the Government’s position that the modern slavery clauses are “capable of being applied compatibly” with Article 4 ECHR (prohibition of slavery and forced labour) “was untenable”.³⁷
- 5.4 We note that the NIHRC has raised concerns about the potential effect of the Bill on victims, and that many would be excluded from protection and thereby at risk of re-trafficking.³⁸
- 5.5 In the context of the UKG’s obligations under Windsor Framework Article 2, we draw attention to the provisions of the EU Victims’ Directive³⁹, and the EU Human Trafficking

³⁵ For example, where the person is co-operating with an investigation by a public authority into their alleged slavery or trafficking or where the person is an unaccompanied child.

³⁶ [House of Commons House of Lords Joint Committee on Human Rights. Legislative Scrutiny: Illegal Migration Bill. Twelfth Report of Session 2022-23. 6 June 2023](#) para 268

³⁷ Ibid, para 274

³⁸ NI Human Rights Commission [Submission to the House of Lords on the Illegal Migration Bill](#). May 2023, para 6.11

³⁹ 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.

Directive⁴⁰, to the extent that those measures were binding on the UK on or before 31 December 2020.

5.6 In particular:

- Articles 8 and 9 of the EU Victims' Directive⁴¹ details the support and assistance that must be provided to potential victims. 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". Further the recitals 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".
- Recital 17 to the EU Human Trafficking Directive⁴² states that "this Directive does not deal with the conditions of the residence of the victims of trafficking in human beings". Article 11 of the Directive sets out the duties on Member States to provide assistance and support to trafficked persons, including the duty in Article 11(3) to "ensure that assistance and support for a victim is not made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial." Article 2 of the 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 fraudulent means set out. Article 8 requires that Member States take the necessary measures to ensure that national authorities are "entitled not to prosecute or impose penalties on victims of human trafficking for their involvement in criminal activities they

⁴⁰ 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.

⁴¹ 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.

⁴² 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.

have been compelled to commit as a consequence of being trafficked”.

- The EU Qualification Directive⁴³ requires an individual assessment of each asylum claim to assess the risks and harm that a person endured or could endure if they were to return to their home country.
- As mentioned above, Article 17 of the EU Reception Directive⁴⁴ requires Member States to take into account the specific situation of vulnerable asylum-seekers, including those subjected to serious forms of psychological, physical or sexual violence.

Recommendation

- 5.7 **The Commission recommends that the UKG ensures that the Bill does not reduce existing rights and protections for victims of modern slavery and human trafficking, and that the Bill’s provisions relating to these rights are compliant with its obligations under Windsor Framework Article 2, and international human rights conventions.**

6 Access to justice

We are concerned about the potential effect of the Bill on the rights of asylum seekers in terms of access to justice and effective judicial protection, and to effective remedies.

- 6.1 We note that the NIHRC has raised concerns that the Bill provides for limited judicial oversight in respect of detention, removal and decisions on protection and human rights claims, raising questions about compliance with standards on access to effective remedy.⁴⁵
- 6.2 We also note that the JCHR has raised that: “The Bill’s introduction of extremely narrow suspensive claims does

⁴³ 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.

⁴⁴ Directive 2003/9/EC, ‘Council Directive laying down minimum standards for the reception of asylum seekers’, 27 January 2003.

⁴⁵ NI Human Rights Commission [Submission to the House of Lords on the Illegal Migration Bill](#). May 2023, para 8.1.

provide some protection against the most serious and immediate human rights abuses, but even this protection is meaningless if the procedural framework prevents effective access to these claims. The time limits placed on each stage of the claim process are so strict that it is hard to see how claimants, who are likely to be traumatised, vulnerable and held in detention, could prepare and present their case effectively.”⁴⁶

- 6.3 Research (2022) commissioned by the Commission, with the NIHRC and the Irish Human Rights and Equality Commission (IHREC) on the divergence of rights on the island of Ireland, has indicated that “the CJEU views effective judicial protection as a procedural right that is integral to EU law both in the field of equal treatment and in respect of other directly effective rights”⁴⁷. Aligned to the Commission’s views, it also states that: “As such, effective judicial protection must be viewed as inherent in the concepts of ‘safeguards’ and ‘civil rights’ within this section of the GFA”.⁴⁸
- 6.4 Any assessment of the Bill’s compliance with Windsor Framework Article 2 should not be limited to the impact of the proposals on the substantive rights, but should also include the remedial dimensions of those rights.
- 6.5 In the Commission’s view, a GFA-protected right, for example, the right relating to ‘non-discrimination’, is underpinned not only by the substantive rules of EU law, but also the remedial rules of EU law; for example, the right to secure damages for breach of a rule by the state.
- 6.6 The substantive right would be much less protected and diminished if the remedial dimensions of the right were removed. We consider that the non-diminution obligation under Article 2 applies not only to the substantive rights but also to the remedial dimensions of those rights.

⁴⁶ [House of Commons House of Lords Joint Committee on Human Rights. Legislative Scrutiny: Illegal Migration Bill. Twelfth Report of Session 2022-23. 6 June 2023](#) para 3.43

⁴⁷ Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), (ECNI, NIHRC, IHREC 2022)

⁴⁸ Equality Commission for Northern Ireland, Northern Ireland Human Rights Commission and Irish Human Rights and Equality Commission, [Policy Recommendations: European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), (ECNI, NIHRC and IHREC, 2023) para 4.84 footnote 176.

6.7 In the context of the UKG’s obligations under Windsor Framework Article 2, we draw attention to the following relevant EU measures to the extent that these standards were binding on the UK prior to the end of the Brexit transition period (31 December 2020). In particular:

- Article 39 of the EU Procedures Directive states that asylum applicants have the right to an effective remedy before a court or a tribunal including against a decision on their application for asylum, and a refusal to reopen an examination of an application after its discontinuation.⁴⁹
- Article 15 of the EU Procedures Directive provides a right for applicants for asylum to obtain legal advice pertaining to their application. Where there has been a negative decision, national legislation can provide legal aid subject to a means and merits test. Article 16 on the scope of legal assistance and representation, requires Member States to allow access, for example by a legal adviser assisting an asylum seeker, to certain relevant information as part of the asylum application.⁵⁰

Recommendation

6.8 **The Commission recommends that the UKG ensures that the Bill does not reduce existing rights and protections relating to access to justice and to effective remedies for asylum seekers and refugees, and that the Bill’s provisions related to these rights comply with its obligations under Windsor Framework Article 2, and international human rights conventions.**

**Equality Commission,
June 2023**

⁴⁹ Directive 2005/85/EC, Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, of 1 December 2005.

⁵⁰ Ibid.