



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

**Invitation to tender for research on the  
rights of Frontier Workers & their families  
and Article 2 of the Ireland/NI Protocol**

**15 February 2022**

**The deadline for submitting a quotation is 28 February, 1pm.**

## Background

The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). Alongside the Equality Commission of Northern Ireland (ECNI), the NIHRC has been given a new mandate under the EU (Withdrawal Agreement) Act 2020. Pursuant to section 78A(1), the NIHRC must monitor the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU Withdrawal Agreement (rights of individuals). NIHRC and ECNI work individually or jointly as part of the 'dedicated mechanism' for oversight of the commitment, exercising advisory, reporting, awareness-raising and legal functions. NIHRC and ECNI collaborate with the Irish Human Rights and Equality Commission (IHREC) to provide oversight of, and reporting on, rights and equalities issues that have an island of Ireland dimension.

NIHRC wishes to contract research on the rights of frontier workers and their families under the UK-EU Withdrawal Agreement and resulting domestic scheme and how they compare with rights enjoyed under previously applicable EU rules. It is part of a series of inter-related pieces of work on the scope of Article 2 of the Ireland/NI Protocol and its interaction with other aspects of the post-Brexit legislative and policy framework.

## Frontier Workers

The principle of free movement gave all EU citizens the right to live, work and study across the EU. Explicit legal protections included Article 45 of the Treaty of the Functioning of the European Union (TFEU) which granted free movement to workers; EU Directive 2004/38/EC (known as the Citizens' Rights Directive) which set out further guarantees for EU workers and their families; the right to move and reside freely in any EU member state<sup>1</sup>; the right to vote and stand in European parliamentary and municipal elections<sup>2</sup>; and the rights enshrined for workers and their families in EU Regulation 492/2011. Further rights and protections were contained within the EU Charter of Fundamental Rights which includes robust equality and anti-discrimination guarantees,<sup>3</sup> explicit protection for

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<sup>1</sup> Article 21 of the TFEU

<sup>2</sup> Article 22 (1) of the TFEU

<sup>3</sup> Articles 20 – 26, EU Charter of Fundamental Rights.

workers' rights,<sup>4</sup> the right to free movement itself,<sup>5</sup> and a wider category of personal rights which were integral to the exercise of EU citizenship, and the benefits which flowed from it.

The implications of the cessation of free movement are wide-ranging and extensive and present unique challenges from a NI perspective in view of the Irish border and the cross-border flow of people, goods and services. One area in which the ending of free movement is likely to have an immediate, direct and potentially long-term impact is on the rights of frontier workers and those who cross the Irish border for work purposes and who now find themselves subject to new legal and regulatory measures.<sup>6</sup>

The EU UK Withdrawal Agreement 2019 sets out the conditions governing the UK's withdrawal from the EU.<sup>7</sup> Part 2 of the Agreement deals with citizens' rights. The Withdrawal Agreement also contains a Protocol on Ireland and Northern Ireland which imposes specific legal obligations on the UK government as alluded to earlier. The Withdrawal Agreement was given domestic legal effect in the UK through the European Union (Withdrawal Agreement) Act 2020, which in Part 3 deals with citizens' rights, including rights of frontier workers, primarily in the form of regulation-making powers.

Under EU law, a frontier worker is defined as 'any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week'.<sup>8</sup> The position of frontier workers assumes increased significance in light of the cross-border nature of employment and work, (often sporadic and temporary), on the island of Ireland where according to some estimates, between 20,000 to 30,000 people in NI and Ireland cross the border daily for work purposes.<sup>9</sup>

Article 10 1(c) of the Withdrawal Agreement sets out the personal scope of protections offered under Part Two including "Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter". Under Article 26 of the Withdrawal

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<sup>4</sup> See, for example, Articles 27 – 28 of the EU Charter of Fundamental Rights.

<sup>5</sup> Article 45, EU Charter of Fundamental Rights.

<sup>6</sup> For more on the Irish Border, see Colin Harvey (2020), 'The Irish Border' in 'The Law & Politics of Brexit: Volume II', (OUP), pp. 148 – 168.

<sup>7</sup> See [GEN \(publishing.service.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434222/gen.pdf)

<sup>8</sup> European Parliament and Council Directive 2004/38/EC (29 April 2004), Article 1(f).

<sup>9</sup> <https://borderpeople.info/site/wp-content/uploads/Briefing-5-revision15June2016.pdf>

Agreement, frontier workers are entitled to be issued with appropriate documentation which certifies their rights as frontier workers.

Pursuant to section 8 of the European Union (Withdrawal Agreement) Act 2020, and to give effect to the new rules on frontier working, the UK Government introduced the Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020 ('the 2020 Regulations').<sup>10</sup>

Under the 2020 Regulations, those coming to Northern Ireland to work since 1 July 2021 have to be in possession of a Frontier Worker Permit.<sup>11</sup> British or EU citizens living in NI but working in the Republic of Ireland do not have to apply to the scheme on account of the benefits derived from the CTA and EU citizenship, respectively.

The Regulations set out the time frames within which applications have to be made, and the grounds upon which a refusal can be issued. They also set out the circumstances in which a worker or self-employed person can retain their status.<sup>12</sup> These cover instances involving accidents, illnesses, engagement in vocational training and pregnancy or childbirth.<sup>13</sup> Grounds for refusal of an application include public policy, public security, public health or misuse of rights.<sup>14</sup> Importantly, family members are not covered by the grant of a frontier workers permit. In their assessment of the 2020 Regulations, the Committee on the Administration of Justice (CAJ) highlighted that no public consultation or human rights impact assessment accompanied their enactment, and further that the Government did not and does not possess accurate data in relation to how many individuals the scheme would impact, or apply to, and so therefore its uptake and success would be almost impossible to quantify.<sup>15</sup>

Given that frontier workers may operate on both sides of the Irish Border, the Oireachtas has recommended that the EU Working Time Directive,<sup>16</sup> which sets out important entitlements regarding working conditions, be continued in Northern Ireland after Brexit.<sup>17</sup>

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<sup>10</sup> See also, statutory guidance for case-workers. [Frontier workers casework guidance \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk)

<sup>11</sup> Regulation 1 1(2)(a), 2020 Regulations.

<sup>12</sup> Regulation 4, 2020 Regulations.

<sup>13</sup> Ibid.

<sup>14</sup> Regulation 9, 2020 Regulations.

<sup>15</sup> See [Letter-to-Secretary-of-State-for-the-Home-Department-26-10-20-.pdf \(caj.org.uk\)](https://www.caj.org.uk)

<sup>16</sup> See [EUR-Lex - 32003L0088 - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu)

<sup>17</sup> Houses of the Oireachtas, (2019), Joint Committee on Rural and Community Development, '*Brexit and the Border: The Impact on Rural Communities*', at p.36.

## Article 2 of the Protocol on Ireland/Northern Ireland

Article 2 of the Protocol states:

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.

This amounts, first of all, to a no diminution commitment in respect of the range of rights protected by the relevant chapter of the Belfast (Good Friday) Agreement and underpinned by EU obligations – EU treaties, Regulations, Directives etc. – in place on 31 December 2020.

Annex 1 of the Protocol sets out six EU equality Directives.<sup>18</sup> Under the Protocol, the UK Government has committed not only to ensuring no diminution of the rights contained in these Directives but also to ensuring that Northern Ireland equality law will keep pace with any changes made by the EU to these rights to improve the minimum levels of protection available, after 1 January 2021.

The Commission takes the view that Protocol Article 2 offers additional rights protection to that set out in the Withdrawal Agreement as a whole; this research is part of ongoing work to explore the extent of that protection.

The rights, safeguards and equality of opportunity chapter of the BGFA, opens with the signatories' acknowledgement of the "civil rights and religious liberties of everyone in the community".

"Community" is not defined but that chapter of the Agreement goes on to provide for the establishment of a Joint Committee of the Northern

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<sup>18</sup> These include Directive 2004/113/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services', 13 December 2004; Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006; Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000; Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000; Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010 & Directive 79/7/EEC, 'EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978

Ireland Human Rights Commission and what is today the Irish Human Rights and Equality Commission. The chapter also includes commitments on the part of the Irish government in relation to human rights.

The UKG 'Explainer' document on Protocol Article 2 states that "everyone who is subject to Northern Ireland law...will be covered."<sup>19</sup>

On this basis, the Commission wishes to explore the potential protection that might be afforded by Protocol Article 2 in the context of frontier working. However, this project is not focused on the personal and geographic scope of Article 2, which is being considered elsewhere; rather, it is intended to consider the substantive rights issues arising in relation to frontier working and the protections that Article 2 might afford, should a) frontier workers and b) family members of frontier workers, be recognised as falling within its protection.

### **Context: The Common Travel Area and the Trade and Co-operation Agreement**

The Common Travel Area (CTA), a long-standing bi-lateral arrangement between the UK and Ireland, which pre-dated the accession of both countries to the EU, remains and is recognised in Article 3 of the Protocol, though it only protects British and Irish citizens and has lost much of the legal underpinning provided by EU law on freedom of movement.<sup>20</sup>

The EU-UK Trade and Co-operation Agreement of 2020<sup>21</sup> provides further context, as it includes provisions regarding the mobility of workers. The TCA comprises a free trade agreement which sets out cooperation on economic, social, environmental and fisheries issues, policing, security and judicial cooperation and an overarching governance structure regarding its implementation and the resolution of any disputes.<sup>22</sup> The TCA was given effect in domestic law by the European Union (Future Relationship) Act 2020.

The TCA does not contain an independent chapter on mobility or free movement but rather, as Barnard and Leinarte put it: "there no longer

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<sup>19</sup> At paragraph 8

<sup>20</sup> See Sylvia de Mars, Colin Murray, Aoife O' Donoghue and Ben Warwick, 'Discussion Paper on the Common Travel Area' (NIHRC and IHREC, 2018)

<sup>21</sup> See [The EU-UK Trade and Cooperation Agreement | European Commission \(europa.eu\)](https://ec.europa.eu/eu-uk-trade-cooperation-agreement/)

<sup>22</sup> See [The UK-EU Trade and Cooperation Agreement: summary and implementation \(parliament.uk\)](https://www.parliament.uk/eu-uk-trade-cooperation-agreement/)

exists a stand-alone right to move; instead, mobility is a composite part of trade."<sup>23</sup>

Articles 140-143 of the TCA distinguish five categories of persons entitled to stay temporarily in the UK, including NI. These include: 'business visitors for establishment purposes', 'contractual service suppliers', 'independent professionals', 'intra-corporate transferees', and 'short-term business visitors'.

Lock argues that these classifications do not reflect the integrated nature of the economies of Ireland and Northern Ireland, where services are provided daily on a cross-border basis. Referencing the construction sector as an example, he argues that restrictions on non-Irish EU citizens for example, could act as an incentive for employers that are active in the supply of cross-border services to employ Irish citizens rather than EU citizens.<sup>24</sup> This may engage the equality and anti-discrimination guarantees contained within the EU Race Equality Directive which falls within scope of Protocol Article 2.<sup>25</sup>

## **Research Brief**

The Commission is seeking to explore the rights of Frontier Workers and their families. It is part of a series of inter-related pieces of work on the scope of Article 2 of the Ireland/NI Protocol and its interaction with other aspects of the post-Brexit legislative and policy framework.

The Commission is particularly keen to explore gaps in rights that may be implicit, indirect, ambiguous or result from policy decisions as distinct from treaty provisions.

The NIHRC also wishes to make recommendations on how the NI Assembly, the UK Government and the Government of Ireland could address any potential legal and/or policy gaps which arise with a view to protecting the rights of workers within NI and border communities, and their families.

By way of introduction, the Commission would request that researchers provide a brief literature review as a basis for identifying gaps in research that may be most productive to explore.

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<sup>23</sup> Catherine Barnard and Emilija Leinarte, *Mobility of Persons in the New UK-EU Relationship* (March 2021), DCU Working Papers, p.3.

<sup>24</sup> See Tobias Lock (2021), *A Common Travel Area? Brexit and the New (Northern) Irish*, in Chris McCrudden (ed), *The Law and Practice of the Ireland/Northern Ireland Protocol* (Cambridge University Press).

<sup>25</sup> See [EUR-Lex - 32000L0043 - EN - EUR-Lex \(europa.eu\)](#)

It is expected that the research will address the following non-exhaustive list of issues:

- the extent to which frontier workers' rights provisions under the UK EU Withdrawal Agreement, as implemented by UK regulations & policy, replicate or diminish the rights of frontier workers under previously applicable EU rules, including as regards security of status, rights of access to social security and public services<sup>26</sup> and the rights of family members not resident in NI as the competent state;
- any interaction between the rights of frontier workers and provisions of the Trade and Co-operation Agreement affecting mobility of workers;
- potential gaps in or breaches of rights that may be implicit, indirect, ambiguous or result from UK Government/ Home Office policy decisions or guidance, or public authority practices, as distinct from treaty provisions;
- the extent to which any rights identified as diminished under the treaty or its implementation, would be addressed if, a) Frontier Workers and, b) their family members, were accepted as falling within the protection of Protocol Article 2;
- potential amendments to legislation and policy to address gaps in rights of frontier workers or their family members and /or to clarify entitlements;
- any other issues not covered by the above which should be brought to the attention of the Commission.

## **Exclusions & Interactions**

This research is part of a series of inter-related pieces of work on the scope of Protocol Article 2. Research on access to healthcare post-Brexit is nearly complete and addresses the right to healthcare of Frontier Workers and their family members.

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<sup>26</sup> Excluding the right of access to healthcare which is the subject of a discrete piece of research – see exclusions section below.



Parallel research is intended to explore free movement on the island after Brexit including the rights of those who fall outside the protection of the Common Travel Area and do not have Frontier Worker status or EU Settled Status.

We will ensure that the researchers are kept apprised of related projects and facilitate collaboration where possible.

## **Specification**

The successful contractor will be required:

- to engage with NIHRC to clarify the parameters of the project;
- to undertake both desktop research and any potential interviews with key stakeholders which may include civil society organisations, practitioners, service providers, academics or policy makers in this field; and
- to submit an interim report by 31 March 2022 and, having taken account of the Commission's comments, a final report by 31 May 2022. These timeframes are negotiable in consultation with the Commission.

The Northern Ireland Human Rights Commission retains all rights to the intellectual property and will be responsible for future decisions regarding the publication of the report. In all publications, the role of the contractor will be duly acknowledged.

Further dissemination opportunities will follow from this research in the form of a seminar and/or round table event which will be hosted and funded by the Northern Ireland Human Rights Commission.

The Director (Human Rights after EU Withdrawal) will be available to liaise with the successful contractor for the duration of the project, to resolve any queries concerning the research or the Commission's requirements in respect of the final draft.

## Application

Interested contractors are invited to:

1. Write a brief letter of motivation, alongside an annex of relevant experience and publications (no more than four pages in total), demonstrating:
  - experience of each member of the research team in undertaking research in the field of EU law & policy, human rights law or any other areas related to the work under this tender;
  - knowledge and understanding of the key issues relating to EU free movement, workers' rights and UK withdrawal from the EU;
  - how they will conduct the research, including how the research team will ensure the research adds value to pre-existing research;
  - how they will ensure value for money; and
  - how quality assurance will be guaranteed.

It is expected that interested contractors will provide an outline of the proposed approach to the project, including the methods they will employ for ascertaining and ensuring that the Commission's requirements are met.

2. Quote a fixed price of no more than £7,000 (inclusive of VAT) for writing and presenting a final report detailing a breakdown of how many days will be allocated to specific tasks undertaken by research team members, alongside a daily financial rate for each researcher. The proposals will be assessed for value for money.
3. Provide details of two referees who can comment on their ability to deliver the type of document described in the above specification.
4. The award of the contract will be based on: the applicant's competence to undertake the work, judged from the content of the letter of motivation and previous experience; how effectively the proposal will be delivered in practice; and value for money. The Commission reserves the right not to accept the lowest quotation.

## **Human Rights Policy**

Tenderers must confirm that their organisation has a human rights policy. Those tenderers who have been selected will be asked to provide a copy of their organisational human rights policy prior to award of contract.

## **GDPR Policy**

Tenderers must confirm that their organisation has a GDPR policy. Those tenderers who have been selected will be asked to provide a copy of their organisational GDPR policy prior to award of contract.

**Any questions about the project should be emailed to [Elis.Haughey@NIHRC.org](mailto:Elis.Haughey@NIHRC.org) who will arrange for a prompt response.**

**Please email your application to [Jacqueline.McClintock@NIHRC.org](mailto:Jacqueline.McClintock@NIHRC.org) by 1.00pm on Monday 28 February 2022. Please note that applications must be emailed as staff are working from home due to Covid-19.**

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