NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Submission to House of Lords on the Border Security, Asylum and Immigration Bill

May 2025

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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 Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). In accordance with section 69(3), the NIHRC additionally advises the NI Executive, the UK Government and Westminster Parliament on legislative and other measures which ought to be taken to protect human rights.

1.2 The NIHRC is also required, by section 78A(1), to monitor, advise and report on the implementation of Article 2(1) of the Windsor Framework[1] attached to the UK-EU Withdrawal Agreement (Windsor Framework Article 2), 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 section 78A(5), the NIHRC also advises the NI Executive, the UK Government and Westminster Parliament on legislative and other measures which ought to be taken to implement Article 2(1).

1.3 In accordance with these functions, the following evidence is submitted to the House of Lords on the Border Security, Asylum and Immigration Bill (the Bill) and refers to the version of the Bill as brought from the House of Commons (HL Bill 101 – 59/1).

2.0 General Comments

International human rights obligations

2.1 The NIHRC welcomes the intended repeal of the Safety of Rwanda (Asylum and Immigration) Act 2024. From the outset, the NIHRC advised that the 2024 Act is incompatible with the State's human rights obligations in that it abdicates, by design, responsibility under the 1951 Refugee Convention and threatens the international refugee protection regime.[2] Such breach will risk erosion of the UK's

[1] The Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement 2020 was renamed by Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework.
[2] NI Human Rights Commission, 'Advice on the Safety of Rwanda (Asylum and Immigration) Bill' (NIHRC, 2024), at para 4.8.

standing and ability to collaborate in the multilateral system.

2.2 In addition, the NIHRC welcomes the intended repeal of most provisions of the Illegal Migration Act 2023. In particular, the NIHRC welcomes the removal of sections 2-10, that required the removal of individuals who entered the UK through 'irregular' means and disregarded any asylum or human rights claim. The removal of sections 31-35, that rendered such people ineligible for British citizenship, is also welcomed. The NIHRC advised that the provisions are in stark contrast to the UK Government's obligations under the European Convention on Human Rights (ECHR).[3]

2.3 However, as examined in detail below, the NIHRC is concerned by the retention of certain provisions of the Illegal Migration Act 2023.[4] In particular: section 12, which diverts certain powers to authorise detention from Judges to the Home Secretary; section 29, which prevents some people from accessing modern slavery protections; and, section 59, that renders asylum and human rights claims inadmissible if they are made from certain countries. The NIHRC is concerned that these provisions may result in the arbitrary detention of refugees and stateless persons,[5] prevent victims of modern slavery from accessing vital protections,[6] and heighten the risk of refoulement for nationals from countries being listed as 'safe' without an individualised assessment of their circumstances.[7]

2.4 Given the UK Government's stated and welcome commitment to human rights, the rule of law and "to supporting and strengthening

[3] The NIHRC identified ECHR Articles 1, 2, 3 and 13 as engaged in relation to sections 2-10 of the Illegal Migration Act and ECHR Articles 8 and 14 as engaged in relation to sections 31-25. See NI Human Rights Commission, 'Submission to the House of Lords on the Illegal Migration Bill' (NIHRC, 2023), at paras 3.1-3.9 and 7.1-7.9.
[4] Illegal Migration Act 2023, Section 12 (Period for which persons may be detained); Section 29 (Disapplication of modern slavery provisions); Section 52 (Judges of First-tier Tribunal and Upper Tribunal); Section 59 (Inadmissibility of certain asylum and human rights claims); Section 60 (Cap on number of entrants using safe and legal routes); Section 62 (Credibility of claimant: concealment of information etc).
[5] UN Refugee Agency, 'UNHCR Observations on the Border Security, Asylum and Immigration Bill' (UNHCR, 2025).
[6] NI Human Rights Commission, 'Submission to House of Lords on the Illegal Migration Bill' (NIHRC, 2023), at paras 6.1-6.12.
[7] See NI Human Rights Commission, 'Advice on the Safety of Rwanda (Asylum and Immigration) Bill' (NIHRC, 2024), at paras 7.1-7.10: "The UK's procedural obligations under Articles 2 and 3 of the ECHR require consideration of the individual's risk of refoulement following removal to a third country, prior to their removal. Obligations under ICCPR, UN CAT and the 1951 Refugee Convention also require States to provide individualised assessment procedures protecting against the risk of refoulement and access to a right of appeal with suspensive effect".

the asylum and immigration system",[8] the NIHRC repeats its concern with the Nationality and Borders Act 2022, which in our view requires much further amendment to ensure its compatibility with international and domestic human rights standards. This Act was the foundation for the previous UK Government's approach to the rights of refugees, asylum seekers and migrants who arrive to the UK by irregular means.[9] It established the concept that asylum claims should not be considered in the UK if the claimant was previously present in, or had another connection to, a safe third country.[10] It also created the 'two tier' refugee system, for the differential treatment of refugees.[11] The NIHRC reiterates that such measures contravene international human rights standards and humanitarian protection law,[12] as consistently acknowledged by international human rights mechanisms.[13]

2.5 The NIHRC recommends that peers seek confirmation from the UK Government on the assessment, if any, that was undertaken to ensure the compatibility of the retained provisions of the Illegal Migration Act 2023 and the Nationality and Borders Act 2022 with the UK Government's international human rights obligations.

Windsor Framework Article 2

2.6 Article 2 of the Windsor Framework states:

> 1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out

[8] UK Parliament, 'Oral statement to Parliament – The King's Speech 2024'. Available at: The King's Speech 2024 - GOV.UK; The Labour Party, 'Change – Labour Party Manifesto 2024'. Available at: Change – The Labour Party; UK Parliament, 'Written Ministerial Statement: Border Security, Asylum and Immigration Bill – Rt Hon Yvette Cooper, Secretary of State for the Home Department - Statement UIN HLWS402', 30 January 2025.
[9] UN Refugee Agency, 'Nationality and Borders Act'. Available at: Nationality and Borders Act | UNHCR UK.
[10] Sections 15 to 17, Nationality and Borders Act 2022
[11] Section 12, Nationality and Borders Act 2022.
[12] NI Human Rights Commission, 'Response to Call for Evidence by the Joint Committee on Human Rights on the Nationality and Borders Bill' (NIHRC, 2021).
[13] UN Refugee Agency, 'UNHCR Updated Observations on the Nationality and Borders Bill' (UNHCR, 2021); UN Refugee Agency, 'UNHCR Legal Observations on the Illegal Migration Bill' (UNHCR, 2023); CCPR/C/GBR/CO/8, 'UN Human Rights Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 3 May 2024, at para 39 and 41; CRC/C/GBR/CO/6-7, 'UN CRC Committee Concluding Observations on the Combined Sixth and Seventh Reports of the UK of Great Britain and NI', 2 June 2023, at para 24(b); CRC/C/GBR/CO/6-7, 'UN CRC Committee Concluding Observations on the Sixth and Seventh Periodic Reports of the UK of Great Britain and NI', 2 June 2023, at paras 50(a)-50(c); Letter from the UN Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally; UN Special Rapporteur on the human rights of migrants, Felipe González Morales; UN Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Tomoya Obokata; and UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin to the UK Government, 5 November 2021.

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 Framework, and shall implement this paragraph through dedicated mechanisms.

2.7 In Windsor Framework Article 2, the UK Government commits to ensuring that certain rights, safeguards and equality of opportunity protections are not diminished as a result of the UK leaving the EU. Therefore, to fall within scope of Windsor Framework Article 2, the human right or equality protection being relied upon must be covered by the relevant chapter of the Belfast (Good Friday) Agreement and have been underpinned by EU law including EU treaties, directives and regulations. In most cases, the relevant EU law will be that which was binding on the UK on 31 December 2020.

2.8 The High Court of NI held that:

- asylum-seekers and victims of human trafficking, *as individuals*, are protected by Windsor Framework Article 2;[14]
- *rights particular* to asylum-seekers and victims of human trafficking fall within the concept of civil rights covered by the relevant chapter of the Belfast (Good Friday) Agreement;[15] and therefore,
- pursuant to Windsor Framework Article 2, certain measures of the EU asylum acquis that bound the UK before Brexit continue to set minimum standards in NI below which the law in NI must not fall.[16]

2.9 On this basis, EU measures found by the High Court of NI to have continuing relevance in Northern Ireland include:

- the EU Human Trafficking Directive (2011/36/EU);[17]

[14] *Re NIHRC and JR295* [2024] NIKB 35 at paras 68-69.
[15] Ibid at para 70.
[16] Ibid at paras 74-173.
[17] Directive 2011/36/EU, 'EU Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011

- the EU Asylum Reception Directive (2003/9/EC);[18]
- the EU Qualification Directive (2004/83/EC);[19] and
- the EU Asylum Procedures Directive (2005/85/EC).[20]

2.10 The UK Government contended in litigation that the scope of the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement 1998 is limited to that which relates to "the healing of sectarian division in Northern Ireland through reconciliation".[21] Several decisions by the High Court of NI and the Court of Appeal of NI have rejected this argument, finding the protection to be "broad in scope"[22] and that:

> The import of that chapter is that a broad suite of rights which had been recognised by the participants in the talks, and which were to be given further effect in the mechanisms to be established pursuant to the B-GFA (such as the incorporation into Northern Ireland law of the ECHR), would provide a baseline for individual rights-protection in the new arrangements which were to follow. The new arrangements for Northern Ireland's governance were to be founded on the protection of citizens' rights. There is no reason, in our view, to construe the broad language of the RSE chapter restrictively.[23]

2.11 The UK Government is appealing judgments of the High Court and the Court of Appeal. The NIHRC will await the outcome but in the meantime encourages peers to explore in detail the degree to which the Bill protects rights in line with relevant EU measures. As made clear by the High Court, certain of the impugned provisions of the Illegal Migration Act diminished rights, contrary to the EU standards in question.[24] Such line of enquiry may assist the House in forming a view of the present Bill, considering what if any amendments may be required to protect rights and to mitigate the risk of future

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[18] Directive 2003/9/EC, 'Council Directive laying down minimum standards for the reception of asylum seekers', 27 January 2003.
[19] 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.
[20] Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005.
[21] As summarised by Humphreys J in *Re NIHRC and JR295* [2024] NIKB 35, at para 69.
[22] Ibid at para 70.
[23] *Dillon & Ors v Secretary of State for NI* [2024] NICA 59 at para 115.
[24] *Re NIHRC and JR295* [2024] NIKB 35 at, for example, paras 99-108, 112-117 and 127-133.

litigation.

2.12 The NIHRC recommends that peers seek confirmation from the UK Government whether or to what extent the Bill reduces the rights of asylum-seekers below minimum standards set out in the EU asylum acquis to which the UK had opted in prior to its withdrawal from the EU.

2.13 The NIHRC recommends that the Home Office, the Northern Ireland Office, the Cabinet Office, NI Executive and other relevant departments act promptly to ensure that judgments of the Northern Ireland higher courts on Windsor Framework Article 2 are reflected in the development and scrutiny of policy and legislation, unless or until there is a contrary ruling.

3.0 Part 1 (Chapter 2): Other Border Security Provision

Clauses 13-17: Offences relating to articles or information for use in immigration crime

3.1 Clauses 13 and 14 create new offences to criminalise supplying, offering to supply and handling articles a person knows or suspects are to be used in connection with an immigration offence under section 24 (illegal entry, etc) or 25 (assisting unlawful immigration) of the Immigration Act 1971. A person will have a defence where they can show a reasonable excuse for their action. Clause 15 defines "relevant article" as anything other than certain items for basic subsistence such as food and medicines. Clause 16 creates a new offence for collecting information to be used in immigration crime. The offence requires reasonable suspicion that the information will be used in a relevant journey, with a defence in case the journey is to be made only by the individual themselves, or they have a reasonable excuse for their action. Clauses 13, 14 and 16 also include a defence for members of organisations providing aid to asylum seekers or when rescuing a person. Clause 17 makes provisions in clauses 13-16 extraterritorial.

3.2 Under the UN Refugee Convention 1951 (the Refugee

Convention),[25] the UK must not penalise someone for being in or entering a country without permission, where this is necessary to seek and receive asylum.[26] The UK has also ratified the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Smuggling Protocol),[27] which protects migrants from prosecution for being the object of certain criminal conduct committed intentionally and to obtain, directly or indirectly, a financial or other material benefit, such as smuggling of migrants, producing a fraudulent travel or identity document and other actions.[28]

3.3 The Council of Europe Convention on Action Against Trafficking in Human Beings includes a 'non-punishment provision' for victims of human trafficking. This provision states that each country must allow the possibility of not penalising victims for engaging in illegal activities, provided that they have been compelled to do so.[29]

3.4 The UK Government stated that the new provisions are intended to target organised crime groups, and to strengthen the capacity of law enforcement agencies to tackle 'people-smuggling networks'. Additionally, they state, that they also provide tools to intervene at an earlier stage and disrupt the criminal gangs.[30] According to the Minister for Border Security and Asylum, Dame Angela Eagle, "it is not the intention to target asylum seekers with these new offences […] In practice, the focus will be intelligence-led and targeted at those who law enforcement believe to be working in connection with organised criminal networks".[31]

3.5 The NIHRC agrees that preventing the exploitation of migrants and refugees by organised crime groups is a critically important effort and one that is required by human rights standards, and welcomes

[25] Ratified 11 March 1954.
[26] See Article 31, UN Refugee Convention 1951 and Article 19 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Smuggling Protocol) according to which nothing in the Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention.
[27] Ratified on 9 February 2006.
[28] Article 5 and 6 of the Smuggling Protocol.
[29] Article 26, Council of Europe Convention on Action against Trafficking in Human Beings 2005.
[30] UK Home Office, 'Border Security, Immigration and Asylum Bill: ECHR Memorandum' (HO, 2025), at para 22; UK Parliament Hansard 'Public Bill Committee Border Security, Asylum and Immigration Bill - Minister for Border Security and Asylum Dame Angela Eagle', 4 March 2025.
[31] UK Parliament Hansard 'Public Bill Committee Border Security, Asylum and Immigration Bill - Minister for Border Security and Asylum Dame Angela Eagle', 4 March 2025.

the Government's efforts to apply a targeted and intelligence-led approach to these provisions. However, the NIHRC is concerned that, as currently drafted, the new offences may be unnecessarily broad and lack sufficient safeguards to ensure they apply specifically to the group they seek to target, namely, people involved in or profiting from organised crime and the smuggling of migrants.

3.6 The NIHRC acknowledges and welcomes the safeguards included in the Bill, such as the requirement for direct knowledge or suspicion when committing the act, as well as the reasonable excuse defence. However, the NIHRC is concerned that despite these safeguards, the breadth of these provisions could lead to prosecutions and possibly convictions of individuals who are not involved in organised crime networks or profiting from people smuggling. The context in which these actions occur is often one of exploitation and coercion, which is not explicitly recognised as a reasonable excuse in the provisions of the Bill.[32] The high penalties attached to these offences -up to 14 years for clauses 13-14 offences and 6 and 5 years for clause 16 offences- heighten our concerns.

3.7 In its observations on the Bill, the United Nations High Commissioner for Refugees (UNHCR) notes its concern that these new criminal offences might have a broader scope than targeting organised immigration crime and have the potential for innocent parties to be wrongly accused, especially considering their extraterritorial effect.[33] As flagged by the UNHCR, in its efforts to tackle crime and the smuggling of people, the UK must not neglect its obligations under the Refugee Convention not to penalise asylum seekers for being in or entering a country without permission in order to seek and receive asylum,[34] as well as its obligations under the Smuggling Protocol that protects migrants from prosecution for being the object of certain criminal conduct.[35] Additionally, the UK

[32] UN Refugee Agency, 'UNHCR Observations on the Border Security, Asylum and Immigration Bill' (UNHCR, 2023), at para 56.
[33] UN Refugee Agency, 'UNHCR Observations on the Border Security, Asylum and Immigration Bill' (UNHCR, 2023), at paras 48-50.
[34] UN Refugee Agency, 'UNHCR Observations on the Border Security, Asylum and Immigration Bill' (UNHCR, 2023), at para 52; See Article 31, UN Refugee Convention 1951 and Article 19 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Smuggling Protocol) according to which nothing in the Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention.
[35] Article 5 and 6 of the Smuggling Protocol.

should, in accordance with the Council of Europe Convention on Action against Trafficking in Human Beings, make sure to protect victims of human trafficking and not penalise them for involvement in unlawful activities, to the extent that they have been compelled to do so.[36]

3.8 As a consequence of Windsor Framework Article 2, the EU Human Trafficking Directive (Directive 2011/36/EU)[37] remains relevant for determining minimum standards of protection that must be upheld in Northern Ireland. Pursuant to Article 8 of the Directive, authorities must be entitled not to prosecute or impose penalties on victims of trafficking for criminal acts they were compelled to commit as a direct consequence of their trafficking experience.

3.9 While offences under Clauses 13 to 17 include a defence of 'reasonable excuse,' the examples given do not include specific reference to coercion arising from human trafficking or modern slavery, nor do they demonstrate consideration of the rights and welfare of children in the context of immigration. The absence of a clear defence risks criminalising victims of trafficking who, for example, may have been coerced into piloting vessels or handling materials in the course of their exploitation.

3.10 Section 22 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 provides a statutory defence for victims (adults and children) who have been compelled to commit certain offences where coercion was attributable to slavery or exploitation.

3.11 The NIHRC notes that the defence provided by section 22 is restricted to offences punishable by a maximum term of less than five years and only extends to more serious offences if they are listed in that section. As such, it appears the section 22 defence would not cover the new offences proposed in the present Bill unless the Bill, or section 22 of the Act, is amended.

3.12 Caselaw affirms the importance of such defences. In *L and others v R*[38] the Court of Appeal for England and Wales held:

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[36] Council of Europe Convention on Action against Trafficking in Human Beings 2005, article 26.
[37] Directive 2011/36/EU, 'EU Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.
[38] *L, HVN, THN and T v R* [2013] EWCA Crim 991, at para 13.

> The criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, not merely because of age (always a relevant factor in the case of a child defendant) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals.

3.13 The NIHRC recommends that to ensure compliance with the Refugee Convention, the Smuggling Protocol and the Europe Convention on Action against Trafficking in Human Beings, Clauses 13 to 17 be amended to limit their application to individuals involved in, or seeking to obtain, financial or material benefits from people-smuggling.

3.14 The NIHRC recommends that to ensure compliance with Windsor Framework Article 2, Clauses 13 to 17 be amended to protect from prosecution individuals who are compelled to participate in criminal activity as a consequence of human trafficking, modern slavery or relevant exploitation.

Legal aid and access to legal representation

3.15 Article 6, paragraph 3(c) ECHR states that anyone charged with a criminal offence has the right to defend themselves personally or to have legal assistance of their choosing. If someone cannot afford legal assistance, they may be entitled to have State legal assistance provided when the interests of justice demand it. According to the case law of the ECtHR, the right to be defended by a competent lawyer is a fundamental aspect of a fair trial under Article 6.[39] When deciding whether State provided legal assistance is necessary in the interest of justice, the ECtHR has considered factors such as the defendant's unfamiliarity with the language used in court or the particular legal system.[40] The Human Rights Committee of the International Covenant on Civil and Political Rights (UN ICCPR) has said that the "availability or absence of legal assistance often determines whether or not a person can access the relevant

[39] Salduz v Turkey (2008) ECHR 1542, at para 51.
[40] Quaranta v Switzerland (1991) ECHR 33, at paras 35-36; Twalib v Greece (1998) ECHR 54, at paras 53-54.

proceedings or participate in them in a meaningful way".[41]

3.16 The NIHRC is concerned that the Bill lacks specific provision on access to adequate legal aid and legal representation of defendants. To ensure the right to a fair trial and to serve as an effective safeguard against the unintended criminalisation of individuals not involved in people smuggling, the reasonable excuse defence outlined in clauses 13, 14, and 16 must be accessible to defendants, who must have the means to effectively present their defence and provide the necessary evidence to support it. This issue is particularly pressing given the vulnerable circumstances of many individuals arriving in the UK, who may experience trauma, language barriers, and unfamiliarity with the law and the seriousness of the penalties. These factors can create significant obstacles to accessing justice.

3.17 The NIHRC is concerned that the increased pressure created by these new offences, particularly given their broad scope, may not be matched by sufficient provision for specialised legal representation. The NIHRC is concerned that this will have a detrimental impact in Northern Ireland, given the particular shortage of immigration law practitioners and access to legal aid.[42]

3.18 The NIHRC recommends that the Bill includes specific provision for legal aid safeguards to ensure access to legal representation.

<u>Safeguards for children, vulnerable adults and dependents</u>

3.19 Specific needs must be considered when assessing the State's obligations to provide for vulnerable individuals. This includes the needs of women and girls,[43] ethnic and racial minorities,[44] people with disabilities,[45] children,[46] and victims of torture or other forms of mistreatment.[47] The NIHRC is concerned that the new offences,

[41] CCPR/C/GC32, 'Human Rights Committee General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial', 23 August 2007, at para 10.
[42] According to Justice Together, "NI has a very severe shortage of advice for immigration and asylum issues…", Justice Together 'It's a no-brainer': Local authority funding for immigration legal advice in the UK, May 2023, at page 10.
[43] UN Convention on the Elimination of All Forms of Discrimination Against Women 1981.
[44] UN Convention on the Elimination of All Forms of Racial Discrimination 1965.
[45] UN Convention on the Rights of Persons with Disabilities 2006.
[46] UN Convention on the Rights of the Child 1989.
[47] UN Convention Against Torture 1984.

as drafted, do not include sufficient protection for persons who are vulnerable with specific needs. By way of example, EU measures relevant to asylum and human trafficking, which bound the UK prior to EU withdrawal, require that the best interests of the child be a primary consideration in their implementation.[48] 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 such as the EU Charter of Fundamental Rights of the EU, Article 24 on the rights of the child. Despite that, children are not addressed explicitly within Clauses 13 to 17.[49]

3.20 Another example is the absence of a defence for a person who is the object of coercion or exploitation. To fail to consider and address the specific needs of the vulnerable will impact upon women and children disproportionately. Women who are subject to coercive control, children who are criminally exploited, and victims of trafficking and modern slavery require more.

3.21 The NIHRC recommends that the Bill be amended to ensure that the child's best interest is recognised as a primary consideration including specifically in the application of these provisions.

3.22 The NIHRC recommends that the Bill should ensure that there are explicit safeguards in place for particularly vulnerable individuals or individuals with specific needs in line with human rights obligations. This includes ensuring protections are in place for children, women and girls, persons with disabilities, older people, pregnant women, ethnic and racial minorities, single parents with children and individuals who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

[48] See for example, 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; Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005; Directive 2003/9/EC, 'Council Directive laying down minimum standards for the reception of asylum seekers', 27 January 2003.
[49] Article 3 UN Convention on the Rights of the Child.

Clause 18: Endangering another during sea crossing to UK

3.23 Clause 18 creates a new criminal offence for a person who makes a journey by sea to the UK from France, Belgium, or the Netherlands in contravention of certain section 24 Immigration Act 1971 offences, where, during that journey, the person endangered the life of another person or created a risk of serious personal injury (whether physical or psychological) to another person. This offence carries a penalty of imprisonment of up to five or six years.[50]

3.24 These provisions engage ECHR Articles 5 (right to liberty and security) and 7 (no punishment without law). The ECtHR has established that ECHR Article 5 includes the principle of legal certainty, under which a law setting conditions for deprivation of liberty must be precise and predictable to meet the "lawfulness" standard set by the Convention. This ensures that citizens can reasonably foresee the consequences of their actions, thereby reducing the risk of arbitrariness.[51] The Human Rights Committee of the UN ICCPR has also emphasised that grounds for arrest or detention must be defined by law and specified clearly to prevent broad or arbitrary interpretation.[52] Similarly, criminal offences must comply with ECHR Article 7. The ECtHR interprets the principle of legality in this article as requiring offences and corresponding penalties to be clearly defined by law. This includes the necessity for both the definition of offences and the penalties to be accessible and foreseeable.[53] The ECtHR has determined that a lack of sufficient "quality of law" regarding the definition of the offence and the applicable penalty constitutes a breach of Article 7 of the Convention.[54]

3.25 The Home Secretary has stated that the new offence aims to deter

[50] For an offence under clause 18 committed in connection with an offence under subsection (A1) of the Immigration Act 1971, the maximum sentence is six years or a fine or both. For an offence under clause 18 committed in connection with an offence under subsections (B1), (D1) or (E1) of section 24 of the Immigration Act 1971, the maximum sentence is five years or a fine or both. Explanatory Notes to the Border Security, Asylum and Immigration Bill, 30 January 2025, at para 139
[51] Del Río Prada v Spain (2013) ECHR 1004, at para 125; Medvedyev and Others v France (2010) ECHR 384, at para 80.
[52] CCPR/C/GC/35, 'Human Rights Committee General Comment No. 35 Article 9 (Liberty and security of person)', 16 December 2014, at para 22.
[53] *Jorgic v Germany* (2007) ECHR 583, at paras 103-114; *Kafkaris v Cyprus* (2008) ECHR 143, at para 150.
[54] *Kafkaris v Cyprus* (2008) ECHR 143, at paras 150-152.

overcrowding on boats and prevent loss of life at sea,[55] and is a measure necessary to discharge the UK's positive obligation under Article 2 ECHR (to protect life).[56]

3.26 The NIHRC welcomes the Bill's efforts to protect the lives and safety of individuals during perilous sea crossings. However, the NIHRC notes that even such a provision should be certain, permit an accused to avail of advice and to raise a defence in certain circumstances.

3.27 In a written statement to Parliament, the Home Secretary indicated that the provision is aimed at people "involved in physical aggression, intimidation or coercive behaviour, including preventing offers of rescue while at sea".[57] The NIHRC welcomes the objective of protecting individuals at sea from harmful behaviour but suggests that to better achieve that the provisions should be clearer and more focused.

3.28 It can also be noted that the UNHCR is concerned there is insufficient legal certainty as required by ECHR Articles 5 and 7.[58]

3.29 The UNHCR expressed concern that the offence may not clearly define the intent required.[59] The NIHRC suggests that this should be made clearer, for example in relation to the intent required.

3.30 **The NIHRC recommends amending clause 18 to clarify the type of conduct that will trigger the endangerment offence, and the intent required to ensure the law is accessible and predictable in line with Articles 5 and 7 of the ECHR.**

3.31 Clause 18 raises similar questions of compliance with Windsor

[55] UK Parliament Hansard, 'Written Statement: Border Security, Asylum and Immigration Bill – Rt Hon Yvette Cooper, Secretary of State for the Home Department - Statement UIN HCWS406', 30 January 2025. Available at: https://questions-statements.parliament.uk/written-statements/detail/2025-01-30/hcws406.
[56] UK Home Office, 'Border Security, Immigration and Asylum Bill: ECHR Memorandum' (HO, 2025), at para 53.
[57] UK Parliament Hansard, 'Written Statement: Border Security, Asylum and Immigration Bill – Rt Hon Yvette Cooper, Secretary of State for the Home Department - Statement UIN HCWS406', 30 January 2025. Available at: https://questions-statements.parliament.uk/written-statements/detail/2025-01-30/hcws406.
[58] UN Refugee Agency, 'UNHCR Observations on the Border Security, Asylum and Immigration Bill' (UNHCR, 2023), at para 65.
[59] As an example, the UNHCR mentions the possibility of someone facing prosecution for overcrowding a boat or instructing someone to sit in the middle of the boat where they face a bigger risk of being trampled, without that person knowing this to be a risk or to attract criminal liability. UN Refugee Agency, 'UNHCR Observations on the Border Security, Asylum and Immigration Bill' (UNHCR, 2023), at para 67.

Framework Article 2 as Clauses 13 to 17.

3.32 **The NIHRC recommends that to ensure compliance with Windsor Framework Article 2, Clause 18 be amended to protect individuals who are compelled to participate in criminal activity as a consequence of their experience of human trafficking, modern slavery or relevant exploitation**.

General comment about Chapter 2 'Other Border Security Provision' Clauses 13-18

3.33 Without accessible alternatives, people fleeing conflict and persecution may take unauthorised and dangerous routes into the UK.[60] Focusing efforts on preventing the need for such dangerous crossings by improving access to safe and legal routes may be more effective and meet the aim of the legislation proportionately.

3.34 **The NIHRC recommends that the UK Government consider expanding safe and legal routes for seeking and obtaining asylum in the UK, whilst also addressing organised crime, in line with its international human rights obligations.**

Clauses 19-26: Powers of search etc in relation to electronic devices

3.35 Clauses 19 to 26 introduce new powers: a power to search (clause 20); associated powers of seizure and retention (clause 21); a duty to pass on items seized (clause 22); and powers to access, copy and use information contained on electronic devices (relevant articles)[61] (clause 23). These powers can be applied to a "relevant person", meaning someone who arrived in or entered the UK without the required leave to enter, in breach of a deportation order, or without a required electronic travel authorisation. They can be exercised when an "authorised officer" (immigration officer or police constable authorised by a superintendent) has reasonable grounds to suspect that a relevant person has a relevant article.

[60] NI Human Rights Commission, 'Submission to the House of Lords on the Illegal Migration Bill' (NIHRC, 2023), at para 2.7.
[61] According to Clause 19 (4) of the Bill a "relevant article" means anything which appears to an authorised officer to be a thing on which information that relates, or may relate, to the commission (whether in the past or future) of an offence under section 25 or 25A of the Immigration Act 1971 is, or may be, stored in electronic form.

3.36 These new powers engage the UK's obligations under for example ECHR Article 8 (private and family life) and Article 1 Protocol 1 (peaceful enjoyment of property).[62] To be compatible, an interference with Article 8 ECHR must be in accordance with law and provide adequate protection against arbitrary actions by public authorities.[63] The same applies to Article 1 Protocol 1.[64] Both require restrictive measures to have a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[65]

3.37 As a fundamental right falling within the scope of the relevant chapter of the Belfast (Good Friday) Agreement, it is the NIHRC's view that the right to protection of one's personal data is covered by Windsor Framework Article 2 and should not be diminished in Northern Ireland below the EU standards binding on the UK before Brexit.[66] Clauses 19-26 therefore engage the relevant EU legal framework for data protection. The right to data protection is enshrined in Article 7 (the right to respect of private life) and Article 8 (right to protection of personal data) of the EU Charter of Fundamental Rights. All relevant EU data protection rules must be interpreted in light of these obligations.

3.38 The right to data protection is given effect in a number of EU measures. The main EU law laying down rules for the protection of personal data in the context of law enforcement is the EU Law Enforcement Directive.[67] The UK took additional steps to incorporate the EU Data Protection and Law Enforcement Directive into UK law via Part 3 of the Data Protection Act 2018, which sets out rules on the processing of personal data for criminal law enforcement

[62] Article 1 of Protocol 1 ECHR says: "Protocol 1, Article 1: Protection of property (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law (2) The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties."
[63] Gillan v UK (2010) ECHR 755, at paras 76-77; Beghal v the UK, (2019) ECHR 181, at para 88.
[64] According to the ECtHR, to be deemed compatible with Article 1 of Protocol No. 1, the interference must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (Beyeler v Italy (2000) ECHR 1, at paras 108-114).
[65] Dudgeon v the UK (1983) ECHR 2, at paras 51-53; Phillips v the UK (2001) ECHR 437, at paras 51-52.
[66] See section 2 above for an overview of Windsor Framework Article 2.
[67] Directive 2016/680/EU, 'Regulation of the of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data', 27 April 2016.

purposes.

3.39 Clauses 20-23 enable authorised law enforcement officers to search for, seize, retain, pass on information from and access, copy and use information stored on electronic devices. The CJEU in the landmark *Landeck*[68] case confirmed that the EU Law Enforcement Directive is the appropriate legal framework for the protection of personal data in the context of law enforcement persons accessing electronic devices.[69]

3.40 The key provisions of the EU Law Enforcement Directive relevant to the Bill are Article 1 (scope and objectives), Article 3 (definitions), Article 4 (principles for the processing of personal data); Article 5 (time limits for storage and review), Article 10 (processing of special categories of personal data) and Article 13 (information to be made available to the individual), among others.

3.41 In the *Landeck* case, the CJEU clarified that attempting to access the data on a phone (electronic device) should be regarded as a serious, or even a particularly serious, interference with the fundamental rights guaranteed in Articles 7 and 8 of the Chater of Fundamental Rights.[70] The nature of the information that can be found on electronic devices, which the CJEU recognised could potentially include 'particularly sensitive data, such as personal data revealing racial or ethnic origin, political opinions and religious or philosophical beliefs', requires adherence to the strict rules on data protection found in Article 10 of the EU Law Enforcement Directive,[71] which sets a higher threshold for the processing of such data, only where strictly necessary and subject to safeguards. The *Landeck* decision also confirmed that to ensure proportionality was observed, access to such data should be "subject to a prior review carried out either by a court or by an independent administrative

[68] *Bezirkshauptmannschaft Landeck* [2024], Case C-548/21, 4 October 2024. Independent research on the interaction between the EU Charter of Fundamental Rights and the NI legal framework commissioned by the NIHRC has highlighted that , unlike in a common law system, CJEU case law is understood to clarify existing EU law (primary or secondary) rather than creating new law or positively extending it in any novel way. As a result, the legal effect of a post-Brexit CJEU judgment interpreting a pre-Brexit provision of EU law in light of the EU Charter will be to clarify what the law has always been, rather than what the law is from the date of such a judgment. See Tobias Lock et al, 'The Interaction between the EU Charter of Fundamental Rights and general principles with the Windsor Framework' (NIHRC, 2024), at 55.
[69] *Bezirkshauptmannschaft Landeck* [2024], Case C-548/21, 4 October 2024, para 57.
[70] *Bezirkshauptmannschaft Landeck* [2024], Case C-548/21, 4 October 2024, para 95.
[71] *Bezirkshauptmannschaft Landeck* [2024], Case C-548/21, 4 October 2024, para 94.

body."[72]

3.42 The EU Law Enforcement Directive does not preclude national rules affording competent authorities the possibility to process data found on electronic devices in the context of law enforcement. To safeguard against disproportionate breaches of the fundamental right to data protection, the CJEU held that in this context national rules must:

- define with sufficient precision the nature or categories of offences concerned,
- ensure respect for the principle of proportionality, and
- make reliance on that possibility, except in duly justified cases of urgency, subject to prior review by a judge or an independent administrative body.[73]

3.43 The NIHRC recognises and welcomes the fact that new powers under clauses 19 to 26 contain several safeguards against arbitrariness. These include the requirement of reasonable grounds for suspicion before exercising the powers, limited application to immigration offences, necessary authorisation by a superintendent for police constables to use these powers, and the prohibition of intimate searches, among others.

3.44 However, the NIHRC suggests close scrutiny is required as to whether the Bill strikes the right balance between law enforcement and the protection of personal data. For example, Clause 23 grants powers to access, copy and use data found on electronic devices collected under Clause 21. Seizure and access to the data are subject to prior approval of a police superintendent rather than requiring prior judicial or independent approval, described as necessary in *Landeck* (see above). The NIHRC notes that the information found on electronic devices in the context of law enforcement could be sensitive personal data, therefore the Bill must adhere to the higher standards established by the EU Law Enforcement Directive.

3.45 The commitment by the Home Office to develop guidance and

[72] *Bezirkshauptmannschaft Landeck* [2024], Case C-548/21, 4 October 2024, para 102.
[73] *Bezirkshauptmannschaft Landeck* [2024], Case C-548/21, 4 October 2024, para 110.

training regarding the use of these powers is particularly welcomed.[74] The guidance should outline how immigration officers or constables establish reasonable grounds for suspicion and under what circumstances reasonable force may be applied. It is essential that this guidance takes a human rights-based approach and prohibits any unlawful or discriminatory application based on protected characteristics. To prevent arbitrariness, the guidance must ensure that the use of any power is necessary and proportionate, not applied as a de facto blanket policy,[75] and allows for effective judicial oversight.[76] The guidance should also detail the approach required to guard against data being shared for purposes incompatible with those for which it was collected, as per the requirement in Article 4(2) of the EU Law Enforcement Directive.

3.46 The NIHRC recommends that the UK Government develops guidance before the powers are deployed, adopting a human rights-based approach, which must include respect for the relevant EU law provisions outlined above and interpreted by the CJEU in the *Landeck* case.

Clauses 27-33: Sharing of information

3.47 Clause 27 allows HMRC or anyone acting on its behalf to supply information (data) held by them to a limited list of law enforcement officials listed in Clause 27(3)(a)-(g). Clause 28 spells out various scenarios in which the further sharing and processing of data can be facilitated and the conditions for this further sharing that need to be met.

3.48 The CJEU has summarised, in the *VS* case, the obligations imposed by the EU Data Protection Law Enforcement Directive on the data controller when further processing personal data for purposes different from the purpose of the initial collection of the data.[77] The Court in *VS* confirmed that under Article 4(2) of the EU Law Enforcement Directive, further processing of personal data must

[74] The ECHR Memorandum of the Bill says that "the Home Office will issue non statutory guidance about the use of the powers and training which will be required for authorised officers exercising those powers". UK Home Office, 'Border Security, Immigration and Asylum Bill: ECHR Memorandum' (HO, 2025), at para 72.
[75] Blanket policies of seizure of mobile phones were determined unlawful by the High Court of England and Wales in 2022 in the case of R (on the application of HM, MA & KH) v Secretary of State for the Home Department [2022] EWHC 695 (Admin).
[76] Gillan v UK (2010) ECHR 755, at para 80.
[77] *VS v Inspektor v Inspektorata kam Visshia sadeben suvet* [2022], Case C-180/21, 8 December 2022

satisfy two conditions: it should be done in accordance with legislation at EU or Member State level and it must be necessary and proportionate to the purpose of the processing.[78] It is the NIHRC's understanding that the UK rules on further processing of data currently align with those established by EU law. Clauses 27-28 of the Bill also provide for the transfer of data to third countries and territories outside of the UK. These provisions engage Chapter V of the EU Law Enforcement Directive which contains the principles for the lawful transfer of data to third countries in the context of law enforcement.

3.49 The UK implemented the EU Law Enforcement Directive in domestic law with the Data Protection Act 2018. Chapter 5 of the Data Protection Act 2018 corresponds to Chapter V of the EU Law Enforcement Directive. The NIHRC notes that Clause 32 of the Bill does not authorise the disclosure of information in a manner that contravenes data protection law, meaning the Data Protection Act 2018. It is the NIHRC's understanding that the UK rules on transfer of data to third countries currently align with those established by EU law.

3.50 The NIHRC notes that the Data Protection Act 2018 aligns with the EU Law Enforcement Directive, but there will be potential misalignment as a result of the Data (Use and Access) Bill once in force. The Data (Use and Access) Bill amends the UK GDPR provisions concerning further processing of data. Furthermore, Schedule 8 of the Data (Use and Access) Bill amends provisions on transfer of data to third countries in Chapter 5 of the Data Protection Act 2018. The NIHRC is keeping a watching brief on the potential impact of the Data (Use and Access) Bill on the alignment between UK standards and EU standards on transfer of data to third countries that are still binding on NI.

3.51 The NIHRC recommends that the UK Government explores the potential for misalignment between the Data Protection Act 2018, as amended by the Data (Use and Access) Bill once the Bill comes into force, and the rules on the lawful transfer of data to third countries established by the EU Law

[78] *VS v Inspektor v Inspektorata kam Visshia sadeben suvet* [2022], Case C-180/21, 8 December 2022, para 51.

Enforcement Directive.

Clauses 34-35: Provision of biometric information by evacuees etc

3.52 Clause 34 provides enables authorised persons to collect biometric data from evacuees. Clause 34 (2)(a) permits authorised officers to collect biometric data from people they 'reasonably believe' would require leave to enter the United Kingdom. Clause 34 (3) further authorises individuals to collect biometric data from children under 16 under specific circumstances. Clause 34 (5) allows authorised persons to collect biometric data from people they have a 'reasonable belief' are over 16 years. Clause 34 (8) extends the exercise of power to places outside the United Kingdom.

3.53 Clause 35 requires the authorised person who collected biometric data to send it to the Secretary of State as soon as reasonably practical. The Secretary of State in turn has the power to process and retain the data for the purposes of immigration, nationality, law enforcement and national security. Clause 35(4) requires the Secretary of State to delete the biometric data when the data is no longer necessary and no later than 5 years from the day on which the information was taken.

3.54 Article 4(1) of the EU Law Enforcement Directive provides important safeguards for the human rights of data subjects by establishing principles for the lawful processing of personal data, such as biometric data. Personal data must be processed lawfully and fairly; must be collected for specified, explicit and legitimate purposes; must be adequate, relevant, non-excessive, accurate and kept up to date; and must allow for the identification of the individual for no longer than necessary.

3.55 Article 10 of the EU Law Enforcement Directive specifies that biometric data is special category data and therefore only to be collected where strictly necessary in a manner provided for by the law to protect the vital interests of the data subject or of another natural person. In *Direktor na Glavna*, the CJEU said this constituted "a strengthened condition for the lawful processing of such data and entails, inter alia, a particularly strict review of compliance with the

principle of 'data minimisation', as derived from Article 4(1)(c)."[79] In relation to the retention of biometric data, the CJEU found in *Direktor na Glavna* that "a 'time limit' for the erasure of stored data, within the meaning of Article 5 of Directive 2016/680, …can be regarded as 'appropriate' only in specific circumstances which duly justify it."[80]

3.56 The NIHRC welcomes the fact that the Bill establishes a period for the retention of biometric data, thereby avoiding indefinite retention. The NIHRC is concerned, however, at the potential impact, particularly on children, of the broad powers granted by the Bill to authorised officers to collect biometric data.

3.57 The NIHRC recommends that the UK Government includes in the forthcoming guidance, instructions on how to ensure Clauses 34 and 35 respect the data minimisation and purpose limitation principles of the EU Law Enforcement Directive.

4.0 Part 2: Asylum and Immigration

Clauses 37 to 39: Repeal of immigration legislation

4.1 The NIHRC welcomes the proposed repeal of the Safety of Rwanda (Asylum and Immigration) Act 2024 and most provisions of the Illegal Migration Act 2023.

4.2 However, as detailed below, the NIHRC is concerned by the retention of certain provisions of the Illegal Migration Act 2023 (the "2023 Act")[81] and related provisions of the Nationality and Borders Act 2022 (the "2022 Act").

<u>Section 12, Illegal Migration Act 2023: Detention</u>

4.3 Section 12 of the 2023 Act came into force on 28 September 2023 and now provides that the Secretary of State, rather than a court,

[79] *Direktor na Glavna direktsia „Natsionalna politsia" pri MVR – Sofia* [2024], Case C-118/22, 30 January 2024 at para 69.
[80] *Direktor na Glavna direktsia „Natsionalna politsia" pri MVR – Sofia* [2024], Case C-118/22, 30 January 2024 at para 69.
[81] Illegal Migration Act 2023, Section 12 (Period for which persons may be detained); Section 29 (Disapplication of modern slavery provisions); Section 52 (Judges of First-tier Tribunal and Upper Tribunal); Section 59 (Inadmissibility of certain asylum and human rights claims); Section 60 (Cap on number of entrants using safe and legal routes); Section 62 (Credibility of claimant: concealment of information etc).

will determine what is a reasonable period of detention is to enable the specific statutory purpose to be carried out. Section 12 applies to all immigration detention powers.

4.4 It provides that a person liable to be detained under these provisions may be detained for such period as, in the opinion of the Secretary of State, is reasonably necessary to enable the deportation order to be made, or the removal to be carried out.

4.5 This is essentially a removal/disapplication of the *Hardial Singh* principles,[82] which set out that:

> (i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
> (ii) the deportee may only be detained for a period that is reasonable in all the circumstances;
> (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;
> (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal.

4.6 The explanatory note provided that "As well as codifying, in part, the *Hardial Singh* principles, this clause also overturns the common law principle established in *R(A) v SSHD* [2007] EWCA Civ 804 (and later authorities) that it is for the court to decide, for itself, whether there is a reasonable or sufficient prospect of removal within a reasonable period of time."[83]

4.7 Section 12 also sets out that the power to detain applies regardless of whether there is anything that for the time being prevents the examination or removal from being carried out, the decisions from being made, or the directions from being given.

4.8 The NIHRC has raised its concern regarding the expansion of the Secretary of State's discretionary power to determine what is a reasonable period to detain an individual under the 2023 Act.[84]

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[82] R (Hardial Singh) v Governor of Durham Prison [1983] EWHC 1 (QB).
[83] The Explanatory Notes to the Illegal Migration Act 2023, at para 102.
[84] NI Human Rights Commission, 'Submission to House of Lords on the Illegal Migration Bill', at paras 4.1-4.6.

Paragraphs 4.54 to 4.70 below set out the NIHRC's analysis of the UK Government's obligations under Article 5 of the ECHR (right to liberty and security), including its concerns with how section 12 of the 2023 Act interacts with clause 41 of the current Bill. Of particular concern is the erosion of operational safeguards that are integral to the principle of non-arbitrariness under Article 5, such as those reflected in the *Hardial Singh* principles.

4.9 The ECtHR highlights a number of factors relevant to the assessment of the "quality of law" under Article 5, often referred to as "safeguards against arbitrariness".[85] These include "the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention; and the existence of an effective remedy by which the applicant can contest the "lawfulness" and "length" of his continued detention".[86] While judicial review is available to challenge the Secretary of State's decision-making under section 12, the NIHRC queries whether the fundamental aims of this provision comply with the "good faith" requirement under ECHR Article 5(1)(f). As summarised by the UN Refugee Agency,

> Detention for purposes that cannot be carried out is arguably not only unnecessary and disproportionate but even arbitrary. More narrowly, creating a power to detain even when it is not possible for the Secretary of State to carry out the function for which detention is authorised, and for a further period to allow her to make "arrangements" for release would permit violations of the principle that administrative detention must not be prolonged due to inefficient processing modalities or resource constraints.[87]

4.10 The NIHRC is concerned that individuals will continue to experience longer periods in detention pending and or whilst challenging their removal or deportation and that will be without sufficient judicial oversight. Section 12 should be viewed with particular attention to Article 18 of the EU Procedures Directive (2005/85/EC) which provides that a person should not be held in detention for the sole

[85] J.N. v. UK, Application No. 37289/12, 19 May 2016, at para 83-96.
[86] J.N. v. UK, Application No. 37289/12, 19 May 2016, at para 83-96.
[87] UN Refugee Agency, 'UNHCR Legal Observations on the Illegal Migration Bill' (UNHCR, 2023), at para 120.

reason that they are an applicant for asylum. Where an applicant for asylum is held in detention, Article 18(2) sets out that the possibility of speedy judicial review should be ensured. Noting that the Bill would repeal all other detention provisions of the 2023 Act, the NIHRC considers that section 12 should also repealed.

4.11 The NIHRC recommends that the Bill is amended to repeal section 12 of the Illegal Migration Act 2023.

Section 29, Illegal Migration Act: Modern Slavery and Human Trafficking

4.12 Section 29 of the 2023 Act (disapplication of modern slavery provisions) is to be retained under the present Bill, though it has not yet been commenced.[88] Section 29 amends earlier legislation to provide that those with a positive reasonable grounds decision recognising that they may be a victim of human trafficking, may nonetheless be disqualified from accessing protections in certain cases.[89]

4.13 Section 63 of the 2022 Act introduced provisions to allow for the discretionary disqualification of victims from the National Referral Mechanism recovery and reflection period on public order or bad faith grounds. Significantly, Section 29 of the 2023 Act makes the disqualification on public order grounds mandatory unless there are "compelling circumstances" to the contrary.[90]

4.14 Section 29 of the 2023 Act also extends the list of situations in which protection is denied, to include where a non-national person is liable to deportation under section 3(5) of the Immigration Act 1971 on the basis that the Secretary of State "(a) deems his deportation to be conducive to the public good or (b) another person to whose family he belongs has been ordered to be deported." This provision also extends the scope of the disqualification to any survivor convicted of an offence regardless of the length of sentence.[91]

[88] Section 29 was formerly Clause 28 of the Bill and considered in NI Human Rights Commission, 'Submission to House of Lords on the Illegal Migration Bill' (NIHRC, 2023), at paras 6.1-6.12
[89] Section 63, Nationality and Borders Act 2022.
[90] Section 63(3), the Nationality and Borders Act 2022.
[91] Section 63(4)(iii), Nationality and Borders Act 2022.

4.15 The NIHRC has advised on section 29 of the 2023 Act and its potential conflict with the ECHR.[92] In particular with Article 4 of the ECHR which requires States to put in place a legislative and administrative framework to prevent and punish trafficking and to protect victims.[93] Article 4 of the ECHR may require the State, in certain circumstances, to take operational measures to protect victims, or potential victims. For instance, if State authorities "were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being" subjected to treatment contrary to Article 4, there will be a violation where "the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk".[94]

4.16 When interpreting Article 4 of the ECHR, the ECtHR pays regard to a number of international instruments, including the Council of Europe Convention on Action against Trafficking in Human Beings (Anti-Trafficking Convention) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime (Palermo Protocol).[95] While there is no general prohibition on the prosecution of victims of trafficking in these international instruments, in certain circumstances, their prosecution would be clearly at odds with the State's duty to take operational measures to protect victims and potential victims under ECHR Article 4.

4.17 In fact, the ECtHR has held that early identification of victims of trafficking by a competent authority, on the basis of criteria

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[92] NI Human Rights Commission, 'Submission to House of Lords on the Illegal Migration Bill' (NIHRC, 2023), at para 6.2-6.3: "The right to not be held in slavery and servitude, as provided for by Article 4(1) of the ECHR, is absolute and cannot be interfered with under any circumstances. Consequently, States have a positive obligation to ensure that domestic legislative and administrative frameworks protect individuals from trafficking and facilitate the identification of victims. States are also required to take appropriate measures to remove victims of slavery and servitude, such as victims of human trafficking, from harm and to provide the appropriate support. In some cases, victims of forced labour and servitude may be subject to threats to life or experience torture or ill-treatment. Articles 2 (right to life) and 3 (freedom from torture) of the ECHR require public authorities to take proactive, reasonable steps when there is a real and imminent risk to life/of torture or ill treatment. In cases where there is a threat to an individual's physical or moral integrity, Article 8 of the ECHR (right to respect for private life may also be engaged. This provision requires that any interference with a person's physical or moral integrity is necessary and proportionate in pursuit of a legitimate aim."

[93] *Rantsev v Cyprus and Russia* (2010) ECHR 22, at para 286; *V.C.L. and A.N. v. UK* (2021) ECHR 132, at para 151.

[94] *V.C.L. and A.N. v. UK* (2021) ECHR 132, at para 152.

[95] *Rantsev v Cyprus and Russia* (2010) ECHR 22, at para 282.

identified in the UN Palermo Protocol and the CoE Anti-Trafficking Convention, is of "paramount importance" and that any decision to prosecute should be taken insofar as possible after this assessment.[96] The ECtHR also underlined that:

> Once a trafficking assessment has been made by a qualified person, any subsequent prosecutorial decision would have to take that assessment into account. While the prosecutor might not be bound by the findings made in the course of such a trafficking assessment, the prosecutor would need to have clear reasons which are consistent with the definition of trafficking contained in the Palermo Protocol and the Anti-Trafficking Convention for disagreeing with it.[97]

4.18 In addition, Article 13 of the Anti-Trafficking Convention obliges States Parties to provide for a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim of trafficking. During this period, it shall not be possible to enforce any expulsion order against the individual concerned and they are entitled to assistance pursuant to Article 12.[98] The CoE monitoring mechanism for the Anti-Trafficking Convention, the Group of Experts on Action against Trafficking in Human Beings (GRETA), has clarified that the automatic disqualification of potential victims of trafficking on public order grounds under the 2023 Act runs contrary to Article 13.[99] The GRETA advise that:

> The grounds of public order should always be interpreted on a case-by-case basis, and it is not possible to automatically disqualify a victim from access to the recovery and reflection period on the basis that the person has violated migration laws. The grounds of public order are intended to apply in very exceptional circumstances and cannot be used

[96] *V.C.L. and A.N. v. UK* (2021) ECHR 132, at paras 160-161.
[97] *V.C.L. and A.N. v. UK* (2021) ECHR 132, at paras 162.
[98] This includes appropriate and secure accommodation, psychological and material assistance, emergency medical treatment, translation and interpretation services, legal counselling and information, and access to education for children.
[99] UK Parliament, 'Joint Committee on Human Rights: Written Evidence by the GRETA (IMB0024)'. Available at: committees.parliament.uk/writtenevidence/119915/pdf/.

by States Parties to circumvent their obligation to provide access to the recovery and reflection period.[100]

4.19 Therefore, the NIHRC considers that the blanket approach to disqualification introduced by section 29 of the 2023 Act conflicts with the UK government's obligations. As above, Article 4 of the ECHR requires the government to take a range of preventative and operational measures to facilitate the identification of victims, remove them from harm, and provide necessary protection and support. In addition, the NIHRC continues to be gravely concerned that the current arrangements risk disincentivising victims to come forward if they face prosecution for offences they were forced to commit, therein creating the conditions for exploitation by traffickers.[101]

4.20 Furthermore, the ECtHR has held that a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking.[102] The NIHRC considers that the current arrangements may miss vital opportunities to pursue and prosecute people smugglers, while punishing victims for crimes they were forced to commit as part of their exploitation.

4.21 Section 29 of the 2023 Act contrasts with Article 11 of the EU Human Trafficking Directive (2011) which requires the provision of assistance and support from the moment that the authorities have a reasonable grounds indication that a person may be a victim of trafficking.[103] Further, Recital 18 stipulates that "In cases where the victim does not reside lawfully in the Member State concerned, assistance and support should be provided unconditionally at least during the reflection period".

4.22 Related provisions in the 2022 Act remain of concern to the NIHRC. For example, section 59 of the 2022 Act (when commenced) will require that a potential victim's late compliance with a Trafficking Information Notice, without good reason, be taken into account as

[100] UK Parliament, 'Joint Committee on Human Rights: Written Evidence by the GRETA (IMB0024)'. Available at: committees.parliament.uk/writtenevidence/119915/pdf/.
[101] NI Human Rights Commission, 'Submission to House of Lords on the Illegal Migration Bill' (NIHRC, 2023), at para 6.11.
[102] Rantsev v Cyprus and Russia (2010) ECHR 22, at para 284.
[103] Directive 2011/36/EU, 'EU Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.

damaging that person's credibility. This engages and may diminish rights under Article 8 of the EU Trafficking Directive (2011) which requires that authorities are entitled *not* to prosecute victims of human trafficking for crimes they were compelled to commit as a consequence of being trafficked.[104] Moreover, the NIHRC is concerned that this clause may reverse the obligation on States to identify victims of human trafficking under Article 9 of the Directive.[105] It also sits uneasily alongside the requirement under Article 11 to provide assistance and support as referenced above. The NIHRC recalls, for example, a joint letter on the Nationality and Borders Bill, in which three UN Special Rapporteurs observed that to view late provision of information as damaging to credibility would "fail to acknowledge the positive obligation on the State to identify victims of trafficking and contemporary forms of slavery".[106]

4.23 It is widely recognised that victims of modern slavery may be unwilling to identify themselves immediately and that there can be numerous reasons for failing to do so, including a failure to recognise their situation to be one of exploitation.[107] Article 11(5) of the Trafficking Directive requires that assistance and support be provided to victims on a "consensual and informed basis".[108] The nature of these Trafficking Information Notices and the mandatory treatment of late information as damaging credibility, arguably sits in conflict with the principle of consensual and informed support. Being made to recall experiences before being ready could be retraumatising for a victim. That could amount to breach of Article 12 of the Trafficking Directive that "Member States shall ensure that victims of trafficking in human beings receive specific treatment aimed at preventing secondary victimisation".[109]

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[104] Article 8, Directive 2011/36/EU 'Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.
[105] Article 9, Directive 2011/36/EU 'Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.
[106] OL GBR 11/2021, Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 5 November 2021, at 4.
[107] OL GBR 11/2021, Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 5 November 2021.
[108] Article 11(5), Directive 2011/36/EU 'Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.
[109] Article 12, Directive 2011/36/EU 'Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.

4.24 Further, the 2022 Act does not mention or make specific provision for child victims of human trafficking. In accordance with the EU Trafficking Directive read with other international obligations, including the UN Convention on the Rights of the Child, the child's best interest must always be the primary consideration in any decision or action.[110]

4.25 The NIHRC remains concerned that the retention of section 29 and related provisions of the 2022 Act mean the provisions will conflict with the minimum standards prescribed by the EU Trafficking Directive (2011) and therefore, potentially breach Windsor Framework Article 2.

4.26 The NIHRC recommends that the Bill be amended to repeal section 29 of the Illegal Migration Act 2023.

4.27 The NIHRC recommends that the Bill be amended to ensure that Part 5 of the Nationality and Borders Act 2022 provides protection for victims and potential victims of modern slavery and human trafficking in accordance with Article 4 ECHR and the relevant EU Directives within scope of Windsor Framework Article 2.

4.28 The NIHRC recommends that the Bill be amended to ensure that all decisions and actions affecting children who may be victims of human trafficking are guided by principles enshrined in human rights law and Windsor Framework Article 2. This includes ensuring that the best interest of the child is recognised as a primary consideration.

Section 59, Illegal Migration Act 2023: Inadmissibility of certain claims and related provisions on removal to a third country

4.29 Another provision of the 2023 Act, which is to be retained, is Section 59 (Inadmissibility of certain asylum and human rights claims). Section 59 requires that an asylum claim, or a human rights claim, be considered inadmissible if the claimant is a national of any of the 'safe states' listed.[111] The list includes, for example,

[110] Recital 8, Directive 2011/36/EU 'Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011; Article 3, UN CRC.
[111] Section 59, Illegal Migration Act 2023 amended Section 80A, Nationality, Immigration and Asylum Act 2002.

India, Georgia[112] and Albania, as well as EU Member States.

4.30 The NIHRC notes that India is not a signatory to either the 1951 Refugee Convention or 1967 Protocol. Article 27(1)(d) of the EU Procedures Directive (2005) is therefore not met for this country. This sets out that the safe country concept requires a person seeking asylum to have the possibility to "request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention."

4.31 There is no requirement to consider the individual application and Section 80A(3) of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") states that no appeal is possible, though under subsection (2) the Secretary of State may, in exceptional circumstances, decide to consider the claim.

4.32 Sections 80B and 80C in the 2002 Act were inserted by the 2022 Act. These sections also relate to inadmissibility of asylum claims and removal to safe third States. Sections 80B and 80C provide for asylum claims to be declared inadmissible if a claimant has a 'connection' with a 'safe third State'. Section 80B provides that no appeal is possible. Section 80B(6) qualifies the requirement for a connection with a safe third State:

> The fact that an asylum claim has been declared inadmissible under subsection (1) by virtue of the claimant's connection to a particular safe third State does not prevent the Secretary of State from removing the claimant to any other safe third State.

4.33 The 2022 Act further amended section 77 of the 2002 Act to allow a person to be removed to a third state pending consideration of their asylum claim if the third country in question meets specified criteria or is specified. Under related amendments made by the 2022 Act, to Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, no appeal is possible against removal to such a third country.

4.34 The NIHRC has significant concern over the retention of Section 59

[112] India and Georgia were inserted by The Nationality, Immigration and Asylum Act 2002 (Amendment of List of Safe States) Regulations 2024.

of the 2023 Act. Under section 59(3), the Secretary of State has the power to add further countries to the list if "satisfied" that there is "in general" no risk of persecution after having had "regard to" relevant information. The NIHRC continues to advise that the general assessment of certain countries as 'safe' must not preclude domestic authorities from individually assessing asylum claims.[113]

4.35 The UK's procedural obligations under Articles 2 and 3 of the ECHR require consideration of the individual's risk of refoulement following removal to a third country, prior to their removal. The ECtHR also emphasises the particular importance of Article 13 of the ECHR (right to an effective remedy) in removal cases.[114] The ECtHR advises that the effectiveness of a remedy within the meaning of Article 13 imperatively requires "independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3" and "access to a remedy with automatic suspensive effect".[115] Obligations under ICCPR, UN CAT and the 1951 Refugee Convention also require States to provide individualised assessment procedures protecting against the risk of refoulement and access to a right of appeal with suspensive effect.[116]

4.36 In addition, the ECtHR clarifies that "the expelling State cannot merely assume that the asylum seeker will be treated in the receiving third country in conformity with the [ECHR] standards but, on the contrary, must first verify how the authorities of that country apply their legislation on asylum in practice".[117] Therefore, simply being signatory to a human rights treaty such as the ECHR or ICCPR is not enough to demonstrate the safety of a third country. The domestic authorities must examine the "accessibility and functioning of the receiving country's asylum system and the

[113] NI Human Rights Commission, 'Advice on the Safety of Rwanda (Asylum and Immigration) Bill' (NIHRC, 2024), at paras 7.1-7.10.
[114] The effectiveness of procedural guarantees under Article 13 ultimately protects individuals from arbitrary removal and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises. See: *M.S.S v Belgium* (2011) ECHR 108, at para 293.
[115] *M.S.S v Belgium* (2011) ECHR 108, at para 293.
[116] CAT/C/GC/4, 'UN Committee Against Torture General Comment No. 4 on the Implementation of Article 3 of the Convention in the Context of Article 22', 4 September 2018, at para 18. See also: CCPR/C/BEL/CO/6, 'UN Human Rights Committee Concluding Observations on the Sixth Periodic Report of Belgium', 6 December 2019, at para 31; CCPR/C/SDN/CO/5, 'UN Human Rights Committee Concluding Observations on the Fifth Periodic Report of the Sudan', 19 November 2018, at para 58; CAT/C/BDG/CO/1, 'UN Committee Against Torture Concluding Observations on the Initial Report of Bangladesh', 26 August 2019, at para 43.
[117] Ilias and Ahmed v Hungary, Application No. 47287/15, Judgment of 21 November 2019, at 141.

safeguards it affords in practice".[118]

4.37 The UN Refugee Agency advises that the designation of a 'safe' country of origin "should therefore only be used as a procedural tool to prioritise or accelerate the examination of applications in carefully circumscribed situations, not to displace the requirement for an individualised assessment of an asylum claim".[119] However, by retaining the arrangements set out in the 2023 Act, individuals who may be at risk of persecution, even though they come from a country that is otherwise deemed 'safe', may still be at risk of refoulement due to the lack of individualised assessment.

4.38 As outlined in section 2 above, the High Court of Northern Ireland has confirmed that a number of EU measures, including the EU Procedures Directive (2005)[120] and the EU Qualification Directive (2004)[121] continue to set minimum standards in NI by virtue of Windsor Framework Article 2.[122]

4.39 Provisions of UK asylum law raise questions of compliance with minimum EU standards that bound the UK prior to Brexit, particularly in four areas:

- rules requiring individual consideration of applications;
- the right to remain pending consideration of an asylum claim;
- rules on removals to a safe third country; and
- the right to appeal.

4.40 Article 4(3) of the EU Qualification Directive specifies that:

> The assessment of an applications for international protection is to be carried out on an individual basis and includes…the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which

[118] Ilias and Ahmed v Hungary, Application No. 47287/15, Judgment of 21 November 2019, at 141.
[119] UN Refugee Agency, 'UNHCR Observations on the Border Security, Asylum and Immigration Bill' (UNHCR, 2023), at para 139.
[120] Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005.
[121] 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.
[122] *Re NIHRC and JR295* [2024] NIKB 35.

the applicant has been or could be exposed would amount to persecution or serious harm.

4.41 A similar requirement is set out in Article 8 of the EU Procedures Directive. As detailed above, individual consideration of applications is precluded under several provisions of relevant domestic law.

4.42 Article 7(1) of the EU Procedures Directive provides that an applicant has the right to remain in the Member State pending examination of the application.[123] The 2022 Act removed such protection in section 77 of the 2002 Act as referenced above.

4.43 By allowing removals to a third country with which the claimant has no connection, Section 80B of the 2002 Act appears to diminish rights under Article 27 of the EU Procedures Directive which sets out rules on 'the safe third country concept', including:

> 2. The application of the safe third country concept shall be subject to rules laid down in national legislation, including:
>
> (a) rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country. (Emphasis added.)

4.44 Article 39 of the EU Procedures Directive provides that the applicant must have the right to an effective remedy before a court or tribunal against a range of decisions including a decision to consider an application inadmissible, a decision not to conduct an examination, or a decision based on the safe third country rules. Article 39 must be read in the context of the right to an effective remedy in Article 47 of the EU Charter of Fundamental Rights.[124] The following provisions which specifically exclude right to an appeal would appear to diminish rights contrary to this obligation:

- claims declared inadmissible under Section 80B of the 2002 Act, as amended by Section 59 of the 2023 Act; and

[123] Article 7(2), Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005 provides an exception where a subsequent application will not be further examined, in accordance with Articles 32 and 34 of the Directive, or in situations where extradition is required due to a European arrest warrant to another Member State, a third country, or an international court or tribunal.
[124] *Re NIHRC and JR295* [2024] NIKB 35 at paras 109-115.

- a decision to remove a claimant to a safe third State under paragraph 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004

4.45 The findings of the High Court of NI in *Re NIHRC and JR 295* are consistent with this analysis.[125] Considering the absence of individual consideration of applications under the 2023 Act, the Court found a diminution in rights under the EU Procedures Directive,[126] noting:

> Even where a country is lawfully designated generally safe, article 27(2)(c) requires national legislation to contain rules which allow for individual examination of whether the third country is safe for a particular applicant. The rules must permit the applicant to challenge the application of the safe third country concept on the grounds that he or she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.[127]

4.46 Section 5(2) of the 2023 Act was disapplied by the High Court of NI on the basis that automatic categorisation of applications as inadmissible meant "There will not be the 'appropriate examination' of the substance of the application for asylum as required by Article 8(2) of the Procedures Directive and Article 4(3) of the Qualification Directive".[128]

4.47 The High Court of NI also considered removals to a safe third country in *Re NIHRC and JR 295*, again referencing the EU Procedures Directive and observing:

> Under article 27(2)(a), for an application to be considered inadmissible on the basis that there is a safe third country, national legislation must contain rules requiring a connection between the person seeking asylum and the third country on the basis of which it would be reasonable for that person to go to that country.[129] (emphasis added)

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[125] *Re NIHRC and JR295* [2024] NIKB 35.
[126] Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005.
[127] *Re NIHRC and JR295* [2024] NIKB 35 at para 131.
[128] *Re NIHRC and JR295* [2024] NIKB 35 at para 99.
[129] *Re NIHRC and JR295* [2024] NIKB 35 at para 130.

4.48 The UK Supreme Court in *AAA* also referenced the obligation under the EU Procedures Directive "that there be a sufficient degree of connection between an asylum seeker and a third country on the basis of which it would be reasonable for that person to go to that country".[130]

4.49 Due to restrictions on the right to appeal in section 5(4) of the 2023 Act, the High Court of NI found a diminution of rights contrary to Article 39 of the EU Procedures Directive read with Article 47 of the EU Charter of Fundamental Rights.[131]

4.50 The NIHRC recommends that the Bill is amended to repeal section 59 of the Illegal Migration Act 2023.

4.51 The NIHRC recommends that the Bill be amended to ensure that the law on individual consideration of applications for asylum, removals to a safe third country, the right to remain pending consideration of a claim and the right to appeal, comply with the full range of international human rights obligations including ECHR, ICCPR, UN CAT, the 1951 Refugee Convention and Article 2 of the Windsor Framework, by ensuring no diminution of minimum standards in the EU Procedures Directive 2005 and the EU Qualification Directive 2004.

Clause 41: Deportation etc

4.52 Clause 41 concerns detention and the exercise of functions pending deportation. This clause proposes to amend sub-paragraph 2 of paragraph 2 of Schedule 3 to the Immigration Act 1971. Currently, a person can be detained who is subject to deportation action on the grounds their presence in the UK is not considered conducive to the public good. This new clause will allow the Secretary of State to detain someone subject to conducive deportation from the point at which the Home Office starts to consider whether to make a deportation order against them and when the decision to make a deportation order has been made, pending the making of the deportation order.

[130] *AAA and others v Secretary of State for the Home Department* [2023] UKSC 42 at para 112.
[131] *Re NIHRC and JR295* [2024] NIKB 35 at para 115.

4.53 Subsection (2)(a) provides that detention under paragraph 2(2) of Schedule 3 to the 1971 Act only applies where the person has been notified in writing that the Secretary of State is considering whether to make a deportation order against them, or that the Secretary of State has decided to make a deportation order against them.

4.54 Clause 41(6) will amend section 141 of the Immigration Act 1999 (fingerprinting) and regulation 2 of the Immigration (Collection, Use and Retention of Biometric Information and Related Amendments) Regulations 2021 (photographs) to allow the Home Office to capture their biometrics at the time of detention.

4.55 Clause 41(14) will amend Section 51(2) of the Immigration Act 2016 (search for nationality documents by detainee custody officers etc) to now allow the Secretary of State to direct a prison officer or prisoner custody officer to search for nationality documents when the Secretary of State is considering making a deportation order, as opposed to when a valid deportation has been made as present.

4.56 Clause 41(17) is intended as a measure of clarification, the powers in the clause are to be treated as always having had effect.

4.57 As acknowledged by the Bill's ECHR Memorandum,[132] these provisions engage Article 5 of the ECHR which provides everyone with the right to liberty and security of the person and requires that no one is deprived of their liberty arbitrarily. The right to liberty is not absolute. Article 5 contains qualifications in an exhaustive list of conditions under which a person's liberty can be lawfully curtailed.[133] This includes Article 5(1)(f) which allows the lawful arrest or detention of a person "to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

4.58 While the second limb of Article 5(1)(f) permits the lawful detention of asylum seekers or other migrants pending deportation, the ECtHR emphasises that compliance with national law is not sufficient and that any deprivation of liberty should be in keeping with the purpose

[132] UK Home Office, 'Border Security, Immigration and Asylum Bill: ECHR Memorandum' (HO, 2025), at para 131.
[133] Articles 5(1)(a)-5(1)(f), ECHR.

of Article 5, which is to "ensure that no-one should be dispossessed of his or her liberty in an arbitrary fashion".[134] In other words, a deprivation of liberty may be lawful in terms of domestic law but could still be arbitrary and thus contrary to Article 5(1)(f). The ECtHR explains that "freedom from arbitrariness" in relation to Article 5(1)(f) means that,

> …such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country"…; and the length of the detention should not exceed that reasonably required for the purpose pursued.[135]

4.59 The ECtHR advises that there must be procedural safeguards in place that are capable of preventing the risk of arbitrary detention pending expulsion.[136] The ECtHR has expressed reservation as to the practice of authorities to automatically place asylum seekers in detention without an individual assessment of their particular needs or vulnerability (such as health or age) that may render their detention inappropriate.[137] However, in the present Bill, the only requirements for the Secretary of State to 'lawfully' detain a person under clause 41 is the need to notify the person in writing that a deportation order for their removal is being considered or is being made.[138]

4.60 The NIHRC underlines the importance of procedural safeguards that ensure the particular circumstances of each individual case are scrutinised in the decision-making process. The NIHRC disagrees with the suggestion in the Bill's ECHR Memorandum that, "Any interference with Article 5 is justified [under clause 41] as it is in accordance with the law and proportionate to achieve a legitimate

[134] Saadi v UK (2008) ECHR 79, at para 66.
[135] Saadi v UK (2008) ECHR 79, at para 74, citing Amuur v France (1996) ECHR 25, at para 43.
[136] Kim v Russia (2014) ECHR 866, at para 53.
[137] Thimothawes v. Belgium (2017) ECHR 320, at paras 73, 79-80; Mahamed Jama v Malta (2015) ECHR 1039, at para 146.
[138] See Clause 41(2)(a).

aim".[139] This currently reads as a blanket justification for the use of detention in every situation where the Secretary of State is merely considering whether to make a deportation order.

4.61 The UN Human Rights Committee has provided detailed guidance on the right to liberty and security of the person (Article 9, ICCPR) in an immigration context.[140] It states that such detention "must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time".[141] The Committee reiterates that the decision to detain asylum seekers or other migrants "would be arbitrary in the absence of particular reasons specific to the individual, such as an individualised likelihood of absconding, a danger of crimes against others or a risk of acts against national security".[142] The Committee highlight the following procedural safeguards for ensuring the principle of non-arbitrariness is upheld during decision-making procedures in relation to the detention of migrants:

- Consideration of relevant factors should be case by case and not be based on a mandatory rule for a broad category;
- Decisions must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding;
- Any decision to detain must be subject to periodic re-evaluation and judicial review;
- Decisions must take into account the effect of the detention on an individual's physical or mental health; and
- Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons.[143]

4.62 When considering the detention of children under ECHR Article 5(1)(f), the ECtHR states that domestic authorities must "establish

[139] UK Home Office, 'Border Security, Immigration and Asylum Bill: ECHR Memorandum' (HO, 2025), at para 131.
[140] CCPR/C/GC/35, 'UN Human Rights Committee – General Comment No.35: Article 9 (Liberty and Security of the Person)' 16 December 2014, at para 18.
[141] CCPR/C/GC/35, 'UN Human Rights Committee – General Comment No.35: Article 9 (Liberty and Security of the Person)' 16 December 2014, at para 18.
[142] CCPR/C/GC/35, 'UN Human Rights Committee – General Comment No.35: Article 9 (Liberty and Security of the Person)' 16 December 2014, at para 18.
[143] CCPR/C/GC/35, 'UN Human Rights Committee – General Comment No.35: Article 9 (Liberty and Security of the Person)' 16 December 2014, at para 18.

that this measure of last resort has been taken after actual verification that no other measure involving a lesser restriction of their freedom could be implemented".[144] Similarly, the UN Human Rights Committee further advise that,

> Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.[145]

4.63 Furthermore, the ECtHR has held that any deprivation of liberty under the second limb of Article 5(1)(f) will only be justified where the deportation or extradition proceedings are in progress.[146] If proceedings are not carried out with due diligence, the detention will cease to be permissible under Article 5(1)(f).[147] For instance, the ECtHR advises that "the domestic authorities have an obligation to consider whether removal is a realistic prospect and whether detention with a view to removal is from the outset, or continues to be, justified".[148]

4.64 The NIHRC highlights the fundamental inconsistency of Clause 41 with these requirements. Namely, that the Secretary of State may detain a person *before* considering *whether* to make a deportation order against them or not. Moreover, the NIHRC has serious concerns about these increased powers of executive detention beginning earlier in the deportation process when combined with the retention of section 12 of the Illegal Migration Act 2023 (see paragraphs 4.3-4.11 above). The NIHRC suggests careful consideration be given to whether these provisions comply with the "good faith" requirement under ECHR Article 5(1)(f).

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[144] A.B. and Others v. France (2016) ECHR 651, at para 123.
[145] CCPR/C/GC/35, 'UN Human Rights Committee – General Comment No.35: Article 9 (Liberty and Security of the Person)' 16 December 2014, at para 18.
[146] Al Husin v. Bosnia and Herzegovina (2012) ECHR 232, at para 97; Thimothawes v. Belgium (2017) ECHR 320, at para 60 (See European Database of Asylum Law, Available at: ECtHR – Thimothawes v. Belgium, Application no. 39061/11, 4 April 2017 | European Database of Asylum Law)
[147] Al Husin v. Bosnia and Herzegovina (2012) ECHR 232, at para 97; Khlaifia v Italy (2016) ECHR 1124, at para 90; Thimothawes v. Belgium (2017) ECHR 320, at para 60.
[148] Al Husin v. Bosnia and Herzegovina (2012) ECHR 232, at para 98.

4.65 In addition, Article 5(4) provides anyone deprived of their liberty by detention the right to have the lawfulness of their detention decided "speedily" by a court and to have their release ordered if the detention is not lawful.[149] The question of how quickly a court should make that decision depends on the circumstances of the case, but that question must itself be decided by a court.[150] The ECtHR also stated that where a decision to detain a person has been taken by a non-judicial authority, the standard of "speediness" of judicial review under Article 5(4) of the ECHR comes closer to the higher standard of "promptness" under Article 5(3) of the ECHR.[151] In *Shcherbina v Russia*, a delay of 16 days in the judicial review of the applicant's detention order issued by the prosecutor was found to be excessive.[152]

4.66 When assessing whether domestic law provides sufficient procedural safeguards against arbitrariness, the ECtHR may take into account the existence or absence of time-limits for detention as well as the availability of a judicial remedy.[153] However, case law demonstrates that the mere existence of time-limits for detention will not in themselves guarantee that a system of immigration detention complies with the requirements of Article 5.[154] The ECtHR considers the existence of procedural safeguards in the context of a detention system taken as a whole, having regard for the particular facts of each individual case.[155]

4.67 The ECtHR notes that it is incumbent on the State to put in place the most appropriate internal procedures to comply with its obligations under Article 5(4).[156] For example, neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities.[157] Further, where domestic authorities decide in exceptional circumstances to detain a child, the lawfulness of such detention must be examined by the national courts with particular expedition and diligence at all levels.[158]

[149] Khlaifia v Italy (2016) ECHR 1124, at para 131
[150] Khlaifia v Italy (2016) ECHR 1124, at para 131.
[151] Shcherbina v. Russia (2014) ECHR 667, at paras 65-70.
[152] Shcherbina v. Russia (2014) ECHR 667, at paras 65-70.
[153] J.N. v. UK, Application No. 37289/12, 19 May 2016, at paras 83-96.
[154] J.N. v. UK, Application No. 37289/12, 19 May 2016, at paras 83-96.
[155] Lazăr v. Romania (2024) ECHR 293, at para 97.
[156] Dimo Dimov and Others v. Bulgaria (2020) ECHR 519, at para 80.
[157] E. v Norway (1990) ECHR 17, at para 66.
[158] G.B. and Others v Turkey (2019) ECHR 748, at paras 167 and 186.

4.68 Therefore, despite the welcome availability of judicial review, the NIHRC considers the legal provisions for "ordering detention, for extending detention, and for setting time-limits for detention" lack clarity.[159] Instead, clause 41 of the Bill and section 12 of the 2023 Act provides the Secretary of State with discretionary power for determining these key "safeguards against arbitrariness", which is too wide.[160] The NIHRC suggests that clear legal provisions reflecting the range of Article 5 considerations and procedural safeguards will provide more certainty as to the government's ability to satisfy ECHR requirements in respect of clause 41.

4.69 Clause 41(17) of the Bill provides for the retrospective application of the new detention powers, enabling the above provisions "to be treated as always having effect". The House of Lords Constitution Committee has emphasised the "unacceptability of retrospective legislation other than in very exceptional circumstances".[161] The NIHRC notes that neither the Bill nor the Explanatory Notes provide a sufficient justification for the retrospective application of Clause 41.

4.70 The NIHRC recommends that clause 41 of the Bill requires thorough reassessment to ensure compliance with Article 5 of the ECHR. The result should ensure that any detention with a view to deportation is carried out in good faith and is subject to robust procedural safeguards to ensure compliance with the principle of non-arbitrariness.

5.0 Part 3: Prevention of Serious Crime

Clauses 45-47: Offences relating to things for use in serious crime

5.1 Clause 45 (articles for use in serious crime) criminalises possessing, importing, making, adapting, supplying, or offering to supply a relevant article in circumstances giving rise to a reasonable suspicion that the article will be used in connection with a serious

[159] J.N. v. UK, Application No. 37289/12, 19 May 2016, at para 83-96.
[160] J.N. v. UK, Application No. 37289/12, 19 May 2016, at para 83-96.
[161] UK Parliament, 'House of Lords Select Committee on the Constitution: 11th Report of Session 2021–22 - Nationality and Borders Bill, HL Paper 149'. Available at: https://committees.parliament.uk/publications/8606/documents/86994/default.

offence (as defined in the Serious Crime Act 2007).[162] It is irrelevant to the offence whether the person intends to use the item in connection with a serious crime. However, the person can claim as a defence that they did not intend or suspect that the relevant article would be used in connection with a serious offence, for which they will have to adduce enough evidence to raise an issue in relation to the defence. Clause 47 defines 'relevant article' as any of the following: (a) a 3D printer firearms template; (b) an encapsulator; (c) a tablet press; or (d) a vehicle concealment. The offence carries a maximum penalty of five years' imprisonment on conviction, a fine or both. Under Clause 45, the court may assume that the defendant possessed the relevant article, unless they show that they did not know of its presence on the premises or that they had no control over it.

5.2 Article 6 ECHR protects the right to a fair and public hearing.[163] This includes the 'presumption of innocence', which is the right of an accused person to be presumed innocent until proved guilty according to law.[164] Article 6(2) requires that when carrying out its duties, a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution; and any doubt should benefit the accused.[165]

5.3 The ECtHR has ruled that shifting the burden of proof to the defence is compatible with Article 6(2) if a prima facie case has already been made against the accused.[166] Additionally, the ECtHR has found that Article 6(2) permits the use of presumptions of fact and law. However, it requires that States keep these presumptions within reasonable limits. This requires considering the significance of what is at stake while also upholding the rights of the defence.[167] The means employed must be reasonably proportionate to the legitimate aim sought to be achieved.[168]

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[162] In Northern Ireland, an offence specified or described in Part 2 of Schedule 1 to the Serious Crime Act 2007. This includes drug and people trafficking, terrorism, firearms offences, prostitution and child sex, armed robbery, money laundering, and fraud.
[163] Article 6(1), ECHR says: "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".
[164] Article 6(2), ECHR.
[165] Barberà, Messegué and Jabardo v Spain (1988) (Application 10590/83), at para 77.
[166] Telfner v Austria (2001) ECHR 228, at para 18; Poletan and Azirovik v the former Yugoslav Republic of Macedonia (2016) ECHR 417, at paras 63-67.
[167] Salabiaku v France (1988) ECHR 19, at paras 27-28.
[168] Janosevic v Sweden (2002) ECHR 618, at para 101; Busuttil v Malta (2021) ECHR 453, at paras 46-47.

5.4 There is a clear positive obligation on the State to take reasonable measures to protect individuals from harm caused by others.[169] This requires the State to strike a fair balance between the competing interests.

5.5 Considering the shift in the burden of proof to the defendant the NIHRC is concerned at the absence of explicit exemptions or defences in cases of coercion or exploitation in involvement in the criminal act. As mentioned in our observations on Clauses 13-17 of the Bill, organised crime groups often rely on exploitation to further their goals. Not considering this element could risk disproportionately impacting certain groups, particularly women who are subject to coercive control, children who are criminally exploited, and victims of trafficking and modern slavery.

5.6 The NIHRC recommends that the Bill include safeguards to protect individuals who are compelled to participate in criminal activity as a consequence of human trafficking, modern slavery or exploitation.

5.7 The NIHRC also reiterates its concern and recommendations made in relation to Clauses 13-17 regarding provisions for access to adequate legal aid and representation of defendants.

Clauses 48-52: Serious crime prevention orders

5.8 Clauses 48-52 expand the operation of Serious Crime Prevention Orders (SCPO) under Part 1 of the Serious Crime Act 2007 by giving courts powers to impose electronic monitoring; allowing additional agencies to apply to the High Court for an SCPO; allowing the Crown Court to make an order on its own motion or on an application on acquittal; and introducing interim SCPOs, which may be made without notice. According to Clause 48, the Secretary of State must establish a code of practice for the processing of data collected during the electronic monitoring of individuals under serious crime prevention orders.

[169] Opuz v Turkey (2009) ECHR 870.

5.9 SCPOs are civil orders that impose conditions (prohibitions, restrictions and requirements) on a person for up to five years to prevent or disrupt their involvement in serious crime, to protect the public.[170] Courts may impose measures as deemed appropriate, which may cover aspects like business transactions, use of premises, provision of goods or services, employment, associations with individuals, communication methods, and travel restrictions.[171]

5.10 Clause 48-52 provisions engage Article 8 ECHR (respect for private and family life, home and correspondence).[172] In particular, the NIHRC is concerned that the potential for imposing electronic monitoring on individuals is not compliant with Article 8. Article 8 protects individuals from arbitrary interferences by public authorities in their private and family life, home, and correspondence.[173] States may limit this right under Article 8(2) if the actions are lawful and necessary in a democratic society for specific objectives outlined in the article. The prevention of disorder or crime and the protection of the rights and freedoms of others are some of the objectives specified in Article 8. The ECtHR evaluates whether an infringement is necessary by weighing state interests against individual rights. The term "necessary" means there must be a pressing need for the interference, not just that it is useful or desirable. A restriction on a ECHR right cannot be regarded as "necessary in a democratic society" unless, amongst other things, it is proportionate to the legitimate aim pursued.[174] When assessing the proportionality of a measure that interferes with a right, the ECtHR examines whether the decision-making process that led to the measure was fair and appropriately considered the interests protected by Article 8.[175]

5.11 As mentioned above, the NIHRC recognises the Bill's efforts to protect the right of others' to be free from serious crime. The NIHRC

[170] Crown Prosecution Service. 'Serious Crime Prevention Orders'. Available at: https://www.cps.gov.uk/legal-guidance/serious-crime-prevention-orders
[171] UK Home Office, 'Border Security, Immigration and Asylum Bill: ECHR Memorandum' (HO, 2025), at para 166.
[172] Article 8 ECHR states that: (1) everyone has the right to respect for his private and family life, his home and his correspondence, and (2) there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
[173] Libert v France (2018) ECHR 185.
[174] Dudgeon v the United Kingdom (1981) ECHR 2, at paras 51-53.
[175] A.M.V. v Finland (2017) ECHR 273, at paras 82-84.

recognises that is a fundamentally important duty of the State. Despite that, a fair balance must still be struck that renders the intrusion with Article 8 rights reasonable and proportionate in compliance with the ECHR. The NIHRC is concerned at the absence of explicit safeguards in the Bill regarding the processing of data collected through electronic monitoring used during serious crime prevention orders. Although the Bill requires the Secretary of State to issue a code of practice to regulate this issue, Clause 48 lacks specific guidelines for processing the data that would aid in developing this code. Furthermore, the Clause specifies that a code breach will not attract civil or criminal liability. The NIHRC is concerned that this lack of guidelines may hinder legislative scrutiny of the proportionality of this provision.

5.12 The NIHRC recommends that careful consideration be given to whether the expansion of serious crime prevention orders (SCPOs) under Clauses 48-52, which includes electronic monitoring and interim orders, ensure that any interference with the right to private and family life is proportionate and justified.

5.13 The NIHRC recommends introducing explicit statutory guidelines to inform the development of the code of practice for processing data collected from electronic monitoring, ensuring its necessary and proportionate use.

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