



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Illegal Migration Act challenge Factsheet – updated 20 May 2024

In September 2023, the Commission issued a legal challenge against the Illegal Migration Act 2023 in the form of a judicial review at the High Court in Belfast. This challenge was against the Secretary of State for the Home Department and Secretary of State for Northern Ireland.

Why did the Commission decide to issue this case?

The Commission decided to issue the challenge due to the significant human rights implications the Illegal Migration Act (IMA) will have for asylum seekers in Northern Ireland, in particular the barriers created for individual legal challenges removing the ability to appeal and judicially review decisions in most circumstances.

The Commission had raised concerns about the compatibility of the legislation with the UK Government's human rights obligations during its passage through Parliament. The Commission made [recommendations](#) to the UK Home Office, which were not followed, and the Bill received Royal Assent on 20 July 2023.

The Commission issued legal proceedings as a last resort. Once the IMA provisions come into force, they would have a very harmful effect on most asylum seekers who seek refuge in NI, removing the ability to claim asylum except in very limited circumstances. In particular there would be a failure to protect some of the most vulnerable people including children and victims of human trafficking and exploitation.

A number of the Commission's specific concerns include:

- The IMA provides for the removal of asylum seekers. Once a person is notified of removal, they can then be sent to a country with which they have no previous connection, including countries that are not signatories of the 1951 Refugee Convention.
- Victims of modern slavery and trafficking and children can be removed under the IMA, with support for victims of trafficking being withdrawn.
- A person who is served with a removal notice has limited time to challenge that decision and must produce compelling evidence that they face a "real, imminent and foreseeable risk of serious and irreversible harm if removed" to the country specified in the removal notice.
- Once a person has been detained for removal, they cannot apply for bail within the first 28 days of detention. For many of those who are not subsequently removed, they will be left indefinitely in legal limbo: unable to claim asylum, meaning they cannot work or have recourse to public funds.

The provisions challenged stand to adversely affect thousands, if not tens of thousands, of individuals each year. The Commission believes that the IMA will unlawfully threaten their life, dignity and liberty.

What human rights obligations does the IMA breach?

The Commission believes that the IMA is in breach of the UK's domestic and international human rights obligations under Article 2(1) of the Windsor Framework, 1951 Refugee Convention and the European Convention on Human Rights (ECHR).

Article 2(1) of the Windsor Framework

Article 2(1) of the Windsor Framework is a UK Government commitment to ensure that no diminution of rights, safeguards or equality of opportunity, as set out in the relevant part of the 1998 Belfast (Good Friday) Agreement, results from the UK's withdrawal from the European Union. The relevant chapter is broadly drawn and opens with a commitment to protect 'the civil rights and religious liberties of everyone in the community'. Article 2 means that in relation to these rights, EU measures to which the UK had signed up to before Brexit, continue to set minimum standards in NI law.

As regards the IMA, the Commission considers the relevant EU law¹ to be:

- [The 2005 Procedures Directive](#) which provides for minimum standards for granting and withdrawing refugee status;
- [The 2004 Qualification Directive](#) which sets common criteria to identify genuine people in need of international protection and the content of that protection;
- The [2011 Trafficking Directive](#) which sets out minimum standards throughout the EU in preventing and combating trafficking in human beings and protecting victims.

The Commission has identified a series of provisions in the IMA that fall short of the minimum standards required by these Directives. Had the UK remained in the EU, such reductions in rights would have been unlawful. Therefore, this constitutes a diminution in rights, contrary to Windsor Framework Article 2.

For example, S. 2(1), s. 5(1) and s.6 IMA which require removal in specified cases even if a protection or human rights claim has been made, appear incompatible with Article 7(1) of the Procedures Directive which requires that a person may remain in the UK until an asylum claim has been properly determined.

Under UK law² flowing from Withdrawal Agreement Article 4, the provisions of the treaty, including the Windsor Framework, continue to

¹ Note that the relevant measures are those to which the UK opted in; the UK opted out of later versions of the Procedures Directive (Directive 2013/32/EU) and the Qualification Directive (2011/95/EU).

² Section 7A EU (Withdrawal) Act 2018

have 'supremacy' and incompatible domestic legislation can be disapplied with respect to Northern Ireland.

European Convention on Human Rights

Article 3 ECHR is an absolute right which prohibits torture, inhuman and degrading treatment. The Commission argues that the mechanism for a suspensive claim under the IMA does not satisfy the Article 3 duty to conduct an individual assessment prior to removal. Where a suspensive claim is unsuccessful, the person in question would face a real risk of a breach of Article 3 (or of Article 2, the right to life, in certain cases) in the country they are removed to.

Article 4 ECHR is an absolute right which prohibits slavery and forced labour. The Commission argues that, where there is a credible suspicion of trafficking, removing that individual before a conclusive grounds decision or a determination of any asylum/protection claim based on the person's fear of being re-trafficked is a breach of Article 4.

Article 5 ECHR is a limited right which protects the right to liberty and security. The Commission believes that the prohibition on a Court from determining the lawfulness of detention in the first 28 days of detention is in breach of Article 5.

Article 8 ECHR is a qualified right which protects the right to private and family life. The Commission will argue that removal of a child will, in defined cases engage, the child's rights under Article 8, for example, when the child has close family in the UK. In such cases, the authorities must treat the child's best interests as a primary consideration in all actions concerning the child, in accordance with Article 3(1) of the UN Convention on the Rights of the Child.

What powers does the NIHRC have?

The statutory functions of the Commission are available on our [website here](#) which include to keep under review the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland.

Since 1 January 2021, the Northern Ireland Human Rights Commission has had duties and powers to monitor, supervise, advise, enforce, and report on the UK Government's commitment in Article 2 of the Windsor Framework.

The Commission issued this challenge under its own motion powers, provided for under s.71(2B) and s.78C of the Northern Ireland Act 1998, which enable a legal challenge without reference to an individual victim.

What was the outcome of the case at Belfast High Court?

On 13 May 2024, the [High Court ruled](#) that a number of provisions in the IMA did breach Article 2(1) of the Windsor Framework leading to a diminution of the rights of asylum seekers in Northern Ireland. The Court held that with respect to these provisions, where a breach of Article 2(1) of the Windsor Framework has been identified, these provisions should be disapplied in Northern Ireland. Further, the Commission was granted a declaration of incompatibility with the ECHR as certain provisions were also incompatible with a number of convention rights.

With respect to Article 2(1) of the Windsor Framework, the High Court found a diminution in the following categories:

Removal

The Court held that sections 2, 5 and 6 of the IMA lead to a diminution of the right in article 7(1) of the Procedures Directive for the following reasons:

- Many people will be removed without their asylum claims being individually determined.
- The availability of a serious harm suspensive claim does not cure that problem since it does not lead to a granting of refugee status, or the range of rights that are contingent on that status.
- The duty to remove is inconsistent with the exceptions in articles 25-27 of the Procedures Directive.

Effective examination and grant of asylum claims

The Court said that section 5(2) IMA leads to a diminution of rights under the EU Directives for a number of reasons including:

- A person will not have the right to make an application for asylum.
- There will not be the “appropriate examination” of the substance of the application for asylum.
- The UK will not grant refugee status or subsidiary protection to a person who qualifies for it.
- A successful suspensive claim is insufficient as it only serves to disapply the duty to remove and does not lead to a grant of international protection status or the rights contingent on it.
- A serious harm suspensive claim applies only to third country removals and will not be granted on the sole basis that the person is at risk of harm in their own country.
- The threshold for a serious harm suspensive claim is higher and more difficult to prove than the test for refugee status or subsidiary protection.

Lack of Effective Remedy

The IMA provides that as a declaration of inadmissibility is not a decision to refuse the claim, no appeal of this decision lies under section 82(1) of the Nationality, Immigration and Asylum Act 2002. Further, section 54 IMA forbids any Court or tribunal from granting an interim remedy which prevents or delays the removal of a person from the UK pursuant to a decision to remove for any reason. The Court held these provisions lead to a diminution of article 39 of the Procedures Directive and article 47 Charter of Fundamental Rights for a serious harm suspensive claim for a number of reasons including:

- No appeal or judicial review is available in respect of a decision taken on their application for asylum.
- No appeal lies in respect of a decision to consider an application inadmissible. Whilst judicial review is available for a declaration that a claim is inadmissible under section 5(2) IMA, the conditions for that declaration are very different and far broader than the criteria for inadmissibility in the Procedures Directive.

Non-refoulement

Article 21 of the Qualification Directive requires Member States to respect the principle of non-refoulement which is defined in article 33 of the Refugee Convention. This states that a refugee cannot be expelled or returned to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. This extends not only to direct return to the country where persecution is feared but also indirect return via a third country. The Court held that there is a diminution of the right of non-refoulement by sections 2(1), 5(1) and 6, notwithstanding the limitations in section 6 IMA.

Detention

The detention provisions prevent a person detained under the IMA to be granted immigration bail within the first 28 days of detention. The Court held that where an individual who wishes to claim asylum, and otherwise has good grounds to apply under the EU Directives, loses that right by virtue of the IMA and is therefore detained without remedy for 28 days, this must give rise to a diminution in that right. It confirmed that the IMA deprives an individual of access to a Court and to an effective remedy during that period.

Trafficking

Even where there are reasonable grounds to believe that a person is a victim of slavery or trafficking, the trafficking provisions of the IMA remove the right for that person to have a recovery period and the right to be granted limited leave to remain. Further, the right to have assistance and support under the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 is disapplied where the removal duty applies. The Court was satisfied that these provisions would cause a diminution in rights enjoyed by victims of slavery or trafficking.

Children

Articles 20(3) and (5) of the Qualification Directive require Member States to take into account the best interests of children as a primary consideration when implementing the Directive. The provisions of the Qualification and Procedures Directives must also be interpreted and

applied in accordance with article 24 of the Charter of Fundamental Rights which states that, "In all actions relating to children ... the child's best interests must be a primary consideration."

The Court confirmed that in performing that assessment and determining claims for international protection prior to removal, the child's best interests must be a primary consideration. The Court held these rights are diminished as the duty under the IMA to declare protection and human rights claims inadmissible applies to children on a blanket basis. The removal provisions mean that the best interests will not be a relevant consideration before removal of an accompanied child and therefore this would be a diminution of rights.

Disapplication of conflicting provisions

The Court stated at paragraph 38 of the judgment, "The principle of parliamentary sovereignty remains a fundamental tenet of our constitutional law. As the Supreme Court confirmed in *R (Miller) v The Prime Minister* [2019] UKSC 41: "laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply."

Under Article 4 of the Withdrawal Agreement, where domestic law is inconsistent with the provisions of the UK-EU Withdrawal Agreement or laws made applicable by the Withdrawal Agreement, the latter takes precedence and domestic law is disappplied. The Court confirmed at paragraph 175 of the judgment that this was the 'will of Parliament as articulated in the Withdrawal Act [*European Union (Withdrawal) Act 2018*].'

The Court concluded that section 7A of the European Union (Withdrawal) Act 2018 mandated disapplication of offending provisions and therefore disappplied the following provisions of the IMA in Northern Ireland: Section 2(1), Section 5(1), Section 5(2), Section 6 Section 13(4), Section 22(2), Section 22(3), Section 25, Section 54 and Section 57.

With respect to the ECHR, the High Court found the following areas were incompatible:

Article 3 ECHR

The section 2 duty will require removal of persons in circumstances where they have advanced valid protection or human rights claims without an assessment. The Court held that as there would be no examination of whether or not those individuals are at real risk of being subjected to treatment contrary to article 3, this would therefore be incompatible with article 3 ECHR.

Article 4 ECHR

The Court held that the trafficking provisions are incompatible with article 4 ECHR when read in conjunction with the Council of Europe Convention on Action against Trafficking in Human Beings ("ECAT"). ECAT provides for a scheme whereby a person is not removed following a "reasonable grounds" decision until a final decision that a person is a victim.³ During this time, he or she must receive a basic level of assistance during a recovery and reflection period.⁴ ECAT also requires leave to remain to be granted if the victim's stay in the UK is "necessary owing to their personal situation."⁵ The duty to remove under IMA would mean that a person in respect of whom a positive reasonable grounds decision has been made will be removed prior to any identification process being complete, or before any asylum claim based on the fear of being re-trafficked has been determined. The Court rejected the argument that public order grounds would allow the disapplication of the protections in article 4 ECHR when read with these ECAT provisions.

Article 8 ECHR

The Court held that the duty to remove in section 2 and 6 of the IMA (subject to section 4) and the duty to declare certain types of claim inadmissible under section 5 would mean that the child's interests will not be the primary consideration. This would not be in accordance with the law as set out in section 55 of the Borders Citizenship and Immigration Act 2009 which imposes a duty on the Secretary of State for the Home Department to have regard to the need to safeguard and promote the welfare of children when discharging any function relating to asylum or immigration. These provisions in relation to children are therefore incompatible with article 8 ECHR.

³ Article 10(2) ECAT

⁴ Articles 12 and 13 ECAT

⁵ Article 14(1)a ECAT

What does this mean for asylum seekers entering NI?

The rights, safeguards and equality provisions of the Belfast Good Friday Agreement contain a specific commitment to the “civil rights ... of everyone in the community”. The Court held that these rights extend to asylum seekers as well as UK or Irish citizens.

The ruling recognises that minimum standards in relation to the rights of asylum-seekers in NI, including potential victims of human trafficking, should not be diminished below the commitments entered into by the UK Government when it was a member of the EU. For example, removal to a safe third country was possible when the UK was a member of the EU but this was subject to conditions including individual consideration of applications and a connection between the individual and the safe third country in question.⁶

The Commission’s case was focused on the IMA. The judgment means the provisions of the IMA disapplied by the court, which are expected to be commenced soon, cannot be brought into force in NI. It is important to note that the case did not consider or conclude on other related legislation and policy such as the Safety of Rwanda Act 2024 or the UK Migration and Economic Development Partnership with Rwanda.

Like the UK, Ireland opted out of some later EU measures but remains bound by the minimum standards raised in this case and has indicated that it will opt into the new EU Asylum and Migration Pact.⁷

Further Information

For more information on the Commission’s advice on the IMA and related issues see:

- [NIHRC Advice to the House of Lords on the Illegal Migration Bill | Northern Ireland Human Rights Commission \(nihrc.org\)](#)

⁶ Article 8 and Article 27 of the Procedures Directive (Council Directive 2005/85/EC)

⁷ [Department of Justice ‘Minister McEntee secures approval from Government to opt-in to measures of the EU Pact on Migration and Asylum’, 27 March 2024](#)

- [NIHRC Briefing Note on Article 2 of the Windsor Framework and the rights of refugees and asylum-seekers | Northern Ireland Human Rights Commission](#)
- Research: [Article 2 of the Windsor Framework and the rights of refugees and persons seeking asylum | Northern Ireland Human Rights Commission \(nihrc.org\)](#)
- [NIHRC Advice on the Safety of Rwanda \(Asylum and Immigration\) Bill | Northern Ireland Human Rights Commission](#)