



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Advice on the Safety of Rwanda (Asylum
and Immigration) Bill**

January 2024

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Summary of Advice and Recommendations

The NI Human Rights Commission:

- 2.5 advises that the Bill requires immediate and thorough reassessment.
- 3.15 advises that refugees and asylum seekers are protected by Article 2 of the Windsor Framework.
- 3.16 advises that rights particular to refugees and asylum-seekers are within the scope of the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement by virtue, in particular, of the commitment to civil rights and to incorporate the ECHR into domestic law.
- 3.17 advises that, as a result of Windsor Framework Article 2, the following measures of EU law, which were binding on the UK before EU withdrawal, continue to set standards for human rights protection below which the law in NI should not fall:
- the EU Temporary Protection Directive (2001/55/EC),
 - the original EU Asylum Reception Directive (2003/9/EC),
 - the EU Qualification Directive (2004/83/EC),
 - the EU Asylum Procedures Directive (2005/85/EC), and
 - the Dublin Convention and successor Regulations, the latest of which is Regulation (EU) No 604/2013 known as the Dublin III Regulation.
- 4.8 suggests that the current relationship between the UK courts, UK Parliament and international law is balanced. The NIHRC advises that this Bill will create an imbalance. It will, deliberately, abdicate responsibility under the 1951 Refugee Convention, threaten the international refugee protection regime and risk the erosion of the UK's standing and ability to collaborate in the multilateral system.
- 5.11 advises that the safety or otherwise of Rwanda cannot be pre-emptively and/or collectively determined. The lawfulness and appropriateness of a person's removal to Rwanda must be assessed individually and be subject to procedural safeguards, prior to removal.

- 5.12 advises that clause 2 may be in breach of Windsor Framework Article 2 by diminishing rights previously protected by the EU Procedures Directive (which bound the UK prior to EU Withdrawal), particularly in relation to Article 27 (the safe third country concept) and Article 8 (requirements for the consideration of applications).
- 5.21 advises that the very limited exceptions provided for in clause 4 of the Bill do not provide adequate safeguards that mitigate the risk of refoulement and ensure compliance with Articles 2 and 3 ECHR. In addition, if enacted, clauses 2 and 4 would contravene the UK's international obligations under ICCPR, UN CAT and the 1951 Refugee Convention.
- 5.22 advises that clauses 2 and 4 may be in breach of Windsor Framework Article 2 by diminishing rights previously protected by the EU Procedures Directive Article 27 (the safe third country concept) in respect of protection against refoulement.
- 5.26 advises that parliamentary sovereignty and the separation of powers go hand-in-hand. This is not the case in the present Bill, particularly within clause 2.
- 5.28 advises that the restriction in the operation of and access to courts and tribunals, in clause 2, may amount to a breach of Windsor Framework Article 2 by diminishing rights previously protected by Article 39 of the EU Procedures Directive and Article 47 of the EU Charter.
- 5.33 advises that to the extent that clause 2(5) limits the ability of an individual to seek redress for a potential diminution of Windsor Framework Article 2, it is in breach of Article 4 of the UK-EU Withdrawal Agreement.
- 6.7 advises that disapplying the interpretative and remedial provisions of the Human Rights Act 1998 while dismantling the guarantees enshrined in ECHR Articles 2 and 3 does not ensure the right to an effective remedy under ECHR Article 13.
- 6.9 advises that the balanced relationship between the UK courts, ECtHR and UK Parliament will be upset by this approach and one

consequence includes the weakening of protection afforded to individuals seeking asylum in the UK.

- 7.10 advises that the restrictions placed on the consideration of an individual's circumstances under clause 4 of the Bill renders the domestic remedies ineffectual and, in the case of those who face a risk of refoulement, unavailable.
- 7.16 advises that narrow grounds of challenge and a high evidential threshold for those grounds may diminish the rights of asylum-seekers which were previously protected by EU Procedures Directive Article 27 (the safe third country concept), which is likely to be contrary to Windsor Framework Article 2.
- 7.18 advises that clause 4(2) may diminish a right to an effective remedy under Article 47 of the Charter of Fundamental Rights of the EU, in relation to minimum standards set out in Article 27(1)(b) of the EU Procedures Directive and Article 21 of the EU Qualification Directive.
- 8.2 advises that compliance with interim measures is an essential requirement of membership of the Council of Europe.
- 9.6 advises that the present Bill does not consider the Belfast (Good Friday) Agreement, and the integral role of both the Human Rights Act and ECHR in the complex fabric of the NI Peace Process and devolution. The NIHRC is particularly concerned that the present Bill appears to be incompatible with obligations under the Belfast (Good Friday) Agreement to incorporate the ECHR and provide direct access to the courts.

1.0 Introduction

1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(1) of the Northern Ireland (NI) Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in NI. The NIHRC is also obliged, under section 78A(1), to monitor the implementation of Article 2(1) of the Protocol on Ireland/NI of the United Kingdom (UK) - European Union (EU) Withdrawal Agreement (Protocol 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 these functions, the NIHRC provides the following advice on the Safety of Rwanda (Asylum and Immigration) Bill, as introduced.

2.0 Statement of Compatibility

2.1 The Home Secretary has made a statement, under s19(1)(b) of the Human Rights Act 1998, of his inability to confirm that the Bill is compatible with the European Convention on Human Rights (ECHR). Despite that, the Government is progressing the Bill through Parliament. In so doing, and in apparent contradiction of the Home Secretary's statement, the UK Government (in its human rights memorandum), indicate that each clause of the Bill is in compliance with the ECHR. The Bill proceeds at clause 2 to disapply sections 3, 4 and 6 to 9 of the Human Rights Act.

2.2 It is the NIHRC's view that this Bill is not compliant with the ECHR. By introducing the presumption, which is incapable of rebuttal, that Rwanda is a 'safe country', an individual will never be able to seek a judicial determination as to breach or potential breach of their right to life and right to freedom from torture. Furthermore, to require the courts of the UK to disregard interim measures issued by the European Court of Human Rights (ECtHR) is inconsistent with the UK's membership of the Council of Europe.

2.3 The NIHRC is concerned by the escalation of measures that diminish the rights of refugees, asylum seekers and migrants who arrive to

the UK by unofficial routes.¹ The UK Government must ensure the correct application of the safe third country concept. Those individuals who are deemed to have no legal basis to stay in the UK must be returned or transferred in safety and dignity.

2.4 The Government's stated aim in pursuing this policy, despite human rights concerns and warnings about international law, is that it will act as a deterrent to those crossing in 'small boats'. The UN Refugee Agency, however, has advised that instead of deterring refugees and asylum seekers from resorting to perilous journeys, the UK's externalisation of its humanitarian responsibilities will only "magnify risks, causing refugees to seek alternative routes, and exacerbating pressures on frontline states".² It also noted that, while Rwanda has made efforts to build capacity in its asylum system, "there is a serious risk that the burden of processing the asylum claims of new arrivals from the UK could further overstretch the capacity of the Rwandan national asylum system, thereby undermining its ability to provide protection".³

2.5 The NIHRC advises that the Bill requires immediate and thorough reassessment.

3.0 Article 2 of the Windsor Framework and the Continuing Relevance of EU Asylum Law in NI

3.1 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 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 place on or before 31 December 2020. In most cases, the relevant EU law will be that which was binding on the UK

¹ See: Illegal Migration Act 2023; Nationality and Borders Act 2022; Home Office, 'Memorandum of Understanding Between the Government of the UK of Great Britain and NI and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement', (UK Gov, 2022); Home Office, 'New Plan for Immigration' (UK Gov, 2022).

² UN Refugee Agency, 'Press Release: UN Refugee Agency opposes UK plan to export asylum', 14 April 2022.

³ UN Refugee Agency, 'UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement' (UNHCR, 2022).

on 31 December 2020.

- 3.2 In addition to the 'no diminution' commitment, Windsor Framework Article 2 requires the UK Government to "keep pace" with any changes made by the EU to the six EU main equality directives listed Annex 1 to the Windsor Framework, which improve the minimum levels of protection available, after 1 January 2021, including the relevant case law of the Court of Justice of the EU (CJEU).⁴
- 3.3 Aligned to the Commission's analysis detailed below, judgment in a recent case before the High Court in NI confirmed that:
- refugees and asylum-seekers are protected under Windsor Framework Article 2;
 - rights associated with the treatment of asylum-seekers are covered by the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement and, therefore;
 - certain measures of EU law, binding on the UK before EU withdrawal, continue to set standards below which the law in NI should not fall.⁵

When and how is Windsor Framework Article 2 engaged?

- 3.4 In considering whether or not there has been a breach of Windsor Framework Article 2, the Commission considers the following questions. If the answer to each of the questions below is yes, then a breach of Windsor Framework Article 2 has been identified. These questions are:
- (i) Does the right, safeguard or equality of opportunity protection fall within the relevant part of the Belfast (Good Friday) Agreement?

⁴ Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000; Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000; Directive 2004/113/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services', 13 December 2004; Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006; Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.; Directive 79/7/EEC, 'EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

⁵ [Angesom's \(Aman\) Application \[2023\] NIKB 102](#) [2023] NIKB 102.

- (ii) Was the right, safeguard or equality of opportunity protection:
 - (a) underpinned by EU law binding on the UK on or before 31 December 2020?
 - (b) given effect in NI law, in whole or in part, on or before 31 December 2020?⁶
- (iii) Has there been a diminution in the right, safeguard or equality of opportunity protection on or after 1 January 2021?
- (iv) Would this diminution have been unlawful had the UK remained in the EU?⁷

3.5 In May 2023, the NI Court of Appeal set out a six-part test, which is not dissimilar to the above.⁸ Other Court decisions have confirmed that Windsor Framework Article 2 has direct effect, meaning individuals can assert their rights under Article 2 before domestic courts.⁹

Article 2 and Refugees & Asylum-Seekers

3.6 In terms of the personal scope of Windsor Framework Article 2, the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement makes explicit the signatories' commitment to "the civil rights and the religious liberties of everyone in the community". "Everyone in the community" is not confined to citizens or "people of Northern Ireland" as referenced in the constitutional issues section of the Belfast (Good Friday) Agreement.

3.7 International human rights treaties make clear that immigration status cannot be a reason to exclude persons from the enjoyment of human rights, albeit that immigration status may be relevant to the scope of those rights. Article 14 of the Universal Declaration of

⁶ Where UK law was out of alignment with EU law on 31 December 2020, the absence of a domestic implementing measure is not an insurmountable obstacle to demonstrating a diminution of rights contrary to Windsor Framework Article 2, provided the EU obligation existed and was capable of having direct effect on that date.

⁷ For more detail, see NI Human Rights Commission and Equality Commission for NI, '[Working Paper: The Scope of Article 2\(1\) of the Ireland/Northern Ireland Protocol](#)', (NIHRC and ECNI, 2022).

⁸ *Society for the Protection of the Unborn Child Pro-Life Ltd v Secretary of State for NI* [2023] NICA 35, para 54.

⁹ See, for example, *In the Matter of an Application by SPUC Pro-Life Ltd for Judicial Review* [2022] NIQB 9; *Angesom's (Aman) Application* [2023] NIKB 102.

Human Rights states that, “everyone has the right to seek and enjoy in other countries asylum from persecution”. The UN Refugee Convention 1951 (the Refugee Convention) builds on this to include the right not to be penalised for being in or entering a country without permission where this is necessary to seek and receive asylum.¹⁰ The CoE Parliamentary Assembly has stated that “as a starting point, international human rights instruments are applicable to all persons regardless of their nationality or status”.¹¹

3.8 Windsor Framework Article 2 protects everyone subject to the law in NI, regardless of immigration status. The UK Government’s ‘Explainer’ on Windsor Framework Article 2 recognises that these protections and safeguards apply to “everyone who is subject to NI law – irrespective of whether that law has been passed by the NI legislature or Westminster”.¹² Research commissioned by the NIHRC demonstrated the protections afforded to refugees and asylum seekers by Windsor Framework Article 2 and highlighted relevant EU law.¹³

3.9 The scope of protections afforded by Windsor Framework Article 2 is determined by the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement. The first section of this chapter is entitled “Human Rights” and opens with a general commitment to “civil rights and religious liberties”. This is followed by a non-exhaustive list of rights “affirmed in particular”.¹⁴ Also within this human rights section is the UK Government’s commitment to the incorporation of the ECHR with direct access to the courts and remedies for breach. It also includes sections on victims’ rights and economic, social and cultural issues. In summary, the chapter represents wide-ranging commitment to civil, political, economic, social and cultural rights and equality of opportunity.

¹⁰ Article 31, UN Refugee Convention 1951.

¹¹ CoE Parliamentary Assembly ‘Resolution 1509: Human Rights of Irregular Migrants’, 27 June 2006.

¹² NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 8.

¹³ Alison Harvey, ‘Article 2 of the Windsor Framework and the rights of refugees and persons seeking asylum’ (NIHRC, 2023).

¹⁴ The UK Government has also recognised that the rights, safeguard and equality of opportunity protections in the Belfast (Good Friday) Agreement are not limited to the “affirmed in particular” rights. See paragraph 9 of the NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in 0: What does it Mean and How will it be Implemented?’ (NIO, 2020).

- 3.10 In its Explainer on Windsor Framework Article 2, the UK Government has acknowledged that the “key rights and equality provisions in the Agreement are supported by the ECHR”. The Explainer further confirms that the UK Government acknowledges that “in NI, EU law, particularly on anti-discrimination, has formed an important part of the framework for delivering the guarantees on rights and equality set out in the Agreement”.¹⁵
- 3.11 The NIHRC and Equality Commission for Northern Ireland (as the Dedicated Mechanism) published a working paper on the scope of Article 2.¹⁶ In it, the Commissions conclude that the non-diminution commitment in Windsor Framework Article 2 encompasses the full range of rights set out in the ECHR, to the extent that they are underpinned by EU legal obligations in force on or before 31 December 2020.
- 3.12 Put another way, the Commissions consider that all EU law in force in NI on or before 31 December 2020 which underpins an ECHR right, falls within scope of the non-diminution commitment in Windsor Framework Article 2.
- 3.13 ECHR rights of particular relevance to refugees and asylum-seekers include freedom from torture, inhuman or degrading treatment (Article 3 ECHR) protections against slavery and forced labour (Article 4 ECHR), the right to liberty and security (Article 5 ECHR) and the right to a private and family life (Article 8 ECHR) as well as freedom from discrimination (Article 14 ECHR).
- 3.14 The NIHRC/ECNI working paper also includes an Appendix setting out the EU measures which the Commissions have identified to date as falling within the scope of the UK Government’s commitment under Article 2 of the Windsor Framework.¹⁷

3.15 **The NIHRC advises that refugees and asylum seekers are**

¹⁵ NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 3.

¹⁶ NI Human Rights Commission and Equality Commission for NI, ‘Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol’, (NIHRC and ECNI, 2022).

¹⁷ NI Human Rights Commission and Equality Commission for NI, ‘Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol’, (NIHRC and ECNI, 2022).

protected by Article 2 of the Windsor Framework.¹⁸

3.16 The NIHRC advises that rights particular to refugees and asylum-seekers are within the scope of the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement by virtue, in particular, of the commitment to civil rights and to incorporate the ECHR into domestic law.

3.17 The NIHRC advises that, as a result of Windsor Framework Article 2, the following measures of EU law, which were binding on the UK before EU withdrawal, continue to set standards for human rights protection below which the law in NI should not fall:

- **the EU Temporary Protection Directive (2001/55/EC),¹⁹**
- **the original EU Asylum Reception Directive (2003/9/EC),²⁰**
- **the EU Qualification Directive (2004/83/EC),²¹**
- **the EU Asylum Procedures Directive (2005/85/EC),²² and**
- **the Dublin Convention and successor Regulations, the latest of which is Regulation (EU) No 604/2013 known as the Dublin III Regulation.²³**

4.0 Clause 1: Relationship with International Law

4.1 Clause 1(4)(b) of the Bill provides “it is recognised that – a) the Parliament of the UK is sovereign, and b) the validity of an Act is unaffected by international law”. Clauses 2 and 3 of the Bill contain “notwithstanding” provisions that require UK courts to disapply aspects of domestic law, including sections of the Human Rights Act 1998, and “any interpretation of international law” by a court or tribunal. Clause

¹⁸ [Anesom's \(Aman\) Application \[2023\] NIKB 102 at para. 107](#): “The applicant and respondent both agree that the rights, safeguards and equality of opportunity enshrined in the relevant part of the GFA do not exclude asylum seekers.”

¹⁹ Directive 2001/55/EC ‘Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons’, 20 July 2001.

²⁰ Directive 2003/9/EC, ‘Council Directive laying down minimum standards for the reception of asylum seekers’, 27 January 2003.

²¹ 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.

²² Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, 1 December 2005.

²³ Regulation 604/2013/EU ‘Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)’, 26 June 2013.

1(6) of the Bill provides a non-exhaustive list of examples of what is meant by international law.

- 4.2 The UK has agreed to be bound by several Council of Europe and UN human rights treaties through the process of ratification. The general rules of interpretation for international treaties have been codified in the 1969 Vienna Convention on the Law of Treaties. Article 31(1) provides the general rule of interpretation, namely that treaties are to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.
- 4.3 Under Article 27 of the Vienna Convention, States cannot invoke conflicting domestic law to avoid an international obligation. Therefore, enacting these provisions in domestic law would ultimately have no bearing on the international legal effect of the UK’s human rights obligations. For example, as a High Contracting Party to the ECHR, the UK must continue to abide by the ECtHR’s final judgment.²⁴
- 4.4 The NIHRC is gravely concerned by the proposal to disapply all interpretations of customary international law in the context of the Bill, particularly the principle of non-refoulement. The prohibition of refoulement is so fundamental to human rights law that it has attained the status of a peremptory norm or *jus cogens*. Therefore, it is non-derogable and is even binding on States which have not become party to the relevant instruments.
- 4.5 In addition, the universality of human rights is one of the most important principles codified in international law.²⁵ It is the central idea of the Universal Declaration of Human Rights and is a foundational aspect of the international human rights system.²⁶ Universality means that human rights instruments are applicable to all persons by virtue of their being human.
- 4.6 The implications of the notwithstanding provisions in the present Bill are particularly significant as they seek to disapply domestic and

²⁴ Article 46(1), European Convention on Human Rights 1950.

²⁵ UN Office of the High Commissioner for Human Rights, ‘Universality and Diversity’. Available at: <https://www.ohchr.org/en/special-procedures/sr-cultural-rights/universality-and-diversity>.

²⁶ Preamble to the Universal Declaration of Human Rights 1948.

international human rights protections in relation to a specific group of people – that is, refugees, asylum seekers and migrants who arrive to the UK through unofficial routes. By targeting individuals that are subject to lesser protection, the current proposals also contravene the universality of human rights.

4.7 Clauses 1 to 3 of the Bill run contrary to international principles and human rights norms upon which the multilateral system is based. In July 2023, the then Foreign Secretary noted that “the multilateral system is the bedrock of global peace and prosperity” and that “the UK pushes back against those who seek to weaken agreed human rights norms and protections in multilateral fora”.²⁷ If enacted, this Bill could erode the UK’s long-standing reputation of promoting human rights in the international order while setting a dangerous precedent in the UK’s domestic human rights framework.

4.8 The NIHRC suggests that the current relationship between the UK courts, UK Parliament and international law is balanced. The NIHRC advises that this Bill will create an imbalance. It will, deliberately, abdicate responsibility under the 1951 Refugee Convention, threaten the international refugee protection regime and risk the erosion of the UK’s standing and ability to collaborate in the multilateral system.

Clause 1 and Windsor Framework Article 2

4.9 Clause 1(5) defines "safe country" as a country to which persons may be removed from the UK in compliance with the UK's obligations under international law. Further to the advice above, Windsor Framework Article 2 creates a particular international obligation by virtue of which a safe third country must be considered in light of minimum EU standards binding on the UK before Brexit. These include EU Procedures Directive Article 27 (the safe third country concept) which, among other things, requires a connection between the person seeking asylum and the third

²⁷ [Human Rights and Democracy: the 2022 Foreign, Commonwealth & Development Office report - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/115444/Human_Rights_and_Democracy_the_2022_Foreign_Commonwealth_and_Development_Office_report.pdf)

country concerned, such that “it is reasonable for that person to go to that country.”²⁸ Article 27 also requires that the application of the safe third country concept shall be subject to a process set out in legislation and only be applied where the authorities are satisfied that persons seeking asylum will be treated in accordance with specified human rights principles.²⁹

4.10 There is obvious internal tension between clause 1 (5), where “safe country” is defined in terms of international law, and clause 1(4), in which the validity of an Act will be unaffected by international law. In this context it is worth noting that the Windsor Framework Article 2, as part of the UK EU Withdrawal Agreement, is incorporated into domestic law via section 7A of the EU (Withdrawal) Act 2018 which provides for its own primacy over other enactments as discussed further below.

5.0 Clause 2: Safety of Rwanda

5.1 Clause 2 of the Bill requires every decision-maker, including courts and tribunals, to “conclusively treat the Republic of Rwanda as a safe country” when deciding whether to remove a person under the Immigration Acts. Clause 2(3) states that no court or tribunal may consider a review of or appeal against such a decision where it is brought on the grounds that Rwanda is not a safe country.

5.2 Clause 2(4) provides that a court or tribunal “must not consider”: (a) any claim that Rwanda will or may remove a person to another State in contravention of any of its international obligations (including under the 1951 Refugee Convention); (b) whether an individual will not “receive fair and proper consideration” of their asylum claim in Rwanda; or (c) whether Rwanda will not comply with the new treaty.

5.3 Significantly, clause 2 would apply “notwithstanding” any other provision of domestic immigration law, any other rule or provision of domestic law, including common law, the Human Rights Act (to the

²⁸ Article 27, paragraph 2(a). Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, 1 December 2005. Note also *AAA (Syria) & Others, R (on the application of) v Secretary of State for the Home Department* [2023] UKSC 42 at para. 108: “The Secretary of State does not dispute that if the Procedures Directive remains in force in United Kingdom domestic law as retained EU law, the MEDP scheme as relevant to these appeals is not compatible with articles 25 and 27 of the Directive.”

²⁹ See Section 7 (Clause 4) of this briefing for further detail.

extent disapplied) or “any interpretation of international law by the court or tribunal”.³⁰

- 5.4 In considering clause 2 it must be recalled that in November 2023 the UK Supreme Court held unanimously that Rwanda was not a safe third country for the transfer and processing of asylum seekers.³¹ The Supreme Court identified a range of factors, including well evidenced shortcomings in Rwanda’s compliance with its international human rights obligations, particularly UN CAT and ICCPR;³² Rwanda’s poor human rights record;³³ defects in its procedures and institutions for processing asylum claims;³⁴ unreliable access to an effective right to appeal;³⁵ a lack of independence in the legal system, particularly in politically sensitive cases;³⁶ a “surprisingly high rejection rate for claimants from known conflict zones”;³⁷ Rwanda’s past history with breach of the principle of non-refoulement; and, its failure to comply with assurances in an analogous agreement with Israel.³⁸
- 5.5 In addition, the Supreme Court took note of a serious incident in 2018 when “the Rwandan police fired live ammunition at refugees protesting over cuts to food rations, killing at least 12 people”.³⁹
- 5.6 At the international level the UN CAT Committee and the UN Human Rights Committee have both raised, in their most recent Concluding Observations, a series of issues with Rwanda’s asylum reception

³⁰ Clause 5(2).

³¹ *AAA (Syria) & Others, R (on the application of) v Secretary of State for the Home Department (2023) UKSC 42.*

³² *Ibid*, at para 76.

³³ *Ibid*, at para 76.

³⁴ *Ibid*, at para 79.

³⁵ *Ibid*, at para 82: “Although a right of appeal has existed since 2018, there has never been such an appeal in practice. The system is therefore untested, and there is no evidence as to how the right of appeal would work in practice. There are, however, concerns about the willingness of the judiciary to find against the Rwandan government.”

³⁶ *Ibid*, at para 83.

³⁷ *Ibid*, at para 85: “UNHCR’s evidence shows 100% rejection rates at [the Refugee Status Determination Committee] level during 2020-2022 for nationals of Afghanistan, Syria and Yemen, from which asylum seekers removed from the United Kingdom may well emanate... By comparison, Home Office statistics for the same period show that asylum claims in the UK were granted in 74% of cases from Afghanistan, 98% of cases from Syria, and 40% of cases from Yemen.”

³⁸ *Ibid*, at para 87: “UNHCR reported six recent cases of expulsion of persons who claimed asylum on arrival at Kigali airport, some of which resulted in refoulement or would have done so if UNHCR had not intervened.”

See also, at para 100: “Although the terms of the agreement may well have been different from the [Migration and Economic Development Partnership] the Rwandan government undertook to comply with the principle of non-refoulement”, therefore “Its apparent failure to fulfil that undertaking is relevant to an assessment of the risk of refoulement under the arrangements entered into with the government of the UK”.

³⁹ *Ibid*, at para 76.

procedures and detention conditions.⁴⁰ Furthermore in 2021, during the Universal Periodic Review process relating to Rwanda, the UK Government highlighted persistent allegations of human rights violations, including against minors and LGBTQI people, at Rwanda's Gikondo Transit Centre;⁴¹ restrictions on media freedom and civil and political rights;⁴² journalists' ability to work freely without fear of retribution;⁴³ State procedures for investigations into alleged extrajudicial killings, deaths in custody, enforced disappearances and torture;⁴⁴ and State procedures for screening, identifying and providing support to trafficking victims, including those held in government transit centres.⁴⁵

5.7 Also of note is the continuing concern raised by the UN Refugee Agency that asylum-seekers relocated to Rwanda are not treated in accordance with accepted international standards.⁴⁶ In relation to the UK-Rwanda arrangement, the UN Refugee Agency reiterated that transfer arrangements must be "challengeable and enforceable in a court of law by the affected asylum-seekers" and that "asylum-seekers must be individually assessed as to the lawfulness and appropriateness of the transfer, subject to procedural safeguards, prior to transfer".⁴⁷

5.8 In light of the above, the NIHRC is particularly concerned that clause 2 if enacted requires every decision-maker in the UK to "conclusively treat the Republic of Rwanda as a safe country". The NIHRC has taken account of the purported safeguards and structures contained in the UK's new treaty with Rwanda but has concluded that they do not avoid the incompatibility of the Bill with the law and do not protect rights. Moreover and in any event, in December 2023 a spokesperson for the Rwandan government

⁴⁰ CAT/C/RWA/CO/2, 'UN Committee Against Torture Concluding Observations on the Second Periodic Report of Rwanda', 21 December 2017, at para 47; CCPR/C/RWA/CO/4, 'Human Rights Committee Concluding Observations on the Fourth Periodic Report of Rwanda', 2 May 2016, at para 30.

⁴¹ UN Human Rights Council, 'Universal Periodic Review – Rwanda (Third Cycle) – Advance Questions to Rwanda (First Batch)'. Available at: <https://www.ohchr.org/en/hr-bodies/upr/rw-index>.

⁴² A/HRC/47/14, 'UN Human Rights Council: Report of the Working Group on the Universal Periodic Review – Rwanda', 25 March 2021, at 114.

⁴³ Ibid, at 134.62

⁴⁴ Ibid, at 135.33

⁴⁵ Ibid, at 135.46

⁴⁶ UN Refugee Agency, 'UNHCR Submission for the Office of the High Commissioner for Human Rights Compilation Report Universal Periodic Review: 3rd Cycle' (UNHCR, 2020); UN Refugee Agency, 'UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement' (UNHCR, 2022).

⁴⁷ UN Refugee Agency, 'UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement' (UNHCR, 2022), at paras 12 -23.

indicated that nothing had changed in this new treaty with the UK and instead advised that the guarantees outlined in the new agreement were the same as before; that they “already existed”.⁴⁸ This indicates, adding to the NIHRC’s concern, that as a matter of practice Rwanda will not be a safe country.

5.9 The definition of Rwanda as 'safe' in law and the rejection of any potential to claim otherwise, are in stark contrast to the UK’s obligations under EU Procedures Directive Article 27 (The safe third country concept).⁴⁹ Under paragraph (2), the concept should be subject to national legislation requiring “a connection between the person seeking asylum and the third country concerned on the basis of which it is reasonable for that person to go to that country.” Article 27 permits the application of the safe third country concept only where authorities are satisfied that key human rights principles will be respected and subject to safeguards set out in legislation, including the “methodology” by which the authorities will satisfy themselves of this.⁵⁰ There is no indication in clause 2 that the definition of Rwanda as a safe country is subject to consideration. In the recent Supreme Court case referenced above, it was not disputed that the Rwanda policy would not have complied with Article 27 had the UK not withdrawn from the EU.⁵¹

5.10 Furthermore, Article 8 of the EU Procedures Directive requires authorities to ensure that each application is “examined and decisions are taken individually, objectively and impartially.”⁵² Article 8 of the Procedures Directive sets the guarantee that decisions made by the determining authority follow an appropriate examination, as outlined in paragraph 2 of the Article. Paragraph 2 also requires that “precise and up-to-date information to be obtained from various sources” such as the UNHCR.⁵³

⁴⁸ ‘Nothing has changed in James Cleverly’s new asylum treaty, Rwandan government claims’, *ITV News*, 5 December 2023.

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

⁵⁰ See Section 7 (Clause 4) of this briefing for further detail.

⁵¹ *AAA (Syria) & Others, R (on the application of) v Secretary of State for the Home Department* [2023] UKSC 42 at paragraph 108: “The Secretary of State does not dispute that if the Procedures Directive remains in force in United Kingdom domestic law as retained EU law, the MEDP scheme as relevant to these appeals is not compatible with articles 25 and 27 of the Directive.”

⁵² Article 8, paragraph 2(a). Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, of 1 December 2005.

⁵³ Article 8 paragraph 2(b). Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, of 1 December 2005.

5.11 The NIHRC advises that the safety or otherwise of Rwanda cannot be pre-emptively and/or collectively determined. The lawfulness and appropriateness of a person's removal to Rwanda must be assessed individually and be subject to procedural safeguards, prior to removal.

5.12 The NIHRC advises that clause 2 may be in breach of Windsor Framework Article 2 by diminishing rights previously protected by the EU Procedures Directive (which bound the UK prior to EU Withdrawal), particularly in relation to Article 27 (the safe third country concept) and Article 8 (requirements for the consideration of applications).

Risk of Refoulement

5.13 The NIHRC reiterates that the principle of non-refoulement forms an essential protection under international human rights law and customary law. It prohibits States from transferring or removing individuals from their jurisdiction when there are substantial grounds for believing that the person would be at risk of irreparable harm on return, including persecution, torture, ill-treatment or other serious human rights violations.

5.14 The UK has obligations under Article 3 of the UN Convention against Torture, which expressly prohibits refoulement and which is non-derogable. Obligations under the International Covenant on Civil and Political Rights (ICCPR) also contain an implicit guarantee of non-refoulement, notably in Articles 6 and 7.⁵⁴ The UN CAT Committee and the UN Human Rights Committee both emphasise that procedural safeguards and remedies must protect against the risk of 'chain refoulement' by ensuring individuals are not removed to countries that do not have adequate asylum procedures.⁵⁵

⁵⁴ CCPR/C/GC/20, 'UN Human Rights Committee General Comment No.20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)', 10 March 1992, at para 9; CCPR/C/GC/36, 'UN Human Rights Committee General Comment No. 36: Article 6 (Right to Life)', 30 October 2018, at para 31.

⁵⁵ CAT/C/MNE/CO/3, 'UN Committee Against Torture Concluding Observations on the Third Periodic Report of Montenegro', 2 June 2022, at para 21; CCPR/C/NOR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of Norway', 25 April 2018, at para 32; CAT/C/RWA/CO/2, 'UN Committee Against Torture Concluding Observations on the Second Periodic Report of Rwanda', 21 December 2017, at para 47.

5.15 The UK's obligations under the European Convention on Human Rights (ECHR) include the obligation to "secure to everyone within their jurisdiction the rights and freedoms" contained within the ECHR.⁵⁶ The ECtHR has held that the removal of people seeking asylum will engage ECHR Articles 2 (right to life) and 3 (freedom from torture, inhuman or degrading treatment) where substantial grounds have been shown for believing that the person in question, if removed, would face a "real risk" of being subjected to treatment contrary to Articles 2 or 3 in the destination country.⁵⁷

5.16 The ECtHR has summarised a number of principles relating to the application of ECHR Article 3 in cases involving the removal of asylum-seekers to "third safe countries".⁵⁸ In particular, the Court acknowledged,

...the duty of the removing State to examine thoroughly the question whether or not there is a real risk of the asylum seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement. If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty that the asylum seekers should not be removed to the third country concerned.⁵⁹

5.17 These general principles and assurances have been reaffirmed by the ECtHR in subsequent cases.⁶⁰ The ECtHR has also reiterated the need to consider the risk of chain refoulement as part of the procedural guarantees under ECHR Article 3.⁶¹

5.18 The Government, in its ECHR Memorandum to the Bill, advises that clause 2 should be read with clause 4(1), which allows an individual to claim that Rwanda is not a safe country for them because of their particular individual circumstances (discussed further below in Section 7). However, clause 4(2) expressly prevents decision-makers from considering whether Rwanda will remove the individual

⁵⁶ Article 1, ECHR.

⁵⁷ *Soering v UK* (1989) ECHR 17; *Al Saadoon and Mufdhi v UK* (2010) ECHR 279; *Othman (Abu Qatada) v UK* (2012) ECHR 817.

⁵⁸ *Ilias and Ahmed v Hungary*, Application No. 47287/15, Judgment of 21 November 2019.

⁵⁹ *Ibid*, at para 134.

⁶⁰ *M.K. and Others v Poland* (2020) ECHR 568; *D.A. and Others v Poland* (2021) ECHR 615.

⁶¹ *Ibid*, at para 69.

concerned to another State in contravention of its international obligations, including the Refugee Convention.

5.19 The ECHR Memorandum states “there is no real risk of onward refoulement in breach of Articles 2 and 3 ECHR arising in practice in relation to any person” due to the *nature* and *substance* of the commitments given by the Rwandan government in its new treaty with the UK.⁶² However, it is clear from ECtHR jurisprudence that the question of safety of a third country must be based on a thorough examination of the “accessibility and functioning of the receiving country’s asylum system and the safeguards it affords *in practice*”.⁶³ The ECtHR states,

...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.⁶⁴

5.20 Prior to withdrawal, the UK was also bound by EU Procedures Directive Article 27 (the safe third country concept) which requires that the concept be applied only where competent authorities satisfy themselves that a person being removed will be treated in accordance with specified principles including “non-refoulement in accordance with the Geneva convention” and other human rights principles.⁶⁵

5.21 The NIHRC advises that the very limited exceptions provided for in clause 4 of the Bill do not provide adequate safeguards that mitigate the risk of refoulement and ensure compliance with Articles 2 and 3 ECHR. In addition, if enacted, clauses 2 and 4 would contravene the UK’s international obligations under ICCPR, UN CAT and the 1951 Refugee Convention.

5.22 The NIHRC advises that clauses 2 and 4 may be in breach of Windsor Framework Article 2 by diminishing rights previously

⁶² UK Government, ‘Safety of Rwanda (Asylum and Immigration) Bill – European Convention on Human Rights Memorandum’, (2023) at para 26(b).

⁶³ *Ilias and Ahmed v Hungary*, Application No. 47287/15, Judgment of 21 November 2019, at 141 (emphasis added).

⁶⁴ *Ibid*, at para 141.

⁶⁵ For further detail on Article 27 of EU Procedures Directive (2005/85/EC), see commentary on clause 4, below.

protected by the EU Procedures Directive Article 27 (the safe third country concept) in respect of protection against refoulement.

Constitutional Implications

5.23 Clause 2 seeks to declare conclusively that Rwanda is safe and remove any challenge on that point. The courts would be excluded from assessing compliance with the so-called safeguards in practice. In other words, there will be no ability to challenge the safeguards in the treaty and their sufficiency in an individual case or to challenge even a flagrant breach of those safeguards in practice. In so doing, the Bill not only interferes with the right to an effective remedy under Article 13 of the ECHR (discussed below in Section 6) but undermines in a critical way the role of the judiciary within the UK's constitutional order.

5.24 The NIHRC is mindful of the importance of parliamentary sovereignty and the rule of law. Parliamentary sovereignty enables the UK Parliament to create or repeal any law.⁶⁶ No Parliament can pass laws that future Parliaments cannot change, and the courts cannot overrule a Parliament's legislation.⁶⁷ However, the UK's separation of powers doctrine is relevant whereby "major institutions of State should be functionally independent".⁶⁸ Parliament makes (and changes) the law, the Executive Government puts the law into action, and the courts make findings on evidence and issue judgments on the correct interpretation of the law. This enables the courts to assess whether it believes that Parliament struck the right balance with a law and to make a judgment suggesting a change to the law as and when the courts deem it necessary.

5.25 Parliamentary sovereignty provides that it is Parliament's prerogative whether to follow or disregard the courts' assessments. However, to uphold the established checks and balances that underpin the UK's constitution, the courts must be able to assess concerns about the

⁶⁶ UK Parliament, 'Parliamentary Sovereignty'. Available at: <https://www.parliament.uk/site-information/glossary/parliamentary-sovereignty>

⁶⁷ UK Parliament, 'Parliamentary Sovereignty'. Available at: <https://www.parliament.uk/site-information/glossary/parliamentary-sovereignty>

⁶⁸ Richard Benwell and Oonagh Gray, 'The Separation of Powers' (HoC, 2022).

safety of Rwanda, including its compliance with the new treaty, and to form their own view in light of the evidence as a whole.⁶⁹

5.26 The NIHRC advises that parliamentary sovereignty and the separation of powers go hand-in-hand. This is not the case in the present Bill, particularly within clause 2.

The right to an effective remedy under relevant EU law

5.27 Article 39 of the EU Procedures Directive requires that “applicants for asylum have the right to an effective remedy before a court or tribunal” against a range of types of decision, including a decision taken on their application for asylum or a decision to consider the application inadmissible under Article 25(2) on the grounds of the safe third country concept in Article 27. Furthermore, the right to an effective remedy in the Directive must be interpreted in line with the EU Charter of Fundamental Rights. As per a recent NI High Court judgement, “the Charter of Fundamental Rights remains enforceable in Northern Ireland and falls within the ambit of Article 2(1) of the Protocol”.⁷⁰ Furthermore, the CJEU has emphasised the fundamental nature of the right to an effective remedy as per Article 47 of the EU Charter as underscored by Article 39 of the Directive.⁷¹

5.28 The NIHRC advises that the restriction in the operation of and access to courts and tribunals, in clause 2, may amount to a breach of Windsor Framework Article 2 by diminishing rights previously protected by Article 39 of the EU Procedures Directive and Article 47 of the EU Charter.

5.29 Clause 2(5) states that the restrictions on courts and tribunals in subsections (3) and (4) apply notwithstanding “any other provision or rule of domestic law”.

5.30 Article 4(1) of the UK-EU Withdrawal Agreement provides that the provisions of the Withdrawal Agreement and provisions of EU law

⁶⁹ *AAA (Syria) & Others, R (on the application of) v Secretary of State for the Home Department* (2023) UKSC 42, at para 57.

⁷⁰ *Angesom's (Aman) Application* [2023] NIKB 102, at para 92.

⁷¹ *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, 28 July 2011.

made applicable by it, shall produce in the UK “the same legal effects” as they produce within the EU and its Member States. As such, “legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under [EU] law”.

5.31 The UK Government has recognised that pursuant to Article 4 of the UK-EU Withdrawal Agreement individuals will be able to “bring challenges to the Article 2(1) commitment before the domestic courts”. As noted above, court judgments have held that Windsor Framework Article 2 has direct effect, meaning individuals can assert their rights before domestic courts.⁷²

5.32 Clause 2(5) would appear to be in conflict with Section 7A of the EU (Withdrawal) Act 2018 which gives domestic effect to Article 4 and incorporates all rights, obligations, and remedies arising under the UK-EU Withdrawal Agreement into UK law. Section 7A(3) also provides for the primacy of this incorporation over “every enactment”. The right to an effective remedy is addressed further below in relation to clause 4.

5.33 The NIHRC advises that to the extent that clause 2(5) limits the ability of an individual to seek redress for a potential diminution of Windsor Framework Article 2, it is in breach of Article 4 of the UK-EU Withdrawal Agreement.

6.0 Clause 3 and the Human Rights Act 1998

6.1 Clause 3 of the Bill seeks to disapply sections 2, 3 and 6 to 9 of the Human Rights Act 1998. Section 2 of the Human Rights Act 1998 requires domestic courts to “take into account” jurisprudence from the European Court of Human Rights (ECtHR). Section 3 of the 1998 Act requires courts and public authorities to interpret all UK legislation “so far as it is possible to do so” in an ECHR-compliant way. By disapplying these sections, clause 3 seeks to prevent UK courts from hearing a challenge to a government decision to treat Rwanda as safe on the basis of non-compliance with the ECHR.

⁷² See, for example, *In the Matter of an Application by SPUC Pro-Life Ltd for Judicial Review* [2022] NIQB 9; *Angesom’s (Aman) Application* [2023] NIKB 102.

- 6.2 Sections 6 to 9 of the Human Rights Act 1998 require public authorities to act compatibly with ECHR rights and provide individuals whose rights have been violated the right to bring proceedings and obtain remedies in domestic courts. The disapplication of these sections suggests a willingness to empower public authorities to act in ways that may breach the UK's human rights obligations. Moreover, clause 3 seeks to inhibit direct access to domestic courts for individuals wishing to challenge a decision to treat Rwanda as safe and limits the ability of individuals to secure a domestic remedy for a breach of their ECHR rights.
- 6.3 Under the ECHR, where an individual has an "arguable complaint" that their removal to a third country would expose them to treatment contrary to Articles 2 and 3, they are entitled to an effective remedy at the domestic level in accordance with Article 13.⁷³ While this is acknowledged within the ECHR Memorandum, the UK government concludes that the power to make a declaration of incompatibility under section 4 of the Human Rights Act 1998 is sufficient to satisfy the right to an effective remedy.⁷⁴
- 6.4 Importantly, the ECtHR has held that a declaration of incompatibility alone does not constitute an effective remedy such that must be exhausted before an application can be made to the ECtHR.⁷⁵ The ECtHR noted, "Although a declaration of incompatibility could be sought, there is no obligation following the making of such a declaration for the Government to amend the legislation and no entitlement to damages arises".⁷⁶
- 6.5 Therefore, the NIHRC continues to have grave concerns that the Bill will deny access to justice for violations of ECHR rights in the domestic courts. The ability to issue a declaration of incompatibility will not remediate the fact that clause 2 of the Bill contravenes the UK's duty to assess the practical effectiveness of Rwanda's asylum procedures under ECHR Articles 2 and 3, while clause 3 prevents judicial scrutiny of whether a person's ECHR rights are infringed as a result.

⁷³ M.S.S. v Belgium and Greece (2011) ECHR 1124.

⁷⁴ UK Government, 'Safety of Rwanda (Asylum and Immigration) Bill – European Convention on Human Rights Memorandum', (2023) at para 21.

⁷⁵ Burden and Burden v UK (2006) ECHR 1064; M.M. v UK (2012) ECHR 1906.

⁷⁶ M.M. v UK (2012) ECHR 1906, at para 178.

6.6 While individuals may still apply to the ECtHR, this is likely to be an insurmountable barrier to almost all individuals, particularly those already facing significant marginalisation. Clause 3 would effectively weaken the ability to protect those who do not have the agency or support to protect themselves and certainly not to test a case before the ECtHR. Access to justice is very likely thereby to be removed entirely.

6.7 The NIHRC advises that disapplying the interpretative and remedial provisions of the Human Rights Act 1998 while dismantling the guarantees enshrined in ECHR Articles 2 and 3 does not ensure the right to an effective remedy under ECHR Article 13.

6.8 This Bill must also be seen and considered in the wider context of measures aiming to reform or disapply aspects of the Human Rights Act 1998.⁷⁷ In particular, clause 3 reflects the premise of the Bill of Rights Bill to “clarify and rebalance” the relationship between the UK courts, the ECtHR and UK Parliament.⁷⁸ The NIHRC would draw attention to its submission on the Bill of Rights Bill which sets out in detail how State discretion is already embedded within domestic legislation.⁷⁹

6.9 The NIHRC advises that the balanced relationship between the UK courts, ECtHR and UK Parliament will be upset by this approach and one consequence includes the weakening of protection afforded to individuals seeking asylum in the UK.

7.0 Clause 4: Decisions Based on Individual Circumstances

7.1 It is suggested that clause 4 of the Bill enables officials and courts to consider whether Rwanda is safe for an individual, “based on

⁷⁷ The Bill of Rights Bill; the Illegal Migration Act 2023; the NI Troubles (Legacy and Reconciliation) Act 2023.

⁷⁸ Clause 1(2), Bill of Rights Bill. See also: NI Human Rights Commission, ‘Advice on the Bill of Rights Bill’ (NIHRC, 2022).

⁷⁹ NI Human Rights Commission, ‘Advice on the Bill of Rights Bill’ (NIHRC, 2022).

compelling evidence relating specifically to the person’s particular circumstances”. The NIHRC does not agree.

- 7.2 The ECtHR emphasises the particular importance of the ECHR Article 13 requirements in removal cases. 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.⁸⁰ The ECtHR has specified 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”.⁸¹
- 7.3 The NIHRC notes that clause 4 permits limited consideration to an individual’s circumstances. However, as highlighted by the ECtHR, the requirements of Article 13, in conjunction with other ECHR Articles, “take the form of a guarantee and not of a mere statement of intent or a practical arrangement”.⁸² It is therefore imperative that clause 4 is effective in practice and, on that, the NIHRC has significant concerns regarding the number of restrictions placed on decision-making procedures within clause 4.
- 7.4 First, clause 4(2) precludes officials and courts from considering any matter, claim or complaint relating to the individual’s risk of refoulement following their removal. 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.⁸³ 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.⁸⁴

⁸⁰ M.S.S v Belgium (2011) ECHR 108, at para 293.

⁸¹ M.S.S v Belgium (2011) ECHR 108, at para 293.

⁸² A.M. v the Netherlands (2016) ECHR 620, at para 63.

⁸³ Ilias and Ahmed v Hungary, Application No. 47287/15, Judgment of 21 November 2019; M.K. and Others v Poland (2020) ECHR 568; D.A. and Others v Poland (2021) ECHR 615.

⁸⁴ 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.

- 7.5 Second, clause 4(4) places restrictions on the power of a UK court or tribunal to grant domestic interim remedies to prevent a person from being removed to Rwanda. Such interim remedies can only be issued where the court or tribunal is satisfied that the person would “face a real, imminent and foreseeable risk of serious and irreversible harm” in Rwanda before the review or appeal is determined. This proposal seeks to overturn the UK’s responsibility to ensure the lawfulness and appropriateness of an individual’s removal to Rwanda.⁸⁵ It therefore places the onus and an excessive burden on the asylum-seeker, who is unlikely to know about conditions in Rwanda and its asylum system and may have limited access to legal advice.⁸⁶
- 7.6 Such an approach is inconsistent with the right to seek and enjoy asylum under Article 14(1) of the Universal Declaration of Human Rights and the 1951 Refugee Convention. The primary responsibility for identifying and assessing international protection needs and ensuring fair and efficient asylum procedures, rests with the State in which an applicant arrives and seeks protection.⁸⁷ The onus is on the State to make inquiries as to the need for international protection of the person concerned. Transfers to a third country can only take place if asylum seekers will receive adequate protection there, a requirement that is overlooked by the conclusive deeming provision in clause 2 of the Bill.
- 7.7 Contrary to what is suggested in the ECHR Memorandum,⁸⁸ the procedural guarantees in ECHR Articles 2 and 3, in conjunction with ECHR Article 13, require the removing State to examine thoroughly whether or not there is a real risk to the asylum seeker in the receiving third country.⁸⁹ The ECtHR advises that assessments must consider the accessibility and functioning of the third country’s asylum system and the safeguards it affords in practice.⁹⁰

⁸⁵ UN Refugee Agency, ‘UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement’ (UNHCR, 2022), at para 15.

⁸⁶ *Ibid.*, at para 16.

⁸⁷ *Ibid.*

⁸⁸ UK Government, ‘Safety of Rwanda (Asylum and Immigration) Bill – European Convention on Human Rights Memorandum’, (2023) at para 26(b).

⁸⁹ *Ilias and Ahmed v Hungary*, Application No. 47287/15, Judgment of 21 November 2019, at para 134.

⁹⁰ *Ilias and Ahmed v Hungary*, Application No. 47287/15, Judgment of 21 November 2019, at para 141.

7.8 Third, the ECHR Memorandum suggests that any evidence relating “specifically to the person’s particular circumstances” must be distinguished from arguments that “Rwanda is not a safe country in general” or it may not be permissible. It is not clear how this will apply in practice. For example, whether assessments will be limited to evidence of targeted threats or attacks to the specific individual or whether an individual’s circumstances will be risk assessed in light of the general human rights situation in Rwanda. To comply with UN CAT, ICCPR and ECHR Article 3, officials and courts must be allowed to examine whether an individual may be at risk of persecution or systematic discrimination amounting to torture or other forms of ill-treatment or punishment on account of his or her belonging to any identifiable group.

7.9 Fourth, clause 4(6) stipulates that interim remedies under the current Bill are only available to individuals who are not subject to removal under the Illegal Migration Act 2023. The high number of individuals likely to be covered by the provisions of the Illegal Migration Act 2023⁹¹ will be subjected to an even more restrictive provision, once commenced, which contains a complete prohibition on domestic interim remedies.⁹²

7.10 The NIHRC advises that the restrictions placed on the consideration of an individual’s circumstances under clause 4 of the Bill renders the domestic remedies ineffectual and, in the case of those who face a risk of refoulement, unavailable.

Individual circumstances & Article 27 EU Procedures Directive

7.11 Article 27 of the EU Procedures Directive⁹³ details the safe third country concept, stating that it may only be applied where competent authorities are satisfied that a person seeking asylum will be treated in accordance with four specific principles. The first principle is that this person’s life and liberty are not threatened based on race, religion, nationality, membership of a particular social group or political opinion in that potentially third safe

⁹¹ NI Human Rights Commission, ‘Submission to the House of Lords on the Illegal Migration Bill’ (NIHRC, 2023).

⁹² Section 54, Illegal Migration Act 2023.

⁹³ Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, of 1 December 2005.

country.⁹⁴ The second principle is that the removal of the person does not breach the internationally recognised principle of non-refoulement according to the Geneva convention.⁹⁵ The third principle to be respected is the “prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law”. Finally, the last principle detailed is that the person should have the “possibility to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva convention”, in that third country.

7.12 Article 27(2) of the Procedures Directive requires that the third safe country concept is anchored in national legislative rules, which satisfy certain criteria. First, the rules should require a connection between the person seeking asylum and the country to which they will be removed.⁹⁶ Second, the rules must dictate the process for application of the third safe country concept. The process must include a “case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe”. Third, the rules should conform to international law principles, which includes the right to challenge a decision on the basis that they face a risk of torture, cruel, inhuman or degrading treatment or punishment.⁹⁷

7.13 Furthermore, Article 27 requires that such a person be provided with a document that informs the authorities of that third country that their application of that person has not been examined in substance.

7.14 Article 27 of the EU Procedures Directive obliges the consideration of individual circumstances including connection to the country of removal. This underscores the nuanced approach to assessing the safety of a country. The evaluation should not be carried out in a broad, generalised manner; rather, the Directive establishes specific methodologies that authorities must follow to determine the general safety and suitability of a country for a particular applicant.

⁹⁴ Ibid, at Article 27, section 1 (a)

⁹⁵ Ibid, at Article 27, section 1 (b)

⁹⁶ Ibid, at Article 27, section 2 (a)

⁹⁷ Article 27, section 2, c.

- 7.15 In place of the detailed duties under Article 27 clause 4(1) provides for only a narrow possibility of challenge together with a very high evidential threshold. Importantly, it should be noted that Article 4(5) of the EU Qualification Directive places limits on the requirements that may be imposed to substantiate claims, based in part on elements “at the applicant’s disposal”.⁹⁸
- 7.16 **The NIHRC advises that narrow grounds of challenge and a high evidential threshold for those grounds may diminish the rights of asylum-seekers which were previously protected by EU Procedures Directive Article 27 (the safe third country concept), which is likely to be contrary to Windsor Framework Article 2.**
- 7.17 Clause 4(2) also engages Windsor Framework Article 2 in ruling out an appeal or a claim based on the risk of refoulement which is a key principle of the EU asylum acquis, specifically referenced in Article 27 of the EU Procedures Directive and the focus of Article 21 of the EU Qualification Directive.⁹⁹
- 7.18 **The NIHRC advises that clause 4(2) may diminish a right to an effective remedy under Article 47 of the Charter of Fundamental Rights of the EU, in relation to minimum standards set out in Article 27(1)(b) of the EU Procedures Directive and Article 21 of the EU Qualification Directive.**¹⁰⁰

⁹⁸ 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.

⁹⁹ Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, of 1 December 2005; 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. See also Recital (3) of the ‘Dublin III Regulation’ (604/2013/EU) ‘Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)’, 26 June 2013.

¹⁰⁰ Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, of 1 December 2005. 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

8.0 Clause 5: Interim Measures

8.1 Clause 5(2) of the Bill proposes that “it is for a Minister of the Crown (and only a Minister of the Crown) to decide whether the UK will comply with the interim measure”. Clause 5(3) of the Bill also states that:

accordingly, a court or tribunal must not have regard to the interim measure when considering any application or appeal which relates to a decision to remove the person to the Republic of Rwanda under a provision of, or made under, the Immigration Acts.

8.2 **The NIHRC advises that compliance with interim measures is an essential requirement of membership of the Council of Europe.**

9.0 Belfast (Good Friday) Agreement and ECHR

9.1 The Belfast (Good Friday) Agreement imposed a duty upon the UK Government to complete incorporation of the ECHR into NI law “with direct access to the courts, and remedies for breach including power for the courts to overrule Assembly legislation on grounds of inconsistency”.¹⁰¹ That incorporation followed by enactment of the Human Rights Act. The Belfast (Good Friday) Agreement notes compliance with the ECHR is a ‘safeguard’ for the peace process in NI. It states that:

there will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including...

b) the ECHR and any Bill of Rights for NI supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission;

¹⁰¹ Belfast (Good Friday) Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for NI.¹⁰²

9.2 The Human Rights Act therefore has an enhanced constitutional function and role unique to NI. The present Bill does not respect the need to fill the gap that will be created by repealing the 1998 Act and to do so in a way that enhances (rather than weakens) human rights protections.

9.3 The NI Act 1998 incorporates the commitments of the Belfast (Good Friday) Agreement into domestic law and legislates for devolution in NI. The ECHR is embedded into the NI Act,¹⁰³ reflecting commitments made under the Belfast (Good Friday) Agreement.¹⁰⁴

9.4 The Belfast (Good Friday) Agreement also commits the Government of Ireland to ensure “at least a comparable level of protection of human rights as will pertain in NI”.¹⁰⁵ This is given effect in the UK by the Human Rights Act 1998 and in Ireland by the European Convention on Human Rights Act 2003. The Bill will cause discrepancies between human rights protection in Northern Ireland and Ireland thereby risking a significant divergence of rights on the island of Ireland.

9.5 Windsor Framework Article 2 reflects the recognition by both the UK and EU that special consideration of human rights and equality in the Belfast (Good Friday) Agreement was essential as the UK left the EU. As such, the UK Government committed to ensuring there would be no diminution of the rights, safeguards and equality of opportunity in the relevant part of the Agreement as a result of the UK’s withdrawal from the EU.

9.6 The NIHRC advises that the present Bill does not consider the Belfast (Good Friday) Agreement, and the integral role of both the Human Rights Act and ECHR in the complex fabric of the NI Peace Process and devolution. The NIHRC is particularly

¹⁰² Belfast (Good Friday) Agreement 1998, Strand One: Democratic Institutions in Northern Ireland, at para 5.

¹⁰³ For example, sections 6 and 24 of the NI Act require compatibility with ECHR rights.

¹⁰⁴ Belfast (Good Friday) Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

¹⁰⁵ Belfast (Good Friday) Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 9.

concerned that the present Bill appears to be incompatible with obligations under the Belfast (Good Friday) Agreement to incorporate the ECHR and provide direct access to the courts.

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