



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Submission to House of Lords on the Illegal
Migration Bill**

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1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(1) of the Northern Ireland (NI) Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in NI.
- 1.2 The NIHRC is also mandated, under section 78A(1) to monitor the implementation of Article 2(1) of the Windsor Framework¹ attached to the UK-EU Withdrawal Agreement (Windsor Framework Article 2), to ensure there is no diminution of rights protected in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast (Good Friday) Agreement 1998 as a result of the UK's withdrawal from the EU. In accordance with these functions, the following evidence is submitted to the House of Lords on the Illegal Migration Bill (the Bill) and refers to the version of the Bill as brought from the House of Commons (HL Bill 133).

2.0 General Comments

Foundational human rights principles

- 2.1 Clause 1 of the Bill sets out its fundamental purpose, to prevent "illegal migration" and ensure that the only way to claim asylum in the UK is through "safe and legal" routes. These routes refer to resettlement schemes, family reunion, and country specific schemes (such as the Afghan, Ukraine, and Hong Kong schemes) that must be accessed prior to arrival in the UK.
- 2.2 Article 14 of the Universal Declaration of 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.²
- 2.3 The UN Refugee Agency has observed that differential treatment

¹ The Protocol on Ireland / Northern Ireland was renamed by Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework.

² Article 31, UN Refugee Convention 1951.

determined by refugees and people seeking asylum mode of arrival into the UK is manifestly incompatible with the Refugee Convention.³ It states that:

most people fleeing war and persecution are simply unable to access the required passports and visas. There are no safe and “legal” routes available to them. Denying them access to asylum on this basis undermines the very purpose for which the Refugee Convention was established.⁴

2.4 Thus, the UN Refugee Agency concludes that, in its current form, the Bill amounts to an asylum ban which is a clear breach of the Refugee Convention by “extinguishing the right to seek refugee protection in the UK for those who arrive irregularly, no matter how genuine and compelling their claim may be, and with no consideration of their individual circumstances”.⁵

2.4 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. Irregular migrants need protection and are entitled to certain minimum human rights in order to live in a humane and dignified manner. These rights include certain basic civil and political rights and social and economic rights.⁶

2.5 The NIHRC shares the significant concern for the number of people who resort to dangerous Channel crossings to seek safety and protection in the UK. The NIHRC is gravely concerned by the current draft of the Bill and the general direction of recent developments that seek to diminish the rights of refugees, asylum seekers and migrants who arrive to the UK through unofficial routes.⁷

³ UN Refugee Agency, ‘Statement on UK Asylum Bill’. Available at: <https://www.unhcr.org/uk/news/press/2023/3/6407794e4/statement-on-uk-asylum-bill.html>.

⁴ UN Refugee Agency, ‘Statement on UK Asylum Bill’. Available at: <https://www.unhcr.org/uk/news/press/2023/3/6407794e4/statement-on-uk-asylum-bill.html>.

⁵ Ibid.

⁶ CoE Parliamentary Assembly ‘Resolution 1509: Human Rights of Irregular Migrants’, 27 June 2006.

⁷ See: 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).

2.6 The NIHRC notes the Commissioner for Human Rights of the CoE, Dunja Mijatović, has warned that the Bill will “add to the already significant regression of the protection of the human rights of refugees, asylum seekers and migrants” in the UK.⁸ Citing the 2021 New Plan for Immigration and the Nationality and Borders Act 2022 in particular, the Commissioner has expressed concern that, “these developments have often been surrounded with, and fuelled by, a public rhetoric that stigmatises and dehumanises those attempting to cross the Channel to the UK and stirs up fear, to which members of the UK government have unfortunately significantly contributed”.⁹

2.7 Further, it is not clear how certain provisions in the current draft of the Bill intend to contribute to the purpose set out in clause 1. Representatives from the asylum and migration sector in the UK, including NI, advise that current UK resettlement schemes are limited in scope and accessibility.¹⁰ Yet, rather than increasing the number and range of authorised routes to entry and resettlement in the UK, clause 58 of the current draft of the Bill proposes to introduce an annual cap on the number of people accessing them. In the absence of accessible alternatives, it is foreseeable that people fleeing conflict and persecution are left with no choice but to resort to unauthorised and dangerous routes into the UK. This highlights fundamental issues with the workability of the current draft of the Bill. Many of its core provisions are reliant on other factors not currently provided for in government policy or procedures. Significantly, it is unlikely that, at present, the Home Secretary would be capable of fulfilling their duty to remove people under clause 4 of the current draft of the Bill (see section 3 below).

2.8 The NIHRC is gravely concerned that the current draft of the Bill will add to the significant regression of human rights protection to refugees, people seeking asylum and migrants

⁸ Letter to the UK House of Commons and House of Lords from Dunja Mijatović, the Commissioner for Human Rights of the Council of Europe, 24 March 2023.

⁹ Commissioner for Human Rights of the CoE, ‘Report on the UK following a visit from 27 June to 1 July 2022 by Dunja Mijatović’ (CoE, 2022), at para 36.

¹⁰ UK House of Commons, ‘NI Affairs Committee: The experiences of minority ethnic and migrant people in NI – Second Report of Session 2021-22’ (HC, 2022). See Law Centre NI, ‘Law Centre NI response to the NI Affairs Committee: experiences of minority ethnic and migrant people living in NI’ (LCNI, 2022), and; Migrant Centre NI, ‘Submission to the UK Parliament NI Affairs Committee’s Call for Evidence on The Experience of Minority Ethnic and Migrant People in NI’ (MCNI, 2022).

in the UK. The NIHRC recommends that the purpose and provisions of the current draft of the Bill require immediate and thorough reassessment, which should take place through meaningful engagement. The result should ensure that routes to seek and receive asylum in the UK are strengthened and expanded, in accordance with international human rights obligations.

2.9 The NIHRC recommends that the current draft of the Bill should be revised to ensure that the principles of inalienability, universality and proportionality are embedded throughout, including in the language used, to prevent the stigmatisation of refugees, people seeking asylum and migrants who arrive to the UK through unofficial routes.

Article 2 of the Windsor Framework

2.10 The NIHRC is considering compliance of the Bill with the UK Government's commitment under Article 2 of the Windsor Framework to ensure no diminution of protections 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.

2.11 The NIHRC takes the view that the rights of asylum-seekers and refugees fall within the protection of the relevant chapter of the Belfast (Good Friday) Agreement and that therefore a number of EU standards, which were binding on the UK on 31 December 2020, remain binding in NI.

2.12 The first section of this chapter of the Belfast (Good Friday) Agreement is entitled 'Human Rights' and opens with a general commitment to the "civil rights and religious liberties of everyone in the community". This is followed by a non-exhaustive list of rights "affirmed in particular".¹¹ 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. The breadth of rights and protections addressed is important in determining the

¹¹ 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 Northern Ireland: What does it Mean and How will it be Implemented?' (NIO, 2020).

range of EU laws relevant to, and within scope of, Windsor Framework Article 2. In summary, the chapter represents wide-ranging acknowledgement of and commitment to civil, political, economic, social and cultural rights and equality of opportunity, anticipating further legislation to entrench and safeguard those rights.

- 2.13 The UK Government's 'Explainer' document on Windsor Framework Article 2 acknowledges that its protections apply to everyone who is "subject to the law in NI".¹² Asylum-seekers are part of the community, subject to the law in NI and are therefore protected by the Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement. In court proceedings ongoing at the time of writing, the Home Office has not disputed the argument that the protections of the relevant chapter of the Belfast (Good Friday) Agreement extend to asylum-seekers and refugees.¹³
- 2.14 Read in the context of the additional pledges on rights within this chapter, the general commitment of the Belfast (Good Friday) Agreement signatories to the range of rights referenced within the chapter must be understood as embracing, as a minimum, those rights set out in the ECHR.¹⁴ In its Explainer the UK Government has confirmed that the "key rights and equality provisions in the [Belfast (Good Friday)] 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 [Belfast (Good Friday)] Agreement".¹⁵ The Commissions are adopting a working assumption that the non-diminution commitment in Windsor Framework Article 2 encompasses the full range of rights set out in the ECHR, to the extent that they are underpinned by EU legal obligations in force on or before 31

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 *In the matter of an application by Aman Angsom for Judicial Review* (Case Ref. 22/006236)

¹⁴ This relates to the scope of issues and EU law relevant to Article 2, rather than the question of whether Article 2 requires the UK to remain committed to the ECHR as considered in Social Change Initiative, 'Human Rights and Equality in Northern Ireland under the Protocol – A Practical Guide' (SCI, 2021); Christopher McCrudden, 'Parliamentary Scrutiny of the Joint Committee and the Application of the Northern Ireland Protocol – Evidence to the House of Commons European Scrutiny Committee' (ESC, 2020); and Sylvia De Mars, Aoife O'Donoghue, Colin Murray and Ben Warwick, 'Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement' (2018).

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.

December 2020. 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.

- 2.15 A number of ECHR rights are engaged by the Bill, bringing into scope relevant EU law as outlined below. Relevant ECHR rights include, for example, 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).
- 2.16 The NIHRC, along with the Equality Commission for NI, have identified the EU Reception Directive,¹⁶ the Procedures Directive,¹⁷ the Qualification Directive¹⁸ and the Dublin III Regulation¹⁹ as relevant to Windsor Framework Article 2. These measures address, for example, free movement, accommodation, detention including conditions designed to meet special needs, family unity, access to healthcare, the best interests of the child and education of minors. The Procedures Directive includes specific provisions on access to judicial review where an applicant for asylum is held in detention and a right to an effective remedy in respect of a decision to consider an application inadmissible.²⁰ EU Directives on Victims and Combating Human Trafficking are also relevant.²¹
- 2.17 Given this analysis, failure to address compliance with Windsor Framework Article 2 in the Human Rights memorandum to the Bill is a matter of concern.²²

¹⁶ Directive 2003/9/EC, 'Council Directive laying down minimum standards for the reception of asylum seekers', 27 January 2003.

¹⁷ Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005.

¹⁸ 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.

¹⁹ Regulation 2013/604/EU, 'Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person', 26 June 2013.

²⁰ Article 18 and 39, Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005.

²¹ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012; Directive 2011/36/EU, 'EU Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.

²² For further analysis of Article 2 of the Windsor Framework, 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

2.18 The NIHRC recommends that peers explore with Ministers what steps the Secretary of State has taken to assure herself that the Bill complies with Article 2 of the Windsor Framework.

2.19 The NIHRC recommends that the Human Rights Memorandum to the Bill be amended to set out in detail an assessment of the compliance of the Bill with Article 2 of the Windsor Framework.

Lack of specific definitions of key terms

2.20 The interpretation of key terms of and expressions in the Bill is limited to Clause 64 which provides cross-references to seven expressions, not including, for example, 'asylum claim' as referenced in Clause 1. In a complex area of the law, a more complete interpretation clause would be helpful to ensure accessibility, even if it is drafted to cross-refer to other statutes.

2.21 The NIHRC recommends that the key terms in the Bill are defined in an interpretation provision.

Clause 1(5): Disapplication of Section 3 of the Human Rights Act 1998

2.22 Clause 1(5) of the current draft of the Bill seeks to remove ECHR considerations from decision-making in respect of the extensive powers contained within the Bill. Yet, section 3 of the Human Rights Act 1998 requires UK courts and public authorities to read and give effect to legislation in a way that is compatible with the European Convention on Human Rights (ECHR), so far as it is possible to do so.

2.23 The NIHRC has consistently highlighted that integrating human rights considerations into public sector decision-making leads to better outcomes.²³ However, throughout the Bill and Explanatory

and ECNI, 2022) and NIHRC and ECNI 'Table of EU Directives which underpin the Rights, Safeguards and Equality of Opportunity provisions included in the Belfast (Good Friday) Agreement chapter of the same name and implementing Domestic Legislation' (NIHRC and ECNI, 2022).

²³ NI Human Rights Commission, 'Response to Public Consultation on the Home Office's New Plan for Immigration' (NIHRC, 2021); NI Human Rights Commission, 'Response to the Consultation on Human Rights Act Reform: A Modern Bill of Rights' (NIHRC, 2022).

Notes, emphasis is placed on reducing the responsibility of government and public authorities to protect the rights of refugees, people seeking asylum and migrants who arrive to the UK irregularly. Clause 1(5) of the current draft of the Bill suggests a willingness to provide public authorities with more freedom to act in ways which are, potentially, incompatible with the UK's human rights obligations.

2.24 Further, if implemented, clause 1(5) of the current draft of the Bill would deny access to justice in the domestic courts for any human rights violations in respect of the Bill. While individuals may apply to the European Court of Human Rights (ECtHR), this creates additional barriers to individuals already facing significant disadvantage and such individuals may be prevented from accessing justice due to the financial costs and the length of time taken by court proceedings.

2.25 The NIHRC recommends that clause 1(5) of the current draft of the Bill is removed and that continued access to domestic courts for human rights violations is ensured, which is a specific requirement of the Belfast (Good Friday) Agreement 1998.

3.0 Duty to Make Arrangements for Removal

Clauses 2 and 4: Inadmissibility and removal

3.1 Clauses 2 and 4 of the current draft of the Bill propose to automatically declare inadmissible the protection and human rights claims of individuals arriving through unofficial routes and empowers the Home Secretary to remove such people without prior examination of the merits of their claim.

3.2 These clauses are in stark contrast to ECHR obligations. The NIHRC is also concerned about the compliance of this approach with requirements under EU standards relevant for the determination of minimum human rights standards in NI.

3.3 The UK has obligations under Article 1 of the ECHR to "secure to everyone within their jurisdiction the rights and freedoms" contained within the ECHR. The ECtHR has consistently held that the

removal of migrants and people seeking asylum could 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 deported, would face a “real risk” of being subjected to treatment contrary to Articles 2 or 3 in the destination country.²⁴

- 3.4 These obligations, taken in conjunction with Article 13 of the ECHR (right to an effective remedy), require domestic authorities to thoroughly examine the merits of an individual’s asylum claim.²⁵ The ECtHR has held that even where applicants have not expressly asked for asylum or described the risks they faced if returned to their origin country, it does not exempt the State from complying with its obligations under Article 3 of the ECHR.²⁶ Further, where individuals can arguably claim that there is no guarantee that their asylum applications would be seriously examined by authorities in the country they are being removed to, the State is obliged to allow the applicants to remain within its jurisdiction until such time that their claims have been properly reviewed by a competent domestic authority.²⁷
- 3.5 Related obligations arise under EU standards that are relevant in NI. Automatic categorisation of applications as inadmissible may be contrary to Article 4(3) of the EU Qualification Directive which specifies that: “The assessment of an applications for international protection is to be carried out on an individual basis and includes...the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.” Article 7(1) of the EU Procedures Directive, provides that an applicant has the right to stay in the Member State pending examination of the application.²⁸

²⁴ *Soering v UK* (1989) ECHR 17; *Al Saadoon and Mufdhi v UK* (2010) ECHR 279; *Othman (Abu Qatada) v UK* (2012) ECHR 817.

²⁵ *Ilias and Ahmed v Hungary* (2017) ECHR 255.

²⁶ *Hirsi Jamaa and Others v Italy* (2012) ECHR 1845.

²⁷ *M.K. and Others v Poland* (2020) ECHR 568, at paras 178-179.

²⁸ Article 7(2) of this Directive provides an exception where a subsequent application will not be further examined, in accordance with Articles 32 and 34 of the Directive, or in situations where extradition is required

- 3.6 Under Article 23(4) of the Procedures Directive, Member States may also provide for consideration of an application to be prioritised or accelerated in specified conditions, but not for a person to be removed.²⁹
- 3.7 Yet, under clauses 2 and 4 of the current draft of the Bill, the only way that an individual could suspend their removal under these proposals is by successfully lodging a “suspensive claim”. The combination of tight timeframes, high evidence thresholds and restrictions on the right to appeal, seriously undermines the effectiveness of this approach (discussed in section 8 below). Therefore, the current Bill is likely to increase the risk that individuals, with valid claims for protection, are removed to places where they may experience serious human rights violations. It is significant that, between 2018 and 2022, 61 per cent of people who arrived in the UK on small boats (and who had received a decision) had been granted refugee status or another form of humanitarian protection.³⁰
- 3.8 Unlike clauses 2(4) and 2(5), international law does not require individuals to claim asylum in the first country that they reach. It is acknowledged that international law also does not rule out the possibility of transfer to a third safe country if Refugee Convention rights will be respected there. However, in addition to being human rights compliant, from a practical perspective, transfer to a third country requires countries to co-operate together to share responsibility and allocate responsibility for determining asylum claims. However, the UK’s bilateral arrangement with Rwanda does not meet the standards set out in the Refugee Convention and was considered by the UN Refugee Agency to be an abdication of international responsibility.³¹

due to a European arrest warrant to another Member State, a third country, or an international court or tribunal.

²⁹ Conditions include, for example, where the applicant is a danger to national security or public order or has entered illegally and without good reason failed to present themselves to the authorities.

³⁰ UK Government, ‘Official Statistics: Irregular Migration to the UK: Year Ending December 2022’. Available at: <https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-december-2022/irregular-migration-to-the-uk-year-ending-december-2022>

³¹ UN Refugee Agency, ‘Press Release: UN Refugee Agency opposes plan to export asylum’, 14 April 2022; UN Refugee Agency, ‘UN High Commissioner for Refugee’s Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers Under the UK-Rwanda Arrangement’ (UNHCR, 2022).

3.9 The NIHRC recommends that clauses 2 and 4 of the current draft of the Bill are removed and that any proposed amendments to the UK asylum system focus on strengthening and building upon current procedures. The purpose and provisions of the current Bill require immediate and thorough reassessment, which should take place through meaningful engagement. This includes ensuring that all refugees, people seeking asylum and migrants arriving to the UK are processed and accommodated in compliance with human rights obligations, with particular focus on if, when and how individuals are transferred to a third country.

3.10 The Bill does not provide particular and explicit safeguards for persons at particular risk or individuals with specific needs.

3.11 International human rights standards require that consideration is given to specific needs and reasonable accommodation is made. This includes for women and girls,³² ethnic and racial minorities,³³ persons with disabilities,³⁴ children³⁵ and victims of torture or other forms of ill-treatment.³⁶

3.12 Article 17 of the EU Reception Directive requires Member States to take into account the specific situation of vulnerable persons. Article 20 of the EU Qualification Directive includes a similar obligation. Both directives define individuals at particular risk as including “minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence”.

3.13 The Bill should ensure that there are explicit safeguards in place for individuals at particular risk or individuals with specific needs in line with human rights obligations and the minimum standards required by the EU Reception and Qualification Directives. This includes ensuring protections are in place for children, women and girls, persons with

³² UN Convention on the Elimination of All Forms of Discrimination Against Women 1981.

³³ UN Convention on the Elimination of All Forms of Racial Discrimination 1965.

³⁴ UN Convention on the Rights of Persons with Disabilities 2006.

³⁵ UN Convention on the Rights of the Child 1989.

³⁶ UN Convention Against Torture 1984.

disabilities, older people, pregnant women, ethnic and racial minorities, single parents with children and individuals who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

3.14 Under Clause 4 of the current draft of the Bill, applications would be deemed inadmissible on grounds of illegal entry as set out in clause 2.

3.15 Article 25 of the EU Procedures Directive sets out seven cases where an asylum claim can be considered inadmissible:

- a) the person already was granted a refugee status;
- b) another (non-EU) state is considered as the first country of asylum;
- c) a third country is considered safe for the applicant;
- d) the applicant is allowed to remain in a member state on other grounds, having equivalent rights to the refugee status;
- e) the applicant can stay on the territory of a member state on some other grounds being protected against refoulement;
- f) the applicant having filed a similar application after a final decision; and
- g) if a dependant of the applicant who previously consented to having an application filed on their behalf, files an additional individual claim, without additional facts justifying a separate application.

3.16 The proposal in clause 4 of the current draft of the Bill is outside the list of grounds in Article 25 and would appear to diminish the rights of asylum-seekers as a consequence.

3.17 The NIHRC recommends that the Bill be amended, as regards its effect in NI, to comply with the EU Procedures Directive and the Qualifications Directive in terms of admissibility of claims; the right to remain pending consideration of an application for asylum; and individual consideration of applications.

3.18 Clause 2(2)(e) of the current version of the Bill provides that not possessing a required Electronic Travel Authorisation (ETA) to enter the UK is a ground for removal. This could have serious consequences for non-visa nationals crossing the land border between Ireland and NI for social or leisure purposes, who are not legally resident in Ireland.

3.19 The NIHRC recommends that all journeys into NI, that originate from Ireland, should be exempt from Electronic Travel Authorisation requirements.

3.20 Furthermore, it is unclear how the current Bill intends to increase the Home Office's capacity to remove under clause 4. Despite increasing the number of refugees and people seeking asylum declared inadmissible to the UK asylum system, the Home Office retains responsibility for accommodation and support while each case is processed. The UK Government's focus should instead be on strengthening the UK's asylum system, by improving case processing and reception conditions, and enhancing cooperation with other countries to expand safe pathways both in and out of the UK. This would accelerate the integration of individuals granted refugee status and facilitate the swift return or transfer of individuals who are deemed to have no legal basis to stay.³⁷

3.21 The NIHRC recommends that the UK Government's focus is on improving case processing and reception conditions, and enhancing cooperation with other countries to expand safe pathways both in and out of the UK.

Clauses 4, 5, 15 and 21: Retrospective effect

3.22 Clauses 4, 5, 15 and 21 of the current draft of the Bill propose that the duty to remove persons who arrive in the UK through unofficial routes will apply to persons who arrived on or after 7 March 2023.³⁸ This potentially engages Article 7 of the ECHR which provides that:

no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a

³⁷ Ibid.

³⁸ Clause 19 of the current draft of the Bill requires the Home Secretary to make additional regulations to extend the application of Clause 15 of the Bill in NI.

criminal offence under national law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

3.23 Thus, Article 7 of the ECHR unconditionally prohibits the retrospective application of the criminal law where it is to an accused's disadvantage. The principle of non-retroactivity of criminal law applies both to the provisions defining the offence and to those setting the penalties incurred. The guarantees in Article 7 of the ECHR are absolute, with no derogation permissible under any circumstances.³⁹

3.24 Further, the principle of non-retroactivity is infringed in cases of retroactive application of legislative provisions to offences committed before those provisions came into force. Therefore, it is prohibited to extend the scope of offences to acts which previously were not criminal offences.

3.25 The NIHRC recommends that amendments are brought forward to address the potential retrospective application of Clauses 4, 5, 15 and 21, to ensure compliance with Article 7 of the ECHR and the principle of non-retroactivity.

4.0 Detention and Bail

Clauses 10 to 12: Detention

4.1 Clauses 10 and 11 of the current draft of the Bill confer a power to detain adults, families and children for as long as "is reasonably necessary" regardless of whether there is anything preventing a removal from being carried out. Clause 11 provides the Home Secretary with a wide discretionary power to determine what is a reasonable period to detain an individual for the purposes of their removal. Clause 12 specifies that detention cannot be challenged in the first 28 days, save for in very limited circumstances.

4.2 These provisions potentially engage Article 5 of the ECHR which provides everyone with the right to liberty and security of person

³⁹ Article 15(2), European Convention on Human Rights 1950.

and requires that no one is deprived of their liberty arbitrarily.⁴⁰ Certain procedural safeguards must be satisfied to ensure that the principles of legality, necessity, proportionality, and non-arbitrariness are adhered to.⁴¹ In the context of immigration detention, the ECtHR have found that:

...such detention must be carried out in good faith; it must be closely connected to the purpose [relied upon by the Government]; the place and conditions of detention should be appropriate, bearing in mind that “the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country”; and the length of the detention should not exceed that reasonably required for the purpose pursued.⁴²

- 4.3 Yet, the current draft of the Bill seeks to disapply existing safeguards by granting wide discretionary powers to the Secretary of State and limiting judicial oversight. The NIHRC is particularly concerned by clause 12 which severely limits the scope for individuals to challenge their detention, despite Article 5(4) of the ECHR stating that:

everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

- 4.4 In addition, clause 10(11) of the current draft of the Bill seeks to disapply limitations on the detention of pregnant women for no more than 72 hours (or seven days under personal authorisation by a Minister of the Crown). Therefore, pregnant women could potentially be detained for indefinite periods in detention facilities that are not necessarily adapted to their needs. The ECtHR has confirmed that there are additional obligations under Article 3 of the ECHR to provide medical, social, and other forms of assistance to

⁴⁰ Articles 5(1)(a)-5(1)(f), European Convention on Human Rights 1950. See European Court of Human Rights, ‘Guide on the Case-law of the European Convention on Human Rights – Immigration’ (CoE, 2022).

⁴¹ Articles 5(1), 5(2) and 5(5), European Convention on Human Rights 1950. See European Court of Human Rights, ‘Guide on the Case-law of the European Convention on Human Rights – Immigration’ (CoE, 2022).

⁴² *Saadi v UK* (2007) ECHR 394, at para 74.

individuals in an immigration context, including to individuals due to be forcibly removed.⁴³

4.5 As noted above, in accordance with Windsor Framework Article 2, the EU Procedures Directive⁴⁴ remains relevant for determining the minimum standard of rights required in NI, to the extent that those measures were binding on the UK on 31 December 2020. In addition, all EU law relevant to the UK-EU Withdrawal Agreement must be interpreted in line with EU norms which include the EU Charter of Fundamental Rights, including Article 18 on the right to asylum and Article 47 on the right to an effective remedy and to a fair trial. Article 17 of the Reception Directive and Article 20 of the EU Qualification Directive are relevant in imposing obligations to take into account the specific situation of vulnerable persons, including, for example, pregnant women and disabled people (as referenced in relation to Clauses 2 to 4 above).

4.6 The NIHRC recommends that the Bill be amended to ensure that migrants and asylum seekers may not be detained other than in exceptional circumstances and in line with the UK’s international obligations and Windsor Framework Article 2.

4.7 As mentioned, the Home Secretary’s ability to remove people under the current Bill is dependent on securing formal arrangements with other countries that agree to receive asylum seekers from the UK. While the UK’s bilateral arrangement with Rwanda was held to be lawful, it is subject to further legal challenge. Meanwhile, no other country has entered such an arrangement with the UK. Enacting clauses 10 to 12 of the current draft of the Bill without a realistic prospect that removals can be carried out, could lead to legal challenges under Article 5 of the ECHR. In *KG v Belgium* (2018), the ECtHR found that the ground for the applicant’s detention did not remain valid after it became clear that no safe third country would admit the applicant.⁴⁵ The ECtHR also confirmed that, in the absence of any immediate prospect of expulsion, measures other than an individual’s protracted detention should be considered by

⁴³ *Hunde v Netherlands*, Application No 17931/16, 5 July 2016; *Shioshvili and Others v Russia* (2016) ECHR 1136.

⁴⁴ Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, 1 December 2005.

⁴⁵ *KG v Belgium* (2018) ECHR 910.

the domestic authorities.⁴⁶

- 4.8 It is likely that the widespread powers of detention within the current draft of the Bill would significantly increase the number of people being detained in the UK. However, it is not clear from the proposals set out in clauses 10 to 12 how the Home Office intends to increase capacity within current detention facilities or other accommodation to manage any additional pressure. While clause 10 of the current draft of the Bill provides that an individual can be detained in any place the Home Secretary considers appropriate,⁴⁷ it is not clear how these places of detention will comply with Articles 3 and 5 of the ECHR.⁴⁸ Increased powers of detention raise feasibility questions in NI due to the limited number of detention facilities. Larne House is NI's only immigration detention facility. It is a short-term holding facility which has the capacity to hold 19 individuals at a time. Individuals in Larne House can be held for up to five days. The NIHRC has expressed concern about the conditions in Larne House.⁴⁹
- 4.9 The Home Secretary's broad powers of detention, combined with the lack of judicial oversight also raise questions of compliance with Article 2 of the Windsor Framework. Article 18 of the EU Procedures Directive requires states to ensure that there is a "possibility of speedy judicial review" when an asylum applicant is held in detention and that no one should be held in detention for the sole reason that they are an asylum seeker. Article 47 of the Charter of Fundamental Rights of the EU grants protection against violation of any right or freedom arising under EU law.⁵⁰ Where a directive imposes an unconditional and sufficiently precise obligation on states, that provision confers a corresponding right on an individual. When read in conjunction with Article 47 of the EU Charter, an individual is entitled to judicial protection in respect of their rights.⁵¹

⁴⁶ *Mikolenko v Estonia* (2008) ECHR 109.

⁴⁷ The Explanatory Notes on the Illegal Migration Bill state: "a person detained under new sub-paragraphs (2C) or (2D) may be detained in any place the Secretary of State considers appropriate (this includes, but is not limited to, pre-departure accommodation, a removal centre or a short-term holding facility – see section 147 of the 1999 Act)". See Home Office, 'Illegal Migration Bill – Explanatory Notes', 27 April 2023.

⁴⁸ *MSS v Belgium and Greece* (2011) ECHR 1124.

⁴⁹ NI Human Rights Commission, 'The 2022 Annual Statement: Human Rights in NI' (NIHRC, 2022) at 114–116.

⁵⁰ As a consequence of Article 4 of the UK EU Withdrawal Agreement 2020, the Charter of Fundamental Rights remains relevant for interpreting provisions of the treaty, including the Windsor Framework, and EU law made applicable under the treaty's provisions.

⁵¹ *Olainfarm*, C-104/13, 23 October 2013, at para 36-39.

4.10 The EU Procedures Directive further provides that applicants for asylum shall have a right to an effective remedy before a court or tribunal for a decision on their application for asylum, including decision to consider an application inadmissible, and a decision taken at a border or transit zone.⁵² The Directive further elaborates that Member States will provide for time limits and other necessary rules for the applicants to exercise their rights.

4.11 In addition, the EU Reception Directive provides that where a decision taken, for example, to confine an applicant to a particular place for reasons of public order, or to decide on place of residence of an asylum seeker in accordance with Article 7 of the Directive, that “at least in the last instance the possibility of an appeal or a review before a judicial body shall be granted.”⁵³

4.12 The NIHRC recommends that all provisions related to detention must be reviewed and amended to ensure access to justice and judicial oversight on detention powers conferred to the Home Secretary, in line with international human rights obligations and Windsor Framework Article 2.

Clause 13: Independent Family Returns Panel

4.13 Clause 13 of the current draft of the Bill proposes to remove the duty on the Home Secretary to consult the Independent Family Returns Panel when removing families from the UK. This panel is a vital safeguard that was established to promote the welfare of children and to avoid the detention of families with children during a forcible removal.

4.14 Individuals considered as having specific vulnerabilities, including children, require additional safeguards to ensure conformity with Article 5 of the ECHR. Such individuals should have access to an assessment of their vulnerability⁵⁴ and domestic authorities should consider alternatives to detention with regard to the specific

⁵² Article 39, Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, 1 December 2005.

⁵³ Article 21, Directive 2003/9/EC, ‘Council Directive laying down minimum standards for the reception of asylum seekers’, 27 January 2003.

⁵⁴ *Thimothawes v Belgium* (2017) ECHR 320.

circumstances of the individual case.⁵⁵

4.15 The NIHRC recommends that clause 13 of the current draft of the Bill is removed and that the duty to consult the Independent Family Returns Panel is maintained.

5.0 Children

Clauses 2 to 4: Inadmissibility and removal of children

- 5.1 Clauses 2 to 4 of the current draft of the Bill propose to prevent children from making an asylum claim when they arrive to the UK through an unofficial route. Although clause 3 of the present Bill temporarily exempts an unaccompanied child from the Home Secretary's duty to remove, it reaffirms the Secretary of State's power to do so once the child has turned 18 years old.
- 5.2 In addition to the 1951 Refugee Convention, the UN CRC contains several obligations on the UK Government that require it to ensure the protection of the rights and welfare of children in the context of migration. For example, Article 3 of the UN CRC requires that "in all actions concerning children... the best interests of the child shall be a primary consideration". Also, Article 22 of the UN CRC requires States to ensure that the rights set out in the UN CRC extend, without exception, to asylum-seeking and refugee children.
- 5.3 Children who have become temporarily or permanently separated from their parents, relatives or caregivers are dependent on State authorities to uphold their rights. Of all refugees, people seeking asylum and migrants, unaccompanied children are among the most vulnerable to violence, abuse and exploitation.⁵⁶
- 5.4 The UN Committee on the Rights of the Child emphasises that the "ultimate aim in addressing the fate of unaccompanied and separated children is to identify a durable solution that addresses all their protection needs".⁵⁷ Determining a child's best interests and seeking a durable solution depends on an assessment of the

⁵⁵ *Nikoghosyan and Others v Poland* (2022) ECHR 211, at paras 86 and 88.

⁵⁶ UN High Commissioner for Refugees, 'High Commissioner's Dialogue on Protection Challenges: Children on the Move', 28 November 2016, at paras 14 -18.

⁵⁷ CRC/GC/2005/6, 'UN Committee on the Rights of the Child General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin', 1 September 2005, at para 79.

individual circumstances of that child.⁵⁸

- 5.5 However, clauses 2 to 4 of the current draft of the Bill will, in practice, leave an affected child in limbo until they turn 18 years old, at which point they may face removal. Consequently, any child affected by this is denied access to the best interests' determination procedure during the time that they are under 18 years of age. This includes denying any affected children the opportunity to develop into adulthood in an environment that meets their needs. The UN CRC Committee is clear that "as they approach adulthood, adolescents need suitable education and support to tackle local and global challenges".⁵⁹ The proposed provisions would also increase the risk of children being removed to countries where they may face harm or persecution once they enter adulthood, which is contrary to the right to life,⁶⁰ freedom from torture⁶¹ and right to physical and moral integrity.⁶²
- 5.6 These provisions raise questions of compliance with Windsor Framework Article 2, as a consequence of which the EU Procedures Directive,⁶³ the EU Qualification Directive,⁶⁴ the EU Reception Directive⁶⁵ and the EU Dublin III Regulation,⁶⁶ remain relevant for determining minimum standards of rights required for asylum-seekers and refugees in NI, to the extent that these standards were binding on the UK on 31 December 2020. All of these measures stipulate that "the best interests of the child shall be a primary consideration" when implementing relevant provisions. Moreover, all EU law relevant to the UK-EU Withdrawal Agreement must, under

⁵⁸ Ibid.

⁵⁹ CRC/C/GC/20, 'UN CRC Committee General Comment No 20: Implementation of the Rights of the Child During Adolescence', 6 December 2016, at para 12.

⁶⁰ Article 2, European Convention on Human Rights 1950; Article 6, UN Covenant on Civil and Political Rights 1966; Article 6(1), UN Convention on the Rights of the Child 1989; Article 10, UN Convention on the Rights of Persons with Disabilities 2006.

⁶¹ Article 3, European Convention on Human Rights 1950; Article 37(a), UN Convention on the Rights of the Child 1989; UN Convention Against Torture 1984; Article 15, UN Convention on the Rights of Persons with Disabilities 2006.

⁶² Article 8, European Convention on Human Rights 1950; *YF v Turkey* (2003) ECHR 391, at para 33; Article 17, UN Convention on the Rights of the Persons with Disabilities 2006.

⁶³ Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005.

⁶⁴ 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.

⁶⁵ Directive 2003/9/EC, 'Council Directive laying down minimum standards for the reception of asylum seekers', 27 January 2003.

⁶⁶ Regulation 2013/604/EU, 'Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person', 26 June 2013.

Article 4 of that Agreement be interpreted in line with EU norms which include the EU Charter of Fundamental Rights of the EU, Article 24 on the rights of the child being particularly relevant in this regard.

- 5.7 Recital 12 of the EU Qualification Directive references the “best interests of the child” as a primary consideration.⁶⁷ Recital 20 of the same Directive, provides that when assessing applications from minors, States should have regard to “child-specific forms of persecution”. Article 30 of the same Directive states that “the unaccompanied minor’s best interests” should be protected. That would include tracing “the members of the minor’s family as soon as possible”.
- 5.8 Article 18 of the EU Reception Directive makes “the best interests of the child” a primary consideration in the implementation of its provisions which include, in Article 19, minimum standards for the treatment of unaccompanied minors applying for asylum. It is not clear how the provisions of the Bill enabling detention and removal of unaccompanied minors comply with the best interests obligation.
- 5.9 The NIHRC recommends that any action on behalf of refugee, asylum seeking and migrant children, including unaccompanied children, who arrive in the UK by any means should be guided by principles enshrined in international human rights law and Article 2 of the Windsor Framework. This includes ensuring that the best interests of the child are a primary consideration in all decisions and actions taken. This requires ensuring that children are not left in limbo until they reach adulthood and that any linked decisions do not risk exposing an individual who was a child on arrival in the UK to harm or persecution at a later date, including when they reach adulthood.**

Clause 10: Child detention

- 5.10 The extensive powers of detention proposed in clauses 10 to 13 of the current draft of the Bill seek to apply equally to adults and

⁶⁷ Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, 1 December 2005.

children. Clause 10(2) provides for the detention of unaccompanied children that will be subject to regulations made by the Home Secretary at a later date.

5.11 Article 37(b) of the UN CRC establishes the general principle that a child may be deprived of liberty only as a last resort and for the shortest period of time. However, the UN CRC Committee emphasises that:

offences concerning irregular entry or stay must not have consequences similar to those derived from the commission of a crime. Therefore, the possibility of detaining a child as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development.⁶⁸

5.12 Instead, the UN CRC Committee advises that:

States should adopt solutions that fulfil the best interests of the child, along with their rights to liberty and family life, through legislation, policy and practices that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and the children's best interests are assessed, as well as before return.⁶⁹

5.13 This is based on the UN CRC Committee's finding that there is inherent in any deprivation of liberty and that immigration detention can have a negative effect on children's physical and mental health and on their development, even when they are detained for a short period of time or with their families".⁷⁰

⁶⁸ CMW/C/GC/4-CRC/C/GC/23, 'Joint UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families General Comment No 4 and e and Committee on the Rights of the Child General Comment No 23: State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return', 16 November 2017, at para 10.

⁶⁹ CMW/C/GC/4-CRC/C/GC/23, 'Joint UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families General Comment No 4 and e and Committee on the Rights of the Child General Comment No 23: State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return', 16 November 2017, at para 11.

⁷⁰ CMW/C/GC/4-CRC/C/GC/23, 'Joint UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families General Comment No 4 and e and Committee on the Rights of the Child General Comment No 23: State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return', 16 November 2017, at para 9.

5.14 As established above, clauses 11, 12, and 13 of the current draft of the Bill engage Articles 5 and 3 of the ECHR.⁷¹ Further, the detention of families with children could raise issues in relation to Article 8 of the ECHR (right to respect for private and family life).⁷² The ECtHR has found that the child's best interests is not confined to whether a child is detained with their parents rather than separated from them.⁷³ The ECtHR confirmed that Article 8 of the ECHR requires that the State should "take all necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life".⁷⁴

5.15 As referenced above, the best interests of the child must be treated as a primary consideration relevant EU law. Article 20 of the EU Qualification Directive and Article 17 of the Reception Directive requires the State to take into account the specific situation of vulnerable persons including minors and unaccompanied minors.

5.16 The NIHRC recommends that the Bill, unlike what is set out in Clause 10 of the current draft, ensures that a child, either separately or with their family, is not detained for irregular entry or stay in the UK. The Bill should provide for measures that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved. The Bill should also expressly require that any such measures adopted should be in the specific child's best interests.

Clauses 15 to 20: Accommodation and support for unaccompanied children

5.17 Clause 15 of the current draft of the Bill provides the Home Secretary with the power to accommodate unaccompanied children and arrange for the provision support. Clause 16 of the current draft of the Bill also provides the Home Secretary with the power to

⁷¹ *Popov v France* (2012) ECHR 2070; *Abdullahi Elmi and Aweys Abubakar v Malta* (2016) ECHR 1027.

⁷² *Moustahi v France* (2020) ECHR 491; *Bistieva and Others v Poland* (2018) ECHR 310; *Nikoghosyan and Others v Poland* (2022) ECHR 211.

⁷³ *Nikoghosyan and Others v Poland* (2022) ECHR 211.

⁷⁴ *Ibid*, at para 84.

terminate the 'looked after' status of a child by a local authority in order to transfer the child into the care and accommodation arranged by the Home Secretary. While these clauses currently seek to apply in England, it is intended that the same powers will be extended to the Home Secretary in NI through the provision of regulations under clause 19 of the current draft of the Bill.

- 5.18 These provisions of the Bill would, in effect, place unaccompanied children outside of the UK's existing child protection systems.⁷⁵ Further, there is no mention of the Home Secretary's duties under section 55 of the Borders Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children. Clauses 15 to 20 risk creating a two-tiered system of legal protections, penalising children who arrive to the UK through an unofficial route. This increases the risk of discrimination which the UK Government is obligated to prevent and protect against.
- 5.19 Article 2 of the UN CRC expressly requires States to ensure a child's rights "without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".
- 5.20 Under Article 22 of the UN CRC, unaccompanied children are entitled to special protection and assistance, including access to care and accommodation.⁷⁶ The UN CRC Committee has reaffirmed that, when a migrant child is first detected by immigration authorities, child protection or welfare officials should immediately be informed and be in charge of screening the child for protection, shelter and other needs.⁷⁷ Thereafter, unaccompanied children should be placed in the local alternative care system, preferably in family-type care with their own family when available, or otherwise

⁷⁵ In NI, unaccompanied children are the responsibility of social services and are regarded as 'children in need' under the Children (NI) Order 1995.

⁷⁶ CRC/GC/2005/6, 'UN Committee on the Rights of the Child General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin', 1 September 2005, at para 40.

⁷⁷ CMW/C/GC/4-CRC/C/GC/23, 'Joint UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families General Comment No 4 and e and Committee on the Rights of the Child General Comment No 23: State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return', 16 November 2017, at para 13.

in community care when family is not available.⁷⁸

5.21 Recent reports of the asylum contingency accommodation provided by the Home Office have raised significant child welfare concerns.⁷⁹ Direct accounts of the living conditions in NI contingency accommodation have reported inadequate access to good quality and culturally appropriate food, restrictions on family and private life and insufficient access to basic services such as health and education.⁸⁰ The current Bill's proposals to increase the Home Secretary's discretion to place unaccompanied children within such accommodation is gravely concerning given their need for special protection and support.

5.22 Article 19 of the EU Reception Directive requires that unaccompanied minors are placed either with adult relatives, with a foster family, in an accommodation centre with special provision for minors or in other accommodation suitable for minors. The best interests of the child must be a primary consideration under relevant EU law and Article 20 of the EU Qualification Directive and Article 17 of the Reception Directive are relevant to these clauses also in requiring the State to take into account the specific situation of vulnerable persons including minors and unaccompanied minors.

5.23 The NIHRC recommends that Clauses 15 to 20 are removed from the Bill and that any new proposals for the care and support of unaccompanied children aim to build on the UK's existing child protection systems, in accordance with the UN CRC and Article 2 of the Windsor Framework.

Clause 56: Age assessments

5.24 Clause 56 empowers the Home Secretary to make provision about the refusal to consent to scientific methods for the purposes of an age assessment, where in certain circumstances, the minor in

⁷⁸ CMW/C/GC/4-CRC/C/GC/23, 'Joint UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families General Comment No 4 and e and Committee on the Rights of the Child General Comment No 23: State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return', 16 November 2017, at para 13.

⁷⁹ Independent Chief Inspector of Borders and Immigration, 'An Inspection of the Use of Hotels For Housing Unaccompanied Asylum-seeking Children' (ICIBI, 2022); Every Child Protected Against Trafficking UK, 'Press Release: Unaccompanied children must be protected by the care system, not placed in hotels', June 2022.

⁸⁰ Meetings between NI Human Rights Commission and civil society organisations, May 2022, August 2022 and October 2022; Children's Law Centre and South Tyrone Empowerment Programme, 'Joint Submission to Framework Convention on the Protection of National Minorities Advisory Committee: Rights of Asylum Seeker Children Living in Contingency Accommodation (Hotel Buildings) in NI, Run by Mears Group PLC' (CLC and STEP, 2022).

question can be considered as an adult, which has serious consequences on the asylum application.

5.25 Children and young people are entitled to several procedural safeguards during an age assessment. This includes the best interests' principle (Article 3 UN CRC) and the right of the child to be heard (Article 12 UN CRC) must be complied with. Children should also be provided with all relevant information regarding the assessment in a child-friendly and accessible manner and should have an 'appropriate adult' present during the assessment.⁸¹ This also extends to monitoring linguistic or translation issues.⁸²

5.26 The UN CRC Committee has advised that decision-makers must:

not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.⁸³

5.27 Article 17 of the EU Procedures Directive sets out a series of guarantees for unaccompanied minors, and includes a number of safeguards for the use of "medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for asylum", including that the best interests of the child shall be a primary consideration.⁸⁴ The minors shall be informed prior to the medical examination in a language that is comprehensible to them that their age might be determined by the examination. This includes information about the method of examination and its possible consequences on the asylum

⁸¹ R (FZ) v London Borough of Croydon [2011] EWCA Civ 59.

⁸² Ibid.

⁸³ CRC/GC/2005/6, 'UN CRC Committee General Comment 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin', 1 September 2005, para 31(i).

⁸⁴ Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005.

application as well as the consequences in case the minor refuses to undergo the medical examination. Furthermore, the unaccompanied minors and/or their representatives need to consent to the medical examination. Any refusal to undergo the examination should not prevent the authorities from taking a decision on the application for asylum, but a decision to reject an application for asylum must not be based solely on such a refusal.⁸⁵

5.28 Treating a child as an adult would frustrate the obligation to ensure the best interest of the child is a primary consideration.

5.29 The NIHRC recommends that the best interests of the child will be the primary consideration in all age assessment procedures and that provision is made for the child’s voice to be heard in all matters which concern them. This should also mean that all relevant information to the child in advance of, and during the age assessment itself.

5.30 The NIHRC recommends that the Bill be amended to remove the provision enabling a child to be treated as an adult if they refuse consent to undergo medical examination.

6.0 Modern Slavery

Clauses 21-28: Modern slavery

6.1 For anyone subject to the duty of removal under the current draft of the Bill, clauses 21 to 28 propose to disapply all domestic provisions that currently protect against modern slavery and human trafficking.⁸⁶ The only exceptions to this are where the person is cooperating with an investigation by a public authority into their alleged slavery or trafficking, or where the person is an unaccompanied child. However, the current draft of the Bill also proposes that as soon as an unaccompanied child turns 18 years old they are no longer deemed to fall within the exceptional circumstances and are precluded from protection.

⁸⁵ Article 17(5), Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005.

⁸⁶ This includes Section 50A, Modern Slavery Act 2015; Sections 9 and 10, Human Trafficking and Exploitation (Scotland) act 2015; Section 18, Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (NI) 2015; and, Part 5, Nationality and Borders Act 2022.

- 6.2 The ECtHR has held that human trafficking falls within the scope of Article 4 of the ECHR (prohibition of slavery and forced labour).⁸⁷ The right to not be held in slavery and servitude, as provided for by Article 4(1) of the ECHR, is absolute and cannot be interfered with under any circumstances. Consequently, States have a positive obligation to ensure that domestic legislative and administrative frameworks protect individuals from trafficking and facilitate the identification of victims.⁸⁸ States are also required to take appropriate measures to remove victims of slavery and servitude, such as victims of human trafficking, from harm and to provide the appropriate support.⁸⁹
- 6.3 In some cases, victims of forced labour and servitude may be subject to threats to life or experience torture or ill-treatment. Articles 2 (right to life) and 3 (freedom from torture) of the ECHR require public authorities to take proactive, reasonable steps when there is a real and imminent risk to life/of torture or ill treatment.⁹⁰ In cases where there is a threat to an individual's physical or moral integrity, Article 8 of the ECHR (right to respect for private life may also be engaged).⁹¹ This provision requires that any interference with a person's physical or moral integrity is necessary and proportionate in pursuit of a legitimate aim.⁹²
- 6.4 As a consequence of Windsor Framework Article 2, the EU Victims' Directive⁹³ and the EU Human Trafficking Directive,⁹⁴ remain relevant for determining the minimum standard of rights required in NI, to the extent that those measures were binding on the UK on 31 December 2020. The rights of victims of crime and human trafficking fall within the scope of the relevant chapter of the Belfast (Good Friday) Agreement for three reasons: first, the chapter embraces the rights protected in the ECHR, including Article 4 on

⁸⁷ *Siliadin v France* (2005) ECHR 545; *Rantsev v Cyprus and Russia* (2010) ECHR 22; *SM v Croatia* (2008) ECHR 633.

⁸⁸ *Siliadin v France* (2005) ECHR 545; *Rantsev v Cyprus and Russia* (2010) ECHR 22; *SM v Croatia* (2008) ECHR 633.

⁸⁹ *Siliadin v France* (2005) ECHR 545; *Rantsev v Cyprus and Russia* (2010) ECHR 22; *SM v Croatia* (2008) ECHR 633.

⁹⁰ *SM v Croatia* (2008) ECHR 633.

⁹¹ *YF v Turkey* (2003) ECHR 391, at para 33.

⁹² *YF v Turkey* (2003) ECHR 391, at para 33.

⁹³ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012

⁹⁴ Directive 2011/36/EU, 'EU Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.

the prohibition of slavery and forced labour; secondly, due to recognition of human trafficking as a form of 'gender-based violence' and thirdly due to the inclusion of victims' rights within the chapter.

- 6.5 Articles 8 and 9 of the of the EU Victims' Directive detail the support and assistance that must be provided to potential victims and Article 1 states that "The rights set out in this Directive shall apply to victims in a non-discriminatory manner, *including with respect to their residence status*". This point is also emphasised in the recitals which state: "Member States should take the necessary measures to ensure that the *rights set out in this Directive are not made conditional on the victim's residence status* in their territory or on the victim's citizenship or nationality" (emphasis added in both cases).
- 6.6 Recital 17 to the EU Human Trafficking Directive states that "this Directive does not deal with the conditions of the residence of the victims of trafficking in human beings". In this context, Article 11 sets out the duties on states to provide assistance and support to trafficked persons, including the duty in Article 11(3) to "ensure that assistance and support for a victim is not made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial."⁹⁵ Article 2 of the Directive stipulates that "the consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant" where trafficking has occurred by any of the fraudulent means set out (emphasis added). Article 8 requires that authorities be entitled not to prosecute or impose a penalty on victims of human trafficking for their involvement in criminal activities they have been compelled to commit as a consequence of being trafficked.
- 6.7 The EU Qualification Directive requires an individual assessment of each asylum claim to assess the risks and harm that a person endured or could endure if they were to return to their home country.⁹⁶ Article 17 of the EU Reception Directive requires states to

⁹⁵ This obligation is subject to Directive 2004/81/EC on the issue of residence permits to third-country nationals who are victims of trafficking; or similar national rules.

⁹⁶ Article 4(2) and (3), 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'.

take into account the specific situation of vulnerable asylum-seekers including those subjected to serious forms of psychological, physical or sexual violence. The question of inadmissibility under the Bill, is dealt with above under Clauses 2 and 4.

- 6.8 Article 13 of the Trafficking Convention provides for a recovery and reflection period of at least 30 days during which presumed victims of human trafficking are not to be removed from the country's territory. During this period, they are entitled to assistance and protection, pursuant to Article 12, paragraphs 1 and 2 of the Convention, such as appropriate and secure accommodation, emergency medical treatment and legal counselling. Under the Bill, the recovery and reflection period would likewise be denied to victims of trafficking.
- 6.9 The explanatory notes state that Clauses 21 to 28 extend the public order disqualification as provided by the Council of Europe Convention Against Trafficking in Human Beings to persons within the scheme.⁹⁷ The public order disqualification in the Convention is set out in Article 13(3) which exempts the Parties of the Convention from observing the 30 days reflection and recovery period and limited leave to remain in the UK for that period. The objective of Clause 21 is to widen the definition of the public order disqualification, effectively categorising without individual consideration all those arriving without visas or leave to enter, including victims of trafficking, as constituting a public order threat sufficient to justify denial of support and assistance, subject to the exception made for participation in an investigation as referenced above. It is not clear that this approach is in keeping with the purpose of Article 13(3) of the Convention.
- 6.10 Systematic denial of support and assistance to potential victims of human trafficking, without individual consideration, appears to constitute a breach of Windsor framework Article 2 by falling below the minimum standards required by these provisions, several of which specify, as detailed above, that the entitlements exist irrespective of residence status.

⁹⁷ House of Commons, 'Explanatory Notes on the Illegal Migration Bill as Introduced in the House of Commons on 7 March 2023 (Bill 262)' (HoC, 2023), at para 2(e).

6.11 Overall, the NIHRC is gravely concerned by the potential effect of clauses 21 to 28 of the current draft of the Bill on victims, many would be excluded from protection and thereby placed at risk of re-trafficking. Further, the Bill risks disincentivising victims to come forward if they face removal from the UK, therein creating the conditions for exploitation by traffickers.

6.12 The NIHRC recommends that clauses 21 to 28 of the current draft of the Bill are removed and that protections provided to victims and potential victims of modern slavery and human trafficking are ensured, in accordance with Article 4 ECHR and in accordance with the relevant EU Directives within scope of Windsor Framework Article 2.

7.0 Entry, Settlement and Citizenship

Clauses 29 to 36: Entry, settlement and citizenship

- 7.1 Clauses 29 to 36 of the current draft of the Bill prohibit anyone who satisfied the four conditions in clause 2, or any of their family members who have met the conditions in clause 8, from being granted leave to enter or remain in the UK or obtain British citizenship.
- 7.2 Restrictions on entry, settlement and citizenship engage several human rights standards. For example, Article 31 of the Refugee Convention 1951 prohibits States from imposing penalties on refugees for being in or entering a country without permission where this is necessary to seek and receive asylum.
- 7.3 In certain circumstances, an arbitrary denial of citizenship may violate Article 8 of the ECHR.⁹⁸ In determining whether a violation has occurred, the consequences of the impugned measure for the individual and whether the measure in question was arbitrary are considered.⁹⁹ Furthermore, a refusal to issue identity cards and recognise the nationality of children born to refugees a State's territory has been found to violate Article 8 of the ECHR.¹⁰⁰

⁹⁸ *Karashev v Finland* (1999) ECHR 200; *Genovese v Malta* (2011) ECHR 1590.

⁹⁹ *Ibid.*

¹⁰⁰ *Hashemi and Others v Azerbaijan* (2022) ECHR 1480.

- 7.4 Many international human rights treaties explicitly prohibit discrimination on the basis of national origin.¹⁰¹ Some specifically require States to ensure that the rights of migrants, refugees and asylum seekers are equally protected.¹⁰² Article 14 of the ECHR prohibits “discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.
- 7.5 Yet in addition to denying access to asylum procedures, clauses 29 to 36 of the current draft of the Bill propose to prevent individuals from obtaining any alternative form of leave to remain. Contrary to Article 31 of the Refugee Convention and the foundational principle of non-discrimination, these penalties appear to be based on a person’s mode of arrival to the UK.
- 7.6 Given the practical barriers to removal, it is likely that under the proposals set out in clauses 29 to 36 of the current draft of the Bill, many individuals will be stuck in a state of limbo. One possible scenario is that an individual cannot be removed from the UK under clause 4, but also does not have any means of regularising their status. Consequently, they will face significant barriers to obtaining basic rights, such as access to healthcare,¹⁰³ to work,¹⁰⁴ to obtain accommodation,¹⁰⁵ and to obtain social security.¹⁰⁶
- 7.7 Further, clauses 30 and 31 of the current draft of the Bill risk discriminating against a child for the actions of a parent, contrary to Article 2 of the UN CRC. Under the proposals, if either parent was subject to the removal duty, their child would become ineligible to apply for British nationality. Significantly, any child born in the UK

¹⁰¹ Article 2, International Covenant on Civil and Political Rights; Article 1, UN Convention for the Elimination of Racial Discrimination; Article 2, International Covenant on Economic, Social and Cultural Rights; Article 2, UN Convention on the Rights of the Child.

¹⁰² See Article 22, UN Convention on the Rights of the Child.

¹⁰³ Article 12, International Covenant on Economic, Social and Cultural Rights; Article 24, UN Convention on Children’s Rights; Article 25, UN Convention on the Rights of Persons with Disabilities.

¹⁰⁴ Article 6, International Covenant on Economic, Social and Cultural Rights; Article 5(e)(i), UN Convention on the Elimination of Racial Discrimination; Article 27, UN Convention on the Rights of Persons with Disabilities.

¹⁰⁵ Article 11, International Covenant on Economic, Social and Cultural Rights; Article 5(e)(iii), UN Convention on the Elimination of Racial Discrimination; Article 27, UN Convention on the Rights of the Child; Article 28, UN Convention on the Rights of Persons with Disabilities.

¹⁰⁶ Article 9, International Covenant on Economic, Social and Cultural Rights; Article 26, UN Convention on the Rights of the Child; Article 28, UN Convention on the Rights of Persons with Disabilities.

after 7 March 2023 to a parent falling under clause 2 of the current draft of the Bill would in practice be stripped of citizenship rights they may have otherwise had.

7.8 Clause 29 of the current draft of the Bill permits the Home Secretary to make discretionary exceptions to this provision where it is considered necessary to do so in order to comply with the UK's obligations under the ECHR or other international agreement. However, it is not clear how or on what basis this could practically be applied. Further confusion is created by clause 4 of the current draft of the Bill, which prohibits the Home Secretary from considering the merits of individual asylum or human rights claims.

7.9 The NIHRC recommends that the proposals under Clauses 29 to 36 which prohibit the entry, settlement and citizenship of any person who arrives to the UK through an unofficial route are removed. The Bill should ensure that individuals are not penalised for seeking asylum in the UK and that the UK settlement and citizenship processes are not arbitrary and adhere to the principle of non-discrimination.

8.0 Legal Proceedings

Access to justice

8.1 As referenced above in relation to Clause 4 and detailed below in relation to Clauses 37-49, the Bill provides for limited judicial oversight in respect of detention, removal and decisions on protection and human rights claims, raising questions about compliance with standards on access to effective remedy (Article 13 of the ECHR).

8.2 A number of EU measures remain relevant for determining the minimum standard of rights required in NI, as a consequence of Windsor Framework Article 2.

8.3 The CJEU has confirmed that the objective of the EU Procedures Directive is to ensure that the Refugee Convention and fundamental rights are fully complied with and that the right to an effective

remedy is a fundamental principle of EU law.¹⁰⁷ Article 39 of the EU Procedures Directive states that asylum applicants have the right to an effective remedy before a court or a tribunal including for a decision on their application for asylum, a refusal to reopen an examination of an application after discontinuation and a decision to consider an application inadmissible.¹⁰⁸ The CJEU further confirmed that for the right to an effective remedy to be exercised, “the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith”. Moreover the “the national court hearing the case must establish whether the decision to examine an application for asylum under an accelerated procedure was taken in compliance with the procedures and basic guarantees laid down in ... the Directive”.¹⁰⁹ The limits that are imposed on appeals, including in Clause 4, or making other challenges may undermine the right to an effective remedy.

Clauses 37 to 49: Legal proceedings

- 8.4 Clauses 37 to 48 provide a limited right by the use of suspensive claims to defer a decision for removal. Where these claims are rejected, an appeal can be made under a very narrow set of circumstances that are not envisioned by the EU Asylum acquis by which the UK was bound at the end of December 2020.
- 8.5 Any other legal proceedings not mentioned by these clauses are not considered suspensive. The two kinds of suspensive claims that defer removal are: serious harm suspensive claim and factual suspensive claim.
- 8.6 The principle of non-refoulement forms an essential protection under international human rights 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. Article 3 of

¹⁰⁷ *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, 28 July 2011.

¹⁰⁸ Article 39, Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005.

¹⁰⁹ *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, 28 July 2011, at para 61.

the UN Convention against Torture expressly prohibits refoulement and specifies it is non-derogable.

- 8.7 As set out above, Articles 2 and 3 of the ECHR may be engaged where a person, if deported, would face a “real risk” of being subjected to treatment contrary to these provisions in the destination country.¹¹⁰ Furthermore, where the individual concerned has an “arguable complaint” that their removal 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 of the ECHR, requiring independent and rigorous scrutiny of their claim.¹¹¹ For example, individuals must have access to adequate information about the asylum procedure and their entitlements in a language they understand. Individuals must have access to a reliable communication system with the authorities, including interpreters where appropriate. Additionally, individuals must have access to legal aid and must be given the reasons for any decision.¹¹²
- 8.8 Article 15 of the EU Procedures Directive provides a right for applicants for asylum to obtain legal advice pertaining to their application. Where there has been a negative decision, national legislation can provide legal aid subject to a means and merits test. Article 16 requires Member States to allow access to relevant information as part of the asylum application. Article 47 of the EU Charter of Fundamental Rights on the right to an effective remedy provides that “legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”. The CJEU has confirmed that any restriction on the fundamental rights should not involve a “disproportionate and intolerable interference which impairs the very substance of the rights guaranteed”.¹¹³
- 8.9 As it stands, Clause 38 defines a serious harm suspensive claim as one where the applicant would, before the end of the relevant

¹¹⁰ *Soering v UK* (1989) ECHR 17; *Al Saadoon and Mufdhi v UK* (2010) ECHR 279; *Othman (Abu Qatada) v UK* (2012) ECHR 817.

¹¹¹ *MSS v Belgium and Greece* (2011) ECHR 1124.

¹¹² *MSS v Belgium and Greece* (2011) ECHR 1124, at paras 304 and 306-310.

¹¹³ *Texdata Software GmbH*, Case C-418/11, 26 September 2013, at para 84.

period, face a real, imminent and foreseeable risk of serious and irreversible harm, in the country to which they are removed from the UK. The types of harm under Article 3 ECHR such as torture, inhuman or degrading treatment that underpin the concept of non-refoulement fall within this concept of serious harm.

8.10 However, this definition of serious harm is troubling. Under Article 15 of the EU Qualifications Directive, it is only necessary to prove torture, inhuman or degrading treatment in the originating country. Under the Bill, the serious harm now falls to be proved within the removal country, a more difficult task for an applicant who has no connection to a removal country.

8.11 Under Clause 38(9), the 'relevant period' covers the length of time to make a human rights claim and any judicial review of the Secretary of State's decision to be completed. However, Clause 39 grants a power to the Home Secretary to amend the meaning of "serious and irreversible harm", which opens the window for a higher threshold which could be inconsistent with the principle of non-refoulement.

8.12 Where an applicant wishes to make a serious harm suspensive claim, under Clause 41(7), they are only provided with a period of 8 days to make that claim from the date of the removal notice to a third country. It is difficult to see how an applicant can benefit from the provisions under Articles 16 and 17 of the EU Procedures Directive in such a limited timeframe.

8.13 A 'factual suspensive claim' is a claim that arises when a person issued with a removal notice asserts that there has been a mistake of fact in determining that they meet the conditions for removal set out in Clauses 2 and 8. An applicant must provide compelling evidence that there has been a mistake of fact. However, as the Bill does not provide for consideration of an applicant's personal circumstances, it is difficult to see how an applicant can provide this 'compelling evidence'.

8.14 Again, under Clause 42(7) there is only a period of 8 days to make this claim leading to the same barriers as for applicants under a serious harm claim. Where an applicant wishes to make an appeal

against a refusal of a suspensive claim, the appeal can be made to the Upper Tribunal under Clause 43. However, where the Secretary of State has certified the case to the 'clearly unfounded', under Clause 44, permission to appeal must be granted before the Upper Tribunal, another administrative hurdle in the legal process. Article 28 of the EU Procedures Directive provides that an application is only unfounded if it does not meet the requirements under the EU Qualifications Directive. For reference, Article 23(4)(c) of the Procedures Directive describes an unfounded application as one where the country of origin is deemed a safe country. Article 28(2) of the Procedures Directive also introduces the concept of an application being 'manifestly unfounded' if it has been defined in national legislation. From the ordinary meanings of the words, 'manifestly' is a higher threshold for the UK Government to prove than 'clearly' leaving the UK Government with a much lower burden of proof.

8.15 The NIHRC considers that Clauses 4 and 37 to 49 may breach Windsor Framework Article 2 by diminishing the rights provided to individuals in the EU Procedures and EU Qualifications Directives and recommends that individuals are afforded the protections guaranteed under these Directives in connection with their asylum applications to ensure adherence to the rule of law and the right to an effective remedy.

Clauses 52: Interim measures

8.16 Clause 52 of the current draft of the Bill proposes to restrict the ability of a court to grant an interim remedy that would prevent or delay removal of a person subject to the duty to remove.

8.17 Under the ECHR, the ECtHR has jurisdiction to issue interim measures to any State Party "to preserve an asserted right before irreparable damage is done to it".¹¹⁴ Such measures are, when issued, legally binding on States, by reason of States' undertaking in Article 34 of the ECHR "not to hinder in any way the effective

¹¹⁴ Rule 39 of the ECtHR's Rules of Court provide for the issue of interim measures to any State Party to the Convention. See European Court of Human Rights, 'Rules of Court' (ECtHR, 2023).

exercise” by a victim of a claim before the ECtHR to be a victim.¹¹⁵

8.18 The Belfast (Good Friday) Agreement 1998 created a duty on the UK Government to incorporate the ECHR into NI law “with direct access to the courts, and remedies for breach of the... [ECHR]”.¹¹⁶ If enacted Clause 52 would empower the Home Secretary to deny an essential safeguard to some of the most vulnerable individuals in the UK.

8.19 Interim measures issued by the ECtHR, and their binding nature, are integral to ensuring that Contracting Parties to the ECHR fully and effectively fulfil their human rights obligations (related to the application of the ECHR).

8.20 The NIHRC recommends that clause 52 of the current draft of the Bill is removed. Steps should be taken to ensure that any subsequent amendments to the Bill are compliant with Article 34 ECHR and Rule 39 of the European Court of Human Rights.

¹¹⁵ *Mamatkulov and Askarov v Turkey* (2005) ECHR 64.

¹¹⁶ The Belfast (Good Friday) Agreement 1998, at Rights, Safeguards and Equality of Opportunity, para 2.

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