



**Human Rights and
Equality in Northern Ireland:
Article 2 of the Windsor Framework
Reaches the Courts:
What's at Stake?**

September 2024



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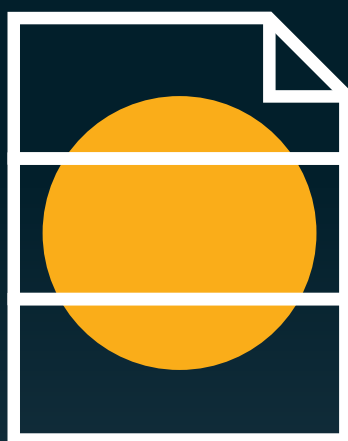
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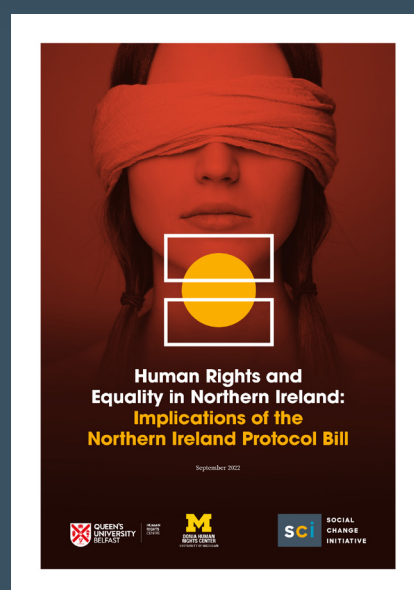
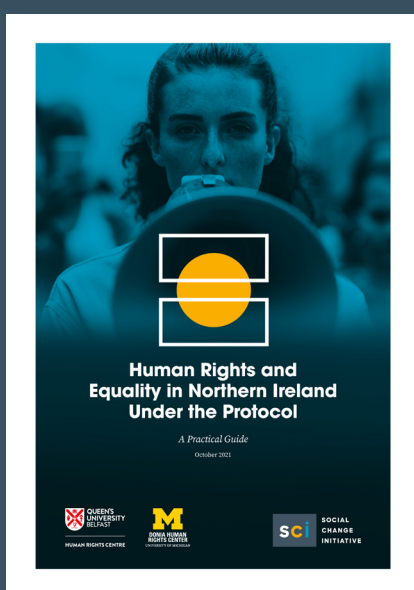
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Why Another SCI Publication on Article 2 Now?

This is the third publication by the Social Change Initiative about the critically important human rights and equality provisions of the Brexit agreement. In each of the previous reports, we emphasised the crucial role that the court's interpretation of Article 2 of the Windsor Framework, previously called the Ireland/Northern Ireland Protocol, would play in determining its scope and effectiveness. There have now been several decisions of Northern Ireland's High Court and Court of Appeal that have provided extensive guidance on the meaning of Article 2, and more are coming soon. This is a good time to review where we have got to in the judges' understanding of Article 2, and what may lie ahead.

Previous SCI Publications on Article 2



What is the purpose of this guide?

In this Guide, we aim to provide an accurate, and readable, guide to the cases that have considered Article 2 so far, in particular the successful challenges in the High Court to the [Northern Ireland Troubles \(Legacy and Reconciliation\) Act 2023](#) (the ‘Legacy Act’) and the [Illegal Migration Act 2023](#).

We set out what is at stake in the Government's attempt to persuade the Court of Appeal to overturn the Legacy Act decision in respect of Article 2, and what the key points of focus are likely to be when that case is decided.

The Court of Appeal's interpretation of Article 2 in that case, whichever way it goes, will have long-lasting consequences for a wide range of issues beyond those dealt with in this case, impacting the overall framework for the protection of human rights in Northern Ireland.

What is Article 2?

Belfast-Good Friday Agreement and Human Rights

The 1998 Belfast-Good Friday Agreement (‘B-GFA’) included significant provisions safeguarding human rights. One of the most important parts of the Agreement from a human rights perspective is the section entitled ‘Rights, Safeguards, and Equality of Opportunity’. These provisions identify many of the rights that Article 2 aims to protect.

Text of paragraph 1 of the Rights, etc. section of the Belfast-Good Friday Agreement

“The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:

- the right of free political thought;*
- the right to freedom and expression of religion;*
- the right to pursue democratically national and political aspirations;*
- the right to seek constitutional change by peaceful and legitimate means;*
- the right to freely choose one’s place of residence;*
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;*
- the right to freedom from sectarian harassment; and*
- the right of women to full and equal political participation.”*



The origins of this paragraph have been traced and its role and function detailed in Christopher McCrudden's article:

'The origins of 'civil rights and religious liberties' in the Belfast-Good Friday Agreement', (2024) 75 Northern Ireland Legal Quarterly.

This article traces the origins of the declaration of rights in the human rights and equality section of the 1998 Belfast–Good Friday Agreement. It sets out in detail for the first time the drafting history of the declaration, set against the complex negotiating history of the Agreement as a whole, describing the multiple actors involved in the evolution of the declaration and their motivations, including loyalist and republican paramilitary groups, feminists and civil rights organisations, Irish and British civil servants and political advisors, as well as the political parties. It thus provides a detailed account of the evolution of human rights thinking at a critical stage of the Northern Ireland peace process. The article argues that it is now more important than ever to understand this history. Although originally conceived as merely declaratory, this declaration has, since the European Union–United Kingdom (EU–UK) Withdrawal Agreement following Brexit, taken on a new lease of life due to the legal status given to it in domestic and international law by the Ireland/Northern Ireland Protocol to the EU–UK Withdrawal Agreement.

Dangers of Brexit

The United Kingdom exit ('Brexit') from the European Union on January 31, 2020, threatened to undermine the successful work, culminating in the B-GFA, which ended the prolonged violent conflict in Northern Ireland. In particular, Brexit presented a threat to the maintenance of the B-GFA's human rights protections many of which were underpinned by European Union law.

Article 2 agreed

To maintain those protections in a post-Brexit Northern Ireland, and prevent any 'diminution' of these rights, Article 2 of the Ireland/Northern Ireland Protocol was agreed between the EU and the UK.

Text of Article 2 of the Windsor Framework

Article 2 of the Windsor Framework states:

"1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.

2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards."

Christopher McCrudden, 'Law and a Crisis of Trust: Human Rights and the Negotiation of Article 2 of the Ireland/Northern Ireland Protocol,' (2023) 70 Irish Jurist 156, 156–193

The absence of trust between the UK and its EU negotiating partners led to an enhanced role for international law. The UK was not trusted to honour merely political commitments, as a result of the domestic political chaos following the result of the Brexit referendum, and the deep unease elicited by the growth of “sovereignist” rhetoric in the UK. This resulted in international legal obligations playing a critical role, being used to trump the then UK Government’s preferred freedom to depart from human rights norms. These crystallised in Article 2.

The obligations that the United Kingdom commits to in Article 2(1) are further underpinned by other provisions of the EU-UK Withdrawal Agreement. In particular, Article 4(1) of the Withdrawal Agreement provides that the provisions of the Protocol/Windsor Agreement, along with associated European Union law, will have the same legal effect in the United Kingdom as they do in Member States of the EU.¹

Text of Article 4(1) of Withdrawal Agreement

Article 4(1) WA states:

‘The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States’.

How was Article 2 made part of UK law?

The Withdrawal Agreement required that the UK Parliament give these provisions the force of law in the UK. As a result, section 7A of the European Union (Withdrawal) Act 2018 incorporates Article 2 into domestic law in Northern Ireland. Throughout the negotiations of 2018-2021, and until recently, Article 2 was generally seen by the Government as ‘not controversial’ even as other significant aspects of the Ireland/Northern Ireland Protocol were the subject of very intense discussion. As a result, the negotiations on revising the Ireland/Northern Ireland Protocol resulting in the Windsor Framework did not touch Article 2.

¹<https://www.socialchangeinitiative.com/human-rights-and-equality-in-northern-ireland-under-the-protocol-a-practical-guide>

Text of Section 7A of European Union (Withdrawal) Act 2018

Section 7A of European Union (Withdrawal) Act 2018 states:

“7A General implementation of remainder of withdrawal agreement

- (1) Subsection (2) applies to—
 - (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and*
 - (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement, as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.**
- (2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—
 - (a) recognised and available in domestic law, and*
 - (b) enforced, allowed and followed accordingly.**
- (3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2).*
- (3A) The following provide for the application in Northern Ireland of EU law relating to the trade in goods necessary for the functioning of the Windsor Framework in the withdrawal agreement to be subject to democratic consent and scrutiny—
 - (a) Articles 13 and 18 of that Framework, and*
 - (b) Part 5A3 of the Northern Ireland Act 1998.”**

A vote will take place in the Northern Ireland Assembly over whether to continue with the trade and customs provisions of the Windsor Framework. This vote will have no direct effect on Article 2. Whatever the Assembly decides, Article 2 will continue to place obligations on the UK.



What have the courts been doing?

List of Article 2 WF cases, with references, mentioned in the text

Application by SPUC Pro-Life Limited for Judicial Review [2022] NIQB 9 (High Court); [2023] NICA 35 (Court of Appeal)

Angesom [2023] NIKB 102 (High Court)

Dillon et al [2024] NIKB 11 (High Court)

NIHRC's and JR 295's Application in the matter of The Illegal Migration Act 2023 [2024] NIKB 35 and [2024] NIKB 44 (High Court)

In the matter of an application by Shima Esmail for judicial review [2024] NIKB 64 (High Court)

Early cases unsuccessful

Initially, court cases attempting to use Article 2 were unsuccessful, but in each case, they developed the interpretation of Article 2 in important respects.

In the SPUC case, there was an unsuccessful claim that Article 2 prohibited recently introduced legislation permitting abortion in Northern Ireland. The argument was that permitting the abortion of a foetus on the grounds of severe foetal abnormality at a later stage of pregnancy than was generally permitted was discriminatory and was prohibited by Article 2.

The case failed. Nevertheless, the Court of Appeal in the SPUC case set out clearly the six elements that need to be established in future Article 2 cases:

- (i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged.
- (ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020.
- (iii) That Northern Ireland law was underpinned by EU law.
- (iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU.
- (v) This has resulted in a diminution in enjoyment of this right; and
- (vi) This diminution would not have occurred had the UK remained in the EU.

Subsequent judicial decisions have adopted this test.

The SPUC case in more detail

In 2023, the Society for the Protection of Unborn Children (SPUC) Pro-life Limited sought to challenge the initial ruling of Mr. Justice Colton ([\[2022\] NIQB 9](#)) by appealing to the Northern Ireland Court of Appeal (NICA) in the case [\[2023\] NICA 35, SPUC Pro-Life Limited Application for Judicial Review](#). SPUC contended that The Abortion (Northern Ireland) Regulations 2021 were unlawful. They argued that the regulations discriminated against disabled persons by permitting abortion in cases where severe foetal abnormalities were detected.

The High Court ultimately dismissed these challenges. Subsequently, in January 2023, SPUC appealed the decision, contending that the 2021 Regulations were beyond the powers of the Northern Ireland Assembly because they conflicted with Article 2(1) of the Ireland/Northern Ireland Protocol of the EU Withdrawal Agreement, EU Law, and the United Nations Convention on the Rights of Persons with Disabilities.

However, in May 2023, the NICA delivered a judgment dismissing all of SPUC's grounds of appeal. Specifically, the court 'rejected the challenge that the 2021 Regulations contravened Article 2(1) of the Protocol, EU Law and the United Nations Convention on the Rights of Persons with Disabilities.'

In the later case of *Angesom*, an asylum seeker unsuccessfully argued that being sent from Northern Ireland to Scotland was contrary to Article 2. Nevertheless, the case established that the EU Charter of Fundamental Rights continued to apply in Northern Ireland.

The Angesom case in more detail

The case of Angesom was heard by the High Court. This case concerned an asylum seeker, Mr. Angesom, who arrived in Northern Ireland from Eritrea in June 2021. Due to an increase in asylum applications, he was then ‘dispersed’ to Falkirk, Scotland, only 24 hours after receiving his initial notice, which was typed in English—a language Mr. Angesom did not speak. Among other things, Mr. Angesom challenged his dispersal on the grounds that his removal from Northern Ireland breached Article 2 of the Windsor Framework, relying on Article 7 of the Charter of Fundamental Rights of the European Union (CFR (the right to private and family life), and the ECHR. In summary, the court found that the CFR did apply, meaning that Mr Angesom was entitled to rely directly on its rights. However, on the facts, the court held that neither Article 7 CFR nor the ECHR had been breached.

Difference between the European Convention on Human Rights and the EU Charter of Fundamental Rights

*The **European Convention on Human Rights** (ECHR) and the **Charter of Fundamental Rights of the European Union** (CFR) are two pivotal documents safeguarding human rights in Europe. Drafted by the Council of Europe in Strasbourg and coming into full effect in 1953, the ECHR is an international treaty protecting the basic rights and freedoms of individuals across 47 member states. This Convention is enforced by the European Court of Human Rights (ECtHR) in Strasbourg.*

The CFR of the European Union, adopted in 2000 and becoming legally binding with the Treaty of Lisbon in 2009, is the EU’s own set of human rights obligations and covers a wide range of rights, including civil, political, economic, social, and cultural rights. Its enforcement is overseen by the Court of Justice of the European Union (CJEU) in Luxembourg.

There are notable differences between these documents: the ECHR has a broader geographical scope encompassing more Member States and focuses primarily on civil and political rights; it functions as an international treaty with its own enforcement mechanisms. In contrast, the CFR is confined to EU institutions and EU Member States, addresses a wider array of rights within the context of EU law, operates in conjunction with EU legislation, and is enforced as EU law.

Later cases more successful

More recent judgments have confirmed Article 2 as an effective and potentially powerful tool for the protection and vindication of rights. Most notably, in two recent cases, the High Court has ‘disapplied’ sections of the Legacy Act and the Illegal Migration Act, meaning that they could not be used in the future in Northern Ireland.

The High Court’s decision in the Legacy Act case (often referred to as the Dillon case) marked the first instance where the United Kingdom faced the full extent of its obligations under the Withdrawal Agreement, demonstrating Parliament’s extensive integration of these obligations into domestic law—moving beyond mere rhetoric. While not the first case invoking Article 2 protections, it is the first occasion in which the strongest remedy is delivered, namely the disapplication of an aspect of the law in Northern Ireland.

The Legacy Act case in more detail

*The **High Court decision in Dillon et al**, concerned the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023. The Legacy Act ‘envisages the current system of criminal prosecutions, inquests, and civil claims associated with deaths that occurred during the Troubles being almost entirely ended and replaced by “reviews” conducted by a new body, the Independent Commission for Reconciliation and Information Recovery (“ICRIR”).’ The Act also provides limited grants of immunity to perpetrators of violence, provided they cooperate with these reviews.²*

In this case, numerous relatives of those killed during the violence of the Troubles sought to disapply certain provisions of the Legacy Act. They argued that these provisions were incompatible with Articles 2 and 3 of the European Convention on Human Rights (‘ECHR’) and Article 2 of the Windsor Framework (‘WF’).

The High Court ruled that the immunity provisions of the 2023 Act should be disapplied, as they were found incompatible with the EU Victims’ Directive, the Charter of Fundamental Rights, and (as a result) Article 2 of the Windsor Framework.³ The court judged that these incompatibilities would not have occurred had the United Kingdom remained in the EU.⁴ Additionally, the court found that several sections of the 2023 Act, including section 8 (exclusion of evidence in civil proceedings), section 41 (prohibition of criminal enforcement action), sections 46 and 47 (interim custody orders), and section 43(1) (regarding Troubles-related civil actions and claims), were in violation of Article 2 and thus were also disapplied in Northern Ireland.⁵

²<https://nihrc.org/publication/detail/briefing-on-the-northern-ireland-troubles-legacy-and-reconciliation-bill>

³<https://nihrc.org/news/detail/northern-ireland-human-rights-commission-responds-to-legacy-judgment>

⁴<https://www.equalityni.org/Footer-Links/News/Delivering-Equality/Judicial-Review#:~:text=%E2%80%9CThis%20is%20an%20important%20decision,carefully%20consider%20any%20next%20steps.%E2%80%9D>

⁵<https://www.judiciaryni.uk/files/judiciaryni/2024-02/Summary%20of%20Judgment%20-%20In%20re%20Dillon%20and%20others%20-%20NI%20Troubles%20%28Legacy%20and%20Reconciliation%29%20Act%202023.pdf>

The Illegal Migration Act case in more detail

*The High Court disapplied several provisions of the Illegal Migration Act 2023 ('IMA') in **Northern Ireland Human Rights Commission's Application and JR295's Application**.*

The court ruled that these provisions breached the ECHR and Article 2(1) of the Windsor Framework. As regards the breach of the ECHR, the High Court granted Section 4 HRA declarations of incompatibility as regards 'Sections 2(1), 5(1), 6(3), and 6(7) insofar as they impose a duty to remove... Sections 2(1), 5, 6, and 22 insofar as they relate to potential victims of modern slavery or human trafficking... [and] Sections 2(1), 5(1), and 6 relating to children.'⁶

As regards Article 2 of the Windsor Framework, the court held that the EU Law rights relied on conferred individual rights that had direct effect in Northern Ireland prior to Brexit. The IMA caused a diminution of those rights, violating Article 2 and requiring their disapplication in Northern Ireland.

In these cases, although the court held that both the European Convention on Human Rights and Article 2 of the Windsor Framework had been breached, it was only because of the breach of Article 2 that the provisions were 'disapplied'. The remedy under the Human Rights Act is much weaker.

The most recent decision of the High Court, the Shima Esmail case, clarified the extent to which the EU Charter of Fundamental Rights could be invoked in the context of a claim based on Article 2.

The Shima Esmail case in more detail

Shima Esmail is a citizen of the United Kingdom, originally from Sudan. Many of her extended family members still live in Sudan. Ms Esmail wanted to secure a safe route by which her family members could leave war-torn Sudan and join her in the UK. She challenged the failure by the UK Government to establish a family reunification scheme akin to the one set up for Ukrainian nationals fleeing war, and a decision that it was not possible to consider the grant of leave outside the Immigration Rules to Ms Esmail's family. Her claim was based, in part, on an alleged breach of Article 2 of the Windsor Framework, in particular a breach of provisions of the Charter of Fundamental Rights ('CFR'). The CFR provides that its provisions only apply when a state is 'implementing' EU law. The High Court (Humphreys J) held that she had not identified any 'anchor provision' of EU law upon which she sought to rely, and therefore rejected her claim. The CFR itself could not itself be the source of the obligation relied upon since it only applies when EU law is being implemented. The Withdrawal Agreement did not elevate the CFR rights to any enhanced status. A separate 'anchoring' right was still required. However, in an important holding, Humphreys J considered that the relevant 'anchoring' right may be found in the Withdrawal Agreement itself, provided the conditions for direct effect are met, such as the right of residence in Article 13.

⁶https://www.judiciaryni.uk/files/judiciaryni/2024-05/Summary%20of%20judgment%20-%20In%20re%20NIHRC%20and%20JR%20295%20%28Illegal%20Migration%20Act%202023%29%20-%20130524_0.pdf



What has been the reaction from the UK government to these recent cases?

Push-back by the previous Conservative Government

The previous Conservative Secretary of State for Northern Ireland, Chris Heaton Harris, decided to challenge the High Court's judgment in the Dillon case dealing with the Legacy Act. His appeal to the Northern Ireland Court of Appeal challenged the decision that parts of the Act are contrary to the ECHR, and that they were also in breach of Article 2. In his arguments to the Court of Appeal, he adopted an interpretation of Article 2 that would render it almost entirely legally ineffective. The Court of Appeal heard the appeal over five days in June 2024, with a decision expected by mid-October.⁷

The new Labour Government's approach: Hilary Benn to the rescue? Not quite

Soon after the Labour Government took control, the new Secretary of State (Hilary Benn MP) set out how he planned to handle the Legacy Act case. [His statement to the House of Commons on July 29, 2024](#) had two main points. Firstly, he announced that he had abandoned his appeal against the High Court's decision that parts of the Act were contrary to the ECHR. The effect of this is that the High Court's decision that the Act breaches the ECHR stands.

However, secondly, he announced that he was continuing the previous government's appeal against the High Court's decision that parts of the Act are in breach of Article 2, and the decision to disapply parts of the legislation because of this breach. He said: 'this judgment has potentially wide-ranging implications for other UK legislation which extends to Northern Ireland...[The Government has] asked the Court to continue with its consideration of the interpretation and effect of Article 2(1) given the profound constitutional and legal questions that have arisen.'⁸ He considered that the issue raised is 'a technical point of law which we hope will be clarified by an onward appeal, for the benefit of by ensuring legal certainty and in maintaining a clear human rights framework in Northern Ireland.'

The Court of Appeal will now have to decide whether it agrees with the High Court's judgment in Dillon or whether it accepts the arguments advanced in the Conservative Secretary of State's appeal.

⁷<https://caj.org.uk/wp-content/uploads/2024/07/Just-News-July-2024.pdf>

⁸<https://www.gov.uk/government/speeches/northern-ireland-troubles-legacy-reconciliation-act-2023>



What Article 2 issues arise in the Legacy Act Case?

The issues that the Court of Appeal has been asked to consider are not only issues of ‘profound constitutional and legal’ importance, as Hilary Benn has said; they are also of considerable significance for future relations between the UK and the EU.

What are these issues? In this section, we set out the ten main issues you need to be aware of and to watch for when the Dillon judgment is announced.

Before doing this, however, bear in mind that the arguments being advanced by the previous Government in Dillon (and allowed to continue by the new Labour Government) were fundamentally at odds with the government's own previously advanced '**Explanations**' of what Article 2 meant, and how it was being implemented in UK law.

1. Status and effect of section 7A

We saw earlier that section 7A of the European Union (Withdrawal) Act 2018 is the main way that Parliament has given effect to Article 2 in Northern Ireland law. A very similar approach was adopted when the UK was a member of the EU. Is section 7A equivalent, then, to sections 2 and 3 of the European Communities Act 1972? If so, then human rights protections previously underpinned by EU law will have a similar status as before Brexit. The Court of Appeal is thus confronted with a critically important set of questions as to the constitutional status of section 7A. Does section 7A trump all inconsistent primary legislation?

2. Legal enforceability of Article 2

Equally important issues arise as to the extent to which Article 2 creates legally-recognised rights. That may sound like a strange question (surely, it does). You have probably been operating on the understanding that Article 2 is fully enforceable legally. If so, you were not alone. This was the orthodox understanding of Article 2 prior to the appeal to the Court of Appeal in Dillon (including by the UK itself) until this approach was significantly challenged by the previous Secretary of State for Northern Ireland in Dillon. He instead argued that Article 2 is a set of solely political commitments, 'enforceable' only through methods of political accountability. Which approach will the NICA adopt?

3. Direct effect of Article 2(1) WF

Article 4(1) WA provides: '... 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 Union law.' A central question facing the Court is whether Article 2(1) WF meets the conditions for 'direct effect'. What will the Court make of the SoSNI's argument that Article 2 does not have direct effect: in particular his argument that the human rights provisions of the B-GFA do not satisfy the test, preventing Article 2 as a whole from being directly effective? In considering the implications of direct effect, will the Court consider that the powers given to the 'Dedicated Mechanism' (i.e. the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission) are relevant in considering whether Article 2 should be considered to be directly effective? Will the Court accept that the intent was to provide effective legal remedies that could be mobilized by the Dedicated Mechanism itself and by individuals in domestic courts to ensure that this obligation was effectively enforced?

4. *The status of the B-GFA*

'The B-GFA' consists of two agreements: a multi-party agreement among political parties in Northern Ireland brokered by the Irish and UK Governments ('the multi-party agreement'), and an agreement between the two sovereign governments themselves ('the British-Irish Agreement', 'BIA'). An important controversy in the Dillon case concerns the first element. Is the multi-party agreement part of an international treaty and should it as a result be interpreted using the accepted methods of interpretation in international law? Will the Court agree that this means that this Court should seek to avoid an overly textual approach to interpretation, and that the provisions of the B-GFA should be given a 'generous and purposive' interpretation?

5. *Scope and meaning of the term 'civil rights' in the B-GFA*

A critical question that the Court of Appeal may consider is what role 'civil rights' (mentioned in the first sentence of the relevant part of the B-GFA's section on rights, set out earlier) plays in the structure of Article 2(1). The SoSNI argued that the sentence in which the concept of 'civil rights' is included should be 'set aside'. Will the Court adopt this position, or will it instead adopt the opposite position that the SoSNI's approach would run contrary to the intention of the Windsor Framework, that the B-GFA should be protected 'in all its parts'? If it is not simply set aside, what does it mean? Does the concept of 'civil rights' run in parallel with the substantive rights protected by the ECHR, meaning that the ECHR may legitimately be used to help give content to the concept of 'civil rights'? Is the EU Charter of Fundamental Rights an appropriate source from which to identify rights that are included in the concept of 'civil rights' in the B-GFA?

6. *Relationship between the ECHR, the CFR and 'diminution' in Article 2 WF*

What are the circumstances under which a breach of the ECHR and/or the CFR may result in a diminution of the rights protected in the B-GFA? There are two separate issues raised in the appeal. The first is the relationship between the rights protected in the CFR and those protected in the ECHR. Will the Court consider that a finding of a violation of an ECHR right appropriately leads to a conclusion that there is a violation of a CFR mirroring right?

The second issue is the relationship between a violation of a CFR right, a violation of an ECHR right, and breach of Article 2. To the extent that B-GFA protected rights (including 'civil rights') are underpinned by ECHR/HRA rights, then is it appropriate that a 'diminution' (breach) of the latter will lead to a conclusion that there has been a 'diminution' of B-GFA rights, and (where the other requirements of a breach of Article 2 are satisfied) to a conclusion that a breach of Article 2 has occurred? So too, where the B-GFA right was underpinned by a mirroring CFR right, and a violation of the ECHR mirroring right is established, is it appropriate to conclude that where a diminution of the B-GFA right has occurred (again, where the other requirements of a breach of Article 2 WF are satisfied) that a breach of Article 2 WF has occurred?

7. *What does a B-GFA right involve?*

Separately, the issue of what a B-GFA right consists of may be considered by the Court. Does it consist only of the substantive right (e.g. a right not to be discriminated against), or does it also consist of the procedural and remedial aspects of that right? Will the Court of Appeal uphold that broader approach, considering that the protection of a right by the CFR gives access to procedures and remedies that are not obtainable where the right is only protected by an ECHR right, or will it accept the SoSNI's argument that 'diminution cannot occur where a CFR right mirrored an ECHR right when the ECHR continues to apply'?

8. *Scope of the CFR*

In EU law, for the CFR to apply, the Member States must be held to be 'implementing Union law'. What does this phrase include? Does the CFR apply where the Member State is acting within the scope of EU law even if there has been no violation of EU law apart from the CFR, but where the Member State's activities are 'within the scope' of EU competences?

9. *Remedies*

Will the Court accept the argument of the SoSNI that in the event of a breach of Article 2, 'the Court should have done no more than identify the said breach in its judgment and or by way of declaration ...' and that it is 'for the government to determine how to ensure the standard of rights [in Article 2(1) WF] is maintained, not the Court'. Will the Court consider either that the disapplication of primary legislation is never permissible where there has been a breach of Article 2 WF, or that there is a broad discretion in the Court whether or not to disapply primary legislation in the event that a breach of Article 2 WF is found? Will the Court consider that remedies following breach of Article 2 WF are discretionary, like under the general principles of UK judicial review? Will the Court consider that this broad discretion should have been exercised in this case not to disapply the legislation?

10. *Potential violations*

Will the Court accept the SoSNI's argument that Colton J erred in 'making a finding of diminution in respect of provisions that were not yet in force'? Or will the Court agree that Parliament itself envisaged that the courts would consider potential violations of Article 2 WF when it set out the powers of the Commissions in the 'dedicated mechanism' to initiate litigation, intervene in litigation, and support others proposing to litigate, referring to 'potential future breach' of Article 2? Will the Court consider that a central element in 'good faith' is that Parties to the Agreement should not even propose a future violation of the Agreement, let alone bring it into effect?



Why does it matter how these legal issues are decided?

How the Court decides these issues will significantly affect a range of policy issues in the future. Here we sketch out some of these.

Legacy

When Sir Keir Starmer and the Labour Party came into power in early July, the new government announced that they planned to repeal and replace the Legacy Act, ‘as soon as...[they] can,’ despite the ‘complicated process’ surrounding it—a sentiment reiterated in the King’s Speech.⁹ It has been stated numerous times, including in the Secretary of State’s recent statement, that the Government’s intention is to retain and reform the Independent Commission for Reconciliation and Information (ICRIR), the investigative body created by the Legacy Act. However, there are no plans to repeal the Act entirely without having a replacement in mind.

If the Court of Appeal upholds the Dillon decision, it would allow for the continued disapplication of the Legacy Act provisions in Northern Ireland that were held to be contrary to Article 2 of the Windsor Framework, removing conditional immunity provisions, reversing the ban on civil claims, and allowing prematurely halted Troubles-era inquests to resume.

In this situation, unless the Government appealed the decision to the Supreme Court, it could be expected that the Government would enact more progressive legislation on a faster-paced timeline, as something would need to be produced to replace the Legacy Act almost immediately. This new legislation could include provisions enhancing victims’ rights and representation, establishing measures to strengthen the ICRIR’s independence from Government and its powers, and setting clearer guidelines regarding amnesty and prosecution, likely in favour of victims.

Additionally, the Secretary of State has stated that, ‘...the Government will therefore now undertake a period of consultation with interested parties, including victims and survivors, to seek their views. This will, of course, include engagement with the Northern Ireland political parties and with the Irish Government.’

If, however, the Court of Appeal does not uphold the Dillon decision on Article 2, there is the possibility of the claimants in the case appealing to the Supreme Court. If there was no appeal or it was turned down, it could still be expected that a similar piece of legislation to the one described above would come to fruition, as the Labour Party would no doubt seek to uphold their promises regarding repealing and replacing the Legacy Act. However, the tone of the new legislation might reflect a more conservative approach. Nevertheless, the ruling would still impact the interaction between domestic law and European Union law, the effectiveness of remedies available to citizens challenging statutes conflicting with EU law, and, most importantly, how rights under Article 2 are protected and enforced.¹⁰

Migration and asylum

Two of the many issues impacted by the upcoming ruling are migration and asylum. After the General Election in early July, Sir Keir Starmer dismantled the ‘Rwanda Plan.’ This plan aimed to send asylum seekers to Rwanda for processing of their asylum claims, instead of processing them in the United Kingdom, after deeming Rwanda a ‘safe’ country. The new Prime Minister fulfilled his claim that the plan would be “dead and buried” on his first full day in office.¹¹

However, before the election, the decision of the High Court in the Northern Ireland Human Rights Commission’s Application and JR295’s Application case disappplied whole swathes of the Illegal Migration Act and in doing so undermined the government’s Rwanda Plan even before Labour came to power.

However, the upcoming NICA decision could challenge and undo this previous decision. In addition to the upcoming ruling concerning the Legacy Act, there is an appeal underway in the Northern Ireland Human Rights Commission’s Application and JR295’s Application case. While it is interesting to speculate on the political stances the government will take on these issues, it will be more interesting still to see the legal arguments they choose to make regarding Article 2 in the upcoming appeal.

⁹<https://www.bbc.co.uk/news/articles/cevw4w8xkz8o>

¹⁰<https://ohrh.law.ox.ac.uk/reconciliation-and-the-northern-ireland-legacy-act-a-human-rights-perspective-part-2/>

¹¹<https://www.bbc.co.uk/news/articles/cz9dn8erg3zo>

Voting rights

Another issue likely to be impacted by the upcoming ruling concerns voting rights. Following Brexit, numerous debates emerged about how to handle voting rights for UK and EU citizens, now two separate groups with different rights. The [Elections Act 2022](#) included provisions regarding the administration and conduct of elections, including those restricting the voting and candidacy rights of EU citizens, but these provisions were not brought into effect. As of 7 May 2024, however, [these provisions are now in effect](#), and the previous right of European Union citizens to register, vote, and stand in local Northern Ireland elections, apart from citizens from EU countries with reciprocal agreements with the UK, and long-term residents, is now abolished. Now that the removal of these voting rights for EU residents in Northern Ireland has been enacted, the question arises whether this constitutes a breach of Article 2.

The forthcoming Court of Appeal decision in Dillon is likely to significantly affect how this question should be answered. To determine what constitutes a breach of these voting safeguards and how to use Article 2 to disapply such breaches in Northern Ireland law, the meaning of Article 2 must first be determined. Essentially, this is the decision the Court of Appeal must make in the upcoming Dillon case.

What's the take-away point?

We have seen that the new Secretary of State, Hilary Benn, dropped the appeal regarding the decision of the High Court that elements of the Legacy Act case are contrary to the ECHR, but is continuing with the appeal against the decision that parts of the Legacy Act were also contrary to Article 2.

We saw, too, that the reason he gave was that the issues raised in the appeal were of significant constitutional significance. He also said, however, that the appeal only concerned 'technical' issues of law, with the implication that the issues raised were only of concern to lawyers. Nothing could be further from the truth.

The Court of Appeal's decision in the Dillon et al case will be pivotal for the wider protection of human right in Northern Ireland.

In particular, it will shape the future interpretation of Article 2(1), including issues of 'direct effect,' the interpretation of relevant parts of the Good Friday Agreement, what classifies as a 'diminution,' and whether disapplication is mandatory in all cases where there has been a breach.

This ruling will influence immigration, voting rights, and the legacy of 'the Troubles,' but also a much broader range of issues that have yet to come before the courts. In doing so, it has the potential to significantly influence Northern Ireland's political landscape in a post-Troubles society and the efforts to move toward more complete reconciliation.¹²

The issues currently before the Court of Appeal in the Legacy Act case are therefore of considerable importance going well beyond the specifics of the case. The Court's decision should be regarded as critically important to a wide range of interests in Northern Ireland and beyond, determining as it will whether the commitment to ensure no diminution in the protection of B-GFA rights as a result of Brexit is to have any real meaning or substance.

¹²<https://ohrh.law.ox.ac.uk/reconciliation-and-the-northern-ireland-legacy-act-a-human-rights-perspective-part-1/>

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