The NI Protocol impact on the Rwanda Bill

‘Dividing the UK’s sovereign territory’

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Introduction

This paper is prepared on an expeditated basis to raise awareness as to the impact of the legislation introduced in Parliament today (6 December 2023) in relation to the immigration crisis and how, due to the NI Protocol, this in effect replicates the concept of the trading border in the Irish Sea by ensuring NI is subject to a different immigration regime than that which applies to the rest of the United Kingdom. Put simply: Northern Ireland is treated as hybrid-territory, with the trade border for the movement of goods now becoming an ever-hardening border in relation to citizens rights/immigration law.

In reading this briefing note, it is important to be clear about different concepts and laws. The effect of Article 2 (1) of the Protocol, in so far as relevant to this paper, is to indisputably cause the continued application (i) of significant areas of relevant EU law which can be deemed as underpinning any of the broad concepts, such as 'civil rights', set out in the section of the Belfast Agreement entitled 'Rights, safeguards and equality of opportunity'; and (ii) interconnected with (i), the continued application of the EU Charter of Fundamental Rights.

These are citizen's rights which do not apply in the rest of the United Kingdom, therefore NI is a 'place apart' in that respect. An illegal immigrant in NI shall have greater protection against deportation than that which is available in GB; this difference is enhanced by the disapplication of the Human Rights Act.

If this disapplication *does* have effect in NI, then the difference remains because of the other provisions continuing to apply due to Article 2 (1) of the Protocol. If it *does not* have effect due to Article 2 (1) (see below), then the difference between GB and NI is even more pronounced.

The EU law and Charter referred to at (i) and (ii) above is different than the European Convention on Human Rights ('ECHR'). The Safety of Rwanda (Immigration and Asylum) Bill 2023 at Clause 3 disapplies large swathes of the ECHR.

It is arguable that this does not in fact have effect in Northern Ireland, because the ECHR gives effect to 'civil rights' within the meaning of the relevant section of the Belfast Agreement and as such due to Article 2 (1) read in conjunction with section 7A (2) and (3), the Rwanda Bill in relation to Northern Ireland cannot have the effect which Clause 3 suggests.

In this paper, The Safety of Rwanda (Immigration and Asylum) Bill 2023 is referred to hereafter as 'the Rwanda Bill'.

Summary

The Rwanda Bill seeks to introduce new measures in relation to the illegal immigration crisis. The Bill (published on 6 December 2023) is emergency legislation and will likely progress through its various Parliamentary stages within a short period of time.

The effect is as follows:

(i) Northern Ireland will afford illegal immigrants greater 'rights' than that which is available in GB to resist and challenge deportation. Owing to Article 2 (1) of the Protocol, the EU Charter on Fundamental Human Rights (which is different than the ECHR) and arguably the ECHR itself will continue to apply in respect of Northern Ireland, notwithstanding the Rwanda Bill.

(ii) In addition, relevant EU law will also continue unabated and, where it conflicts with the UK policy on immigration and border control, the UK law will yield, and NI will be subject to the supremacy of EU law. The Rwanda Bill does not address this issue.

(iii) In consequence, an illegal immigrant will have significant additional legal weapons in Northern Ireland to frustrate deportation, and therefore- obviously- there is the potential NI will become a hub for illegal immigration into the UK.

(iv) Flowing from the reality of Northern Ireland being the 'best' place within the UK for an illegal immigrant seeking to avoid deportation, it is obvious that many illegal immigrants will come to NI from GB to avail of greater legal protections afforded by the continued application of EU law, and equally many illegal immigrants will enter the UK via NI due to the wide-open Irish land border.

(v) Therefore, for NI to be an integral part of the sovereign UK territory, the UK borders must apply with the same force and laws across all entry points to the UK. That means, in circumstances of the UK hardening immigration policy, revisiting the Common Travel area, and in reality putting in place border controls on the Irish land border. If there are no such border controls, NI becomes a backdoor into the UK for illegal immigration.

(vi) If, however, the UK is not prepared to apply the same immigration laws and border controls at the NI border with the EU (the Irish land border), then the obvious risk to the UK is that illegal immigrants flow not only into the UK funneled through NI, but through the 'open door' of NI into GB.

(vii) This brings us back to the same issue as applies in relation to the movement of goods. Where is the border to be; between the UK and the EU at the Irish land border; or down the Irish Sea carving NI off from the rest of the UK?

(viii) The default position, due to Article 2 (1) of the Protocol, is Northern Ireland being essentially subject to a different legal regime in relation to UK immigration law and border control in areas which can be deemed as citizens rights. This replicates the concept of Irish Sea customs border for goods, only this time it is a border in relation to the movement of people.

(ix) In order to give effect to the Rwanda Bill throughout the UK, and ensure NI remains- in practice and substance- within the sovereign territory of the UK, it is necessary to disapply section 7A of the EUWA 2018 (and thus the Protocol).

Northern Ireland being subject to a different immigration regime than GB

The Northern Ireland Protocol is part of the Withdrawal Agreement between the UK and EU. It has direct effect in domestic law via section 7A of the EUWA 2018. As established in the Supreme Court case of *Allister*, section 7A (2)- acting effectively as a conduit pipe- has the effect of transposing all rights, obligations, restrictions, remedies and procedures arising from the Withdrawal Agreement (inclusive of the Protocol) directly into domestic law.

Section 7A (3) provides that *"every enactment (including an enactment contained within this Act) is to be read and has effect subject to subsection (2)*". This provision 'looks both ways', or put another way applies both retrospectively and prospectively. In consequence that which flows down the section 7A 'pipe' (i.e., the Protocol) has unchallenged supremacy in domestic law.

Article 2 (1) of the Protocol provides:

> *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.*

At first blush it may appear that the only EU law (in relation to Article 2 (1)) which continues to apply is that which is listed at Annex 1. However, that is not so. The broad scope of Article 2 (1) means that if a citizen can identify a 'civil right' which falls under the broad provisions of the relevant section of the Belfast Agreement which was underpinned by EU law, then this can be relied upon in domestic law *vis-à-vis* Northern Ireland.

If reading Article 2 (1) in isolation, that would seem like an odd outcome. However, it must be read in conjunction with Article 4 of the Withdrawal Agreement (which equally flows down the section 7A 'conduit pipe') which provides:

> *"1. 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. Accordingly, 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."*

Accordingly, if an EU law can be identified as underpinning a 'right' or 'safeguard' within the broad (extremely broad) meanings of the relevant section of the Belfast Agreement then the effect of Article 2 (1) of the Protocol, read in conjunction with Article 4 of the Withdrawal Agreement and section 7A of the EUWA 2018 is to give the relevant EU law effect in domestic law.

The Northern Ireland Human Rights Commission ('NIHRC') have already launched a legal challenge against the Illegal Migration Act on the grounds, *inter alia*, that it is incompatible with Article 2 (1) of the Protocol.

The basis for this legal challenge is set out in a 'fact sheet' prepared by the NIHRC.[1]

It is beyond doubt that relevant provisions of EU law continue to have effect in Northern Ireland. The NIHRC, in relation to the Illegal Migration Act, have identified three aspects of EU law which, they say, would have relevance. This includes, for example, the EU 2005 Procedures Directive which at Article 7 (1) requires that a person can remain in the UK whilst an Asylum claim is processed. That expressly frustrates the intention of the Rwanda Bill, and due to section 7A (3), the Rwanda Bill would have to yield or, put another way, would be subjugated.

EU law is defined in Article 2 (a) of the UK-EU Withdrawal Agreement, and includes:

> *"(i) The Treaty on European Union ("TEU") the Treaty on the Functioning of the European Union ("TFEU") and the Treaty establishing the European Atomic Energy Community ("Eurotom Treaty") as amended or supplemented as well as the Treaties of Accession and the Charter of Fundamental Rights of the European Union, together referred to as "the Treaties."*

Therefore, alongside the continued application of relevant EU law which applies due to the interplay between Article 2 (1) and the relevant section of the Belfast Agreement, specifically the Charter of Fundamental Rights of the European Union (to be interpreted consistent with EU law principles rather than domestic law) will also continue to apply unabated.

That this is the position, with the Charter continuing (and thus being capable of being relied upon by illegal immigrants) in NI but not GB is put beyond doubt (as the Charter is excluded in the UK, but not in respect of NI) in *Amen Angesom's application* [2023] NIKB 102, in which Colton J at paragraph [94] succinctly summarises the issue:

> *[94] The combined effect of section 7A of the European Union (Withdrawal) Act 2018 ("EUWA 2018") and Article 2 of the Protocol limits the effects of section 5(4) and (5) of the EUWA 2018 and Schedule 1, para 3 of the same Act which restrict the use to which the Charter of Fundamental Rights and EU General Principles may be relied on after the UK's exit. Thus, the Charter*

[1] https://nihrc.org/news/detail/illegal-migration-act-challenge-factsheet

of Fundamental Rights remains enforceable in Northern Ireland and falls within the ambit of Article 2(1) of the Protocol.

The applicant in *Angesom's application* contended that as they had been removed from Northern Ireland to Scotland, that- owing to the continued application of relevant EU law etc set out above-there had been a diminution of the applicant's rights in so far as they could no longer (in Scotland) rely upon the EU Charter of Fundamental Rights, which they could avail of in Northern Ireland due to such provisions remaining in force as a consequence of Article 2 (1) of the Protocol.

In this judgment, Colton J accepted that the EU Charter of Fundamental Rights continued to apply in Northern Ireland, but not the rest of the UK, due to Article 2 (1), but rejected the relevant ground of challenge on the basis that in order to establish a diminution, the applicant had to show that the same rights were not effectively available within the ECHR. It was held the applicant could still avail of same substantive rights as that which was available in NI via the Charter of Fundamental Rights, albeit via a different pathway (the ECHR).

The issue will be immediately apparent: given the disapplication of significant parts of the ECHR by the Rwanda Bill, it could not- in future- be argued that there had been no diminution of rights owing to the fact the substantive rights still *prima facie* existed via the ECHR, because the ECHR has been disapplied.

Even if Colton J was wrong about that (drawing a comparison with the ECHR) it makes little difference for present purposes.

The salient point is that relevant EU law, and the Charter of Fundamental Rights, remains applicable in Northern Ireland, but not the rest of the United Kingdom.

In consequence, the threshold for deporting an illegal immigrant from Northern Ireland shall be higher than doing so from Great Britain, therefore- due to the Protocol- creating a difference in immigration/border controls for one part of the United Kingdom from another.

This has the effect of replicating the constitutional damage of the Protocol in relation to trade, by also now making Northern Ireland a place apart in relation to immigration and more broadly citizen's rights.

ECHR

The above analysis has focused on the continued application of EU law and the EU Charter of Fundamental Rights which, without any doubt, continue to apply and thus create a different framework between GB and NI.

However, it is also at least arguable (and has been deemed so at the leave stage in the legacy series of cases awaiting judgment) that Article 2 (1) also requires the continued application of the ECHR. If, as would seem to be the case on any reading of Article 2 (1), this is true, then the disapplication of relevant sections of the ECHR via Clause 3 the Rwanda Bill will have no effect in Northern Ireland. This is so because section 7A of the EUWA 2018 would have the effect of resolving the conflict between

Clause 3 (which, if the Bill becomes and Act will be 'section' 3) and Article 2 (1) by forcing what would then be section 3 to yield.

There is an additional freestanding point found in paragraph 2 of the Rights, safeguards and equality of opportunity section of the Belfast Agreement, which stands in the way of disapplying the Convention as incorporated into domestic law (via the Human Rights Act).

Paragraph 2 requires *"incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR)".*

Therefore, the requirement to incorporate the Convention must equally, at least arguably, act as a barrier to removing the Convention rights. If this point is good, then the continued application of the Convention- which is incorporated by the Human Rights Act- falls within the 'rights' conferred by Article 2 (1) and thus, pursuant to section 7A (3), prevents the Rwanda Bill from having effect in relation to disapplying the HRA in NI.

The constitutional impact of differing thresholds for the application of immigration laws

It is clear, notwithstanding even the issues in relation to the ECHR, that the continued application of relevant EU law underpinning that which is conferred by Article 2 (1) of the Protocol stands as a barrier to the UK Government giving effect to the intention of the Rwanda Bill, because Northern Ireland will stand apart as a 'haven' for illegal immigrants and the threshold for deportation will be significantly higher than GB.

Northern Ireland will allow illegal immigrants to benefit from being within the territory of the UK in NI, but simultaneously to rely upon the protection of EU law and the ECHR, which doesn't apply in the rest of the UK.

In theory, an illegal immigrant who could be deported to Rwanda from GB, could simply jump on the Stena Line and come to NI, at which point the Government could not deport them in the same way.

The issues the Government seek to overcome in GB (in terms of preventing legal challenges blocking UK immigration policy) will simply now be shifted and centralised to Northern Ireland because- due to the Protocol- the Government has created an effective hybrid EU-UK territory.

The constitutional consequences are immense. There is no other sovereign unitary territory in the world whereby there are two differing thresholds for the application of immigration law within the same territory.

In order to remedy this as a matter of urgency, the Rwanda Bill must be amended in the following way:

In Clause 3 after paragraph (5) insert:

(6) The provisions of this Act shall have effect in Northern Ireland, notwithstanding section 7A of the European Union (Withdrawal) Act 2018

In the absence of such an amendment, the Protocol's constitutional impact on more than just trade will continue to grow. The citizen's rights provisions in Article 2 of the Protocol are a trojan horse for increasing divergence in terms of citizenship between GB and NI, and the normalisation of NI existing as a hybrid EU-UK territory, increasing wedged out of the UK.

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