



Northern Ireland
Assembly

Research and Information Service Briefing Note

Paper 40/24

30 October 2024

NIAR 210-24

Assessing compliance with the UK Government's commitment to no diminution of rights in the Windsor Framework.

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This briefing note highlights a six-question test which has been used in the courts in Northern Ireland to determine if Northern Ireland or UK law is compliant with the commitment to no diminution of rights, in Article 2(1) of the Windsor Framework.

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Introduction

The UK Government has committed to ensuring that certain rights, safeguards and equality of opportunity protections set out in the Belfast (Good Friday) Agreement (B-GFA) and underpinned by EU laws, are not reduced following the UK's withdrawal from the EU. This commitment to "no diminution" of rights is set out in Article 2(1) of the Windsor Framework.¹ As a result of this commitment it is unlawful for the Northern Ireland Executive or Assembly to make any laws that would lead to a reduction of equality protections and rights in Northern Ireland.² Moreover, the UK Government must ensure compliance with all its commitments laid out in Withdrawal Agreement,³ including this "no diminution" commitment. In addition, individuals have the right to challenge any law that has been made by the UK Parliament or Northern Ireland Assembly, if they believe their rights have been reduced in breach of this commitment.⁴

Research on parliamentary scrutiny⁵ has highlighted that, in light of those provisions in law that guard against the creation of new laws that could breach this "no diminution" commitment, it is important that any new laws are effectively scrutinised or examined at an early stage. But how does one determine if this commitment has been breached?

In 2020, the UK Government's Explainer document on the "no diminution" commitment set out a three-question process to determine whether this commitment had been breached.⁶ This process was later built upon by the

¹ Article 2 [Protocol on Ireland/Northern Ireland](#) to the Withdrawal Agreement (as amended by the Windsor Framework)

² See Section 7A of the EU (Withdrawal Act) 2018, Section 6 and Section 24 of the Northern Ireland Act 1998

³ See Article 4(2) of [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](#) (2020).

⁴ Northern Ireland Office (2020). [Explainer: 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?](#) para 29.

⁵ Evans P, Horne A and Ghazi T (2021) [Legislative Scrutiny and the Dedicated Mechanism for monitoring Article 2 of the Ireland/Northern Ireland Protocol](#) (ECNI, 2021)

⁶ Northern Ireland Office (2020). [Explainer: 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?](#) para 10.

Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission, which have powers and duties to oversee⁷ the “no diminution” commitment, in their scoping paper on Article 2 of the Windsor Framework.⁸ The process has been further developed and reinforced by Court judgments on cases involving the “no diminution” commitment.⁹

This briefing note will highlight a six question “test” which has been used to determine if Northern Ireland or UK law is compliant with, or potentially in breach of, this “no diminution” commitment in the Windsor Framework. Although, ultimately it is up to the courts to decide if any law breaches the commitment.

This test has been used in a recent Court of Appeal judgment in September 2024 in relation to the judicial review brought by Dillon and others¹⁰ against the “Legacy Act” (Northern Ireland Troubles (Legacy and Reconciliation) Act 2023).¹¹ The Court of Appeal noted that the test:

...is not a binding or rigid code. In certain cases, it may be appropriate to address the questions in a different order: for instance, if it is clear that there has been no diminution in rights, a determination may not be required in relation to some of the other questions.¹²

⁷ The NIHR and ECNI are mandated by Article 2 (1) of the Windsor Framework as the “dedicated mechanism” for overseeing the UK Government’s commitment on rights and equality in Northern Ireland. Their powers and duties as set out in the Northern Ireland Act 1998 include monitoring the implementation of Article 2 Windsor Framework, providing advice to the UK Government, NI Executive and Assembly on Article 2 including on compliance issues, promoting understanding and awareness of Article 2; and bringing, intervening in or assisting individuals in legal proceedings.

⁸ Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland (2022). [Working Paper: The Scope of Article 2\(1\) of the Ireland/Northern Ireland Protocol](#). (ECNI, NIHR, 2022)

⁹ For example, [In re SPUC Pro-Life Ltd \[2023\] NICA 35](#), para 54; and [Re NIHR and JR295 \[2024\] NIKB 7](#), para 33.

¹⁰ [In re Dillon and others \[2024\] NICA 59](#)

¹¹ [Northern Ireland Troubles \(Legacy and Reconciliation\) Act 2023](#). The Act envisages ending the current system of criminal prosecutions, inquests and civil claims associated with the Troubles and replacing it with reviews carried out by a new body, the Independent Commission for Reconciliation and Information Recovery (ICRIR). It also provides for a grant of immunity to suspected perpetrators of Troubles-related offences who co-operate with these reviews.

¹² [In re Dillon and others \[2024\] NICA 59](#), para 96

In addition, the test may evolve in subsequent judgments and, in this context, it should be noted that the Northern Ireland Office has confirmed that it has lodged an application to challenge the Court of Appeal judgment in the *Dillon* case. More broadly, it should also be noted that the UK Government has committed to repealing and replacing the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023¹³ and has further committed to ‘...implementing mechanisms to address the legacy of the Troubles that fully comply with human rights’.¹⁴

1 The Six Question “test”

The six-question test is summarised below, using the Court of Appeal’s judgment in the *Dillon* case as an example, and the test is further illustrated in Figure 1.

Before determining if a right has been reduced, it is important to determine whether or not the right in question actually falls within the scope of the “no diminution” commitment in the Windsor Framework. This process is outlined in the first three questions:

- The **first question** is to identify if the right (or equality of opportunity protection) is included within the “Rights, Safeguards and Equality of Opportunity” (RSE) chapter of the B-GFA. The ECNI and NIHRC have highlighted that the purpose of the “no diminution” commitment was to protect equality and human rights, as set out in the B-GFA, after the UK’s withdrawal from the EU, recognising that many of these rights had been underpinned by EU law.¹⁵ In the *Dillon* case, the Court of Appeal stated that the rights set out in the RSE chapter of the B-GFA, consisted of a

¹³ Prime Minister’s Office (2024). [The Kings Speech](#) delivered on 17 July 2024

¹⁴ Northern Ireland Office (2024) [Written Ministerial Statement - Legacy - Northern Ireland](#) (7 October 2024).

¹⁵ Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland (2022). [Working Paper: The Scope of Article 2\(1\) of the Ireland/Northern Ireland Protocol](#). (ECNI, NIHRC, 2022), para 2.1-2.4.

broad definition of “civil rights” which extended beyond those rights specifically listed in that chapter.¹⁶ The Court of Appeal concluded that the rights of the victims and their families in this case *do* fall within this broad commitment to civil rights and, more specifically, the rights of victims that are set out in the RSE Chapter of the B-GFA.¹⁷

- The **second question** is to determine if the right was given effect in (that is, protected by) Northern Ireland law on or before 31 December 2020 (the end of the Brexit transition period). In the *Dillon* case, the Court of Appeal highlighted that in this case the Right was protected, on or before 31 December 2020, by the Northern Ireland Victim Charter.¹⁸ However, the EU Victims Directive could also have been used directly to protect rights were these weren’t included in the Victim Charter.¹⁹
- The **third question** is to identify if the Northern Ireland law was underpinned by EU law. In our example, the Court of Appeal concluded that in the *Dillon* case, the Victim Charter was underpinned by EU law – that is, the EU Victims Directive - which is to be interpreted in light of the Charter of Fundamental Rights (CFR) and the general principles of EU law.²⁰

As the right in this example falls within the scope of the “no diminution” commitment, whether or not the commitment has been breached can now be assessed. This process is outlined in the final three questions:

- The **fourth question** is to identify if the EU law has been removed, in whole or in part, following withdrawal from the EU. In our example, the

¹⁶ [In re Dillon and others \[2024\] NICA 59](#), para 115

¹⁷ As above, para 117

¹⁸ As above, para 123

¹⁹ As above, para 125

²⁰ As above, para 126

court decided that the underpinning EU law *had* been removed due to the effects of the EU Withdrawal Act (2018).²¹

- The **fifth question** is to determine if this removal has led to a diminution or reduction in the enjoyment of this right. In our example, the Court of Appeal concluded that it was “self-evident that there has been a diminution of the rights enjoyed by the applicants (*Dillon and others*) in various respects..”.²² The court highlighted that the granting of immunity meant that “no prosecution is possible at all under the 2023 Act”,²³ which is not compatible with the Victims Directive.²⁴ In addition, victim involvement has been limited²⁵ and the ability to seek compensation (for example, via civil action) has been effectively removed, contrary to the Victims Directive.²⁶
- The **sixth question** is to determine if this diminution or reduction could have occurred if the UK had remained in the EU. In the *Dillon* case the Court of Appeal concluded that it was clear that this reduction in rights would not and could not have occurred but for Brexit.²⁷ The Legacy Act reduces the rights of victims and their families under the EU Victims Directive in a way which would not have been lawful had the UK remained in the EU.²⁸

²¹ [In re Dillon and others \[2024\] NICA 59](#), para 128

²² As above, para 129

²³ As above, para 130

²⁴ As above, para 131

²⁵ As above, para 131

²⁶ As above, para 132-133

²⁷ As above, para 134

²⁸ As above, para 135

2 Remedies

As all six steps of the test set out above had been met, the Court of Appeal agreed with the High Court that the Legacy Act had resulted in a reduction in rights and a breach of the “no diminution” commitment in the Windsor Framework. As a result of the breach, the Court of Appeal agreed that the parts of the Legacy Act that resulted in a reduction of rights set out in the Victims Directive (for example, in relation to granting immunity and compensation) should be “disapplied” in Northern Ireland.²⁹ This decision is significant as it involves setting aside the offending parts of this piece of UK parliamentary law. The “disapplication” remedy is not new as, prior to Brexit, it applied where domestic law was found to be in conflict with EU law, and reflects the commitment that the UK Government made in the EU Withdrawal Agreement and actioned through the Withdrawal Act³⁰ to provide the Courts powers “to disapply inconsistent or incompatible domestic provisions”.³¹ This is clearly a more significant remedy than that provided for in the Human Rights Act 1998 for breaches of Convention rights.³² In these cases, the Court can make a “declaration of incompatibility” and it is ultimately up to the UK Parliament to change the law. The Northern Ireland Human Rights Commission is planning to commission further research to explore the range of remedies available for addressing a breach of the commitment under Article 2(1) of the Windsor Framework.³³

3 Conclusion

In conclusion, the scope of “no diminution” commitment in the Windsor Framework can be observed in the range and complexity of the cases that have

²⁹ [In re Dillon and others \[2024\] NICA 59](#), para 154

³⁰ Section 7A of the EU (Withdrawal Act) 2018

³¹ See Article 4(2) of [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](#) (2020).

³² Section 4 of the Human Rights Act 1998

³³ Northern Ireland Human Rights Commission (2024) [Call for Expression of Interest on Remedies and Windsor Framework Article 2](#). (NIHRC, July 2024)

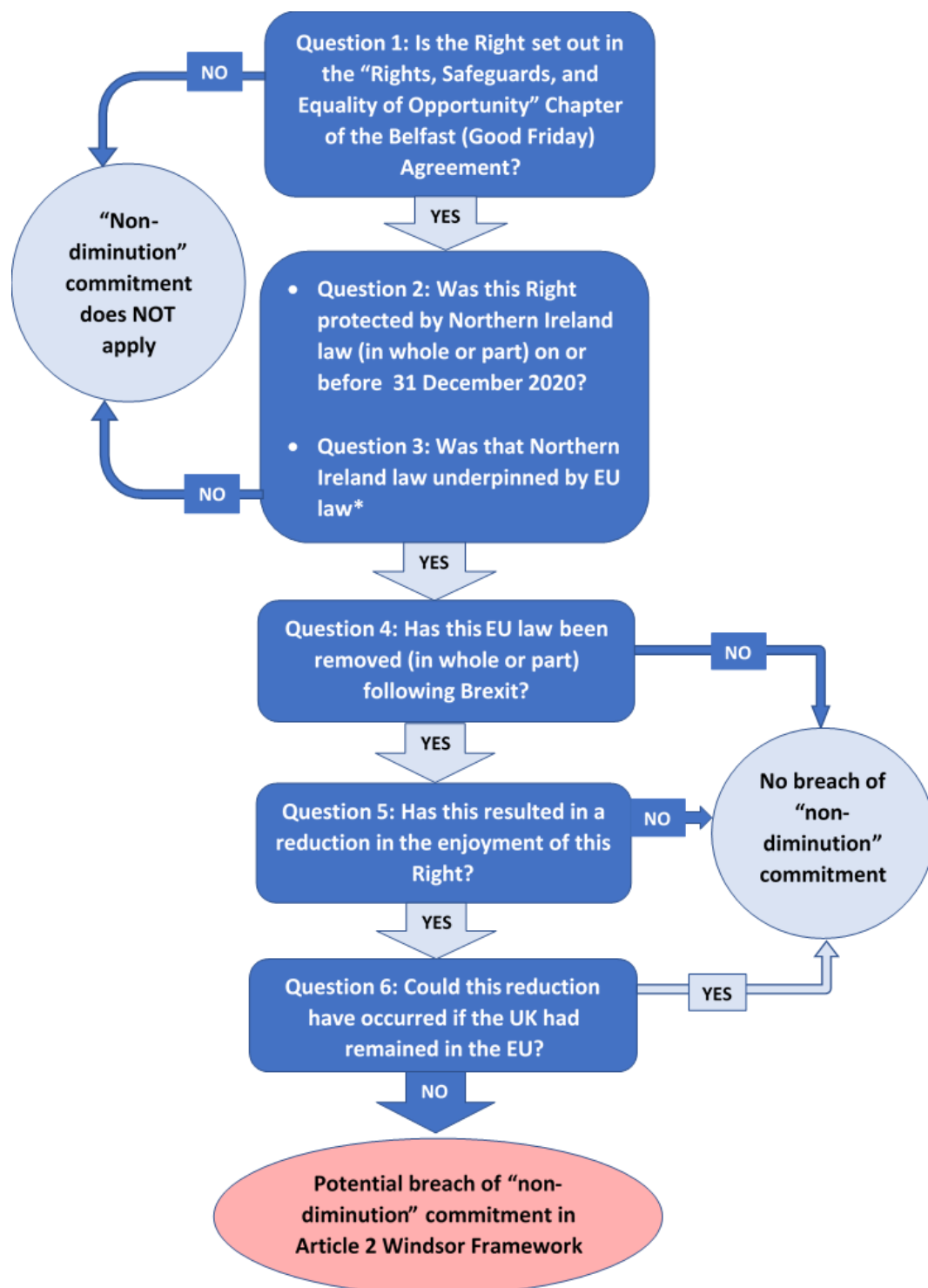
been taken by individuals and organisations to challenge UK law on these grounds. These cases have, so far, involved an array of different issues including: abortion provisions;³⁴ the legacy of the Troubles,³⁵ immigration and asylum issues.³⁶ In addition, the remedies available to the courts, where they find a breach of the commitment, are significant. It is important, therefore, that proposed laws are assessed and scrutinised to avoid potential breaches of the “no diminution” commitment in the Windsor Framework.

³⁴ [In re SPUC Pro-Life Ltd \[2023\] NICA 35](#).

³⁵ [In re Dillon and others \[2024\] NIKB 11](#) and [in re Dillon and others \[2024\] NICA 59](#).

³⁶ [In re NIHRC and JR295 \[2024\] NIKB 7](#) and [in re Angsom \[2023\] NIKB 102](#).

Figure 1: Illustration of six question test for determining whether Northern Ireland law is compliant with the no diminution commitment in Article 2(1) of the Windsor Framework



*[In re Dillon and others \[2024\] NICA 59](#), the Court of Appeal reinforced that sometimes an EU law (for example, the Victims Directive) can be used directly in Court (without NI law) if it satisfies certain conditions and was part of national law prior to Brexit on this independent basis [para 125].