NORTHERN IRELAND HUMAN RIGHTS COMMISSION

The Environment, Human Rights and the Windsor Framework

Ciara Brennan
Mary Dobbs
Alison Hough
Orla Kelleher
and
Lisa Whitten

February 2025

This paper was written by Dr Ciara Brennan (Environmental Justice Network Ireland - EJNI), Dr Mary Dobbs (Maynooth University), Alison Hough BL (Technological University of the Shannon Athlone and EJNI), Dr Orla Kelleher (Maynooth University and EJNI) and Dr Lisa Claire Whitten (Queen's University Belfast) for the Northern Ireland Human Rights Commission. The views expressed in the paper do not necessarily represent the views of the Northern Ireland Human Rights Commission, nor the employers of the authors. Responsibility for any statements, errors or omissions in this report rests with the authors. The paper is not intended to be relied upon as legal advice applicable to any individual case.

Paper finalised February 2025.

Northern Ireland Human Rights Commission, 4th Floor, Alfred House,
19-21 Alfred Street, Belfast BT2 8ED.

About the authors

Dr Ciara Brennan

is a founder and the Director of Environmental Justice Network Ireland (EJNI). Dr Brennan's key research interests are environmental justice, environmental governance and the enforcement of environmental law. In her previous career as an academic at Newcastle University Law School and with her ongoing research and advocacy work at EJNI, Dr Brennan has extensive project management experience in delivering high impact, rapid response research and advocacy outputs with a particular focus on delivering highly collaborative, transdisciplinary projects that relate to shared environmental challenges on the island of Ireland and across Europe. EJNI's goal is to create a community of practice connecting academic researchers, NGOs, lawyers and environmental defenders to work together to address the root causes of environmental injustice.'

Dr Mary Dobbs

is an associate professor in the School of Law and Criminology in Maynooth University, having joined from Queen's University Belfast in 2020. She specialises in environmental law and governance, including agri-environmental issues and Brexit. She has published widely in the field, including an award-winning co-authored book on Brexit and Agriculture. Mary undertakes extensive public engagement and current is a Special Advisor regarding agricultural policy for a Scottish Parliamentary Committee; a member of the College of Experts for the Office for Environmental Protection; and a member of the Stakeholder Reference Group for the current NI review of environmental governance. Previously, Mary was the legal expert appointed to the Expert Advisory Group for the Irish Citizens' Assembly on Biodiversity Loss.

Alison Hough BL

is a Senior Lecturer and researcher in Technological University of the Shannon (formerly Athlone Institute of Technology). Previously she practiced at the Irish Bar for eight years. Alison has a track record of high-impact research at Irish and EU level, as well as high-quality peer reviewed publications in environmental law journals on the topic of the Aarhus Convention, and on Brexit. She currently leads the Environmental Democracy Observatory for the EJNI. This is a project examining EU and domestic law for compliance with international law obligations relevant to environmental democracy. Co-designed, collaborative projects with NGOs and other stakeholders, are a priority for her. Currently, she is engaged on a variety of issues including Brexit and Environment, transboundary public participation, intersectional public participation and the ways in which technology shapes and is shaped by the law. She volunteers/ has volunteered with a variety of local organisations including at board and operational levels.

Dr Orla Kelleher

was appointed as an assistant professor at the School of Law and Criminology at Maynooth University in August 2022. Her research and teaching focuses on climate, environmental, and constitutional/human rights law. She was awarded her PhD in September 2022 from University College Dublin. She holds an LLM from the College of Europe and a BCL (Law and French) degree from University College Cork. She is a qualified barrister having been called to the Irish Bar in 2020. Over the past three years, Orla has been funded to conduct engaged research on EU climate law, strategic environmental litigation, just transitions and environmental rights with Environmental Justice Network Ireland. She has also done work with the Community Law and Mediation Centre for Environmental Justice on strategic environmental and climate litigation.

Dr Lisa Claire Whitten

is a research fellow at Queen's University Belfast. Her current research focuses on the inclusivity of UK trade agreements from a devolved perspective as well as on the trade and regulatory impacts of the UK's EU Exit generally and in particular in Northern Ireland due to its unique arrangements under the Windsor Framework. Other recent research undertaken by Lisa Claire has included production of an 'EU Law Tracker' on alignment with EU law for the Constitution, Europe, External Affairs and Culture in the Scottish Parliament; a report on regulatory divergence in Northern Ireland for the NI Department for the Economy and an assessment of regulatory divergence in nutrient management strategies on the island of Ireland for the Office of Environmental Protection. Prior to entering academia, Lisa Claire held a variety of posts in the public sector including working for an MP in Westminster and in the Office of the Northern Ireland Executive in Brussels.

Contents

Executive Summary

This report examines the relationship between Article 2 of the Windsor Framework,[1] which deals with the rights of individuals, and environmental protections. It does so in light of the 1998 Belfast 'Good Friday' Agreement (the 1998 Agreement), which is central to understanding Article 2. More specifically, this report considers two main questions:

1) **Whether and to what extent does Article 2 of the Windsor Framework provide meaningful protection of environmental human rights and of other human rights that could be used to protect the environment?**

2) **Does evidence exist which indicates that Article 2 protections may be triggered[2] (now or in the foreseeable future) in an environmental context?**

The research underpinning this report is desk-based research which references a range of transnational elements, key legal and political sources as well as relevant supplementary literature. While the analysis centres on Article 2 of the Windsor Framework and the Rights, Safeguards and Equality of Opportunity (RSE) section of the 1998 Agreement, it also considers rules of customary international law regarding interpretation – as well as other relevant provisions in agreements such as the remainder of the EU-UK Withdrawal Agreement, the subsequent EU-UK Trade and Cooperation Agreement (TCA), and some international agreements between Ireland and the United Kingdom (UK) or where the UK and the European Union (EU) are common signatories.

This is a politically sensitive, technical and rapidly evolving area of law which is playing out within a more general post-Brexit upheaval of Northern Ireland's legal landscape. However, these changes may bring important new opportunities, and the no diminution requirements of Article 2 in particular are 'likely to be at the forefront of novel legal rights analysis in the coming decades'.[3] This report explores some of the possibilities regarding human rights and the environment that are emerging within this complex legal context. This is a particularly important issue in Northern Ireland where the approach of successive devolved and direct rule governments to environmental protection has been the subject of significant and sustained criticism.[4]

1 As part of a package of measures agreed between the UK and the EU in February 2023 regarding the operation and implementation of the Protocol on Ireland/Northern Ireland (the Protocol) which forms part of the UK-EU Withdrawal Agreement, the two parties jointly declared that the Protocol as amended by a related Joint Committee Decision, should now be known as the 'Windsor Framework' and that both the UK and EU could use the term 'Windsor Framework' in their respective domestic law when referring to provisions of (hitherto known as) the Protocol. This report adopts and reflects the same position in that the title 'Windsor Framework' is used throughout except when the specific reference is to the original unamended Protocol. See: *Official Journal* (2023) 'Joint Declaration No. 1/2023 of the Union and the United Kingdom in 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 Economic Atomic Energy Community' 17.4.2023 L102/87.

2 I.e. that a potential diminution of relevant rights (or safeguards, as discussed below) within the scope of Article 2 has occurred or is likely to occur.

3 A. O'Donoghue, 'No Diminution of Rights, Safeguards or Equality – Article 2 of the Ireland/Northern Ireland Protocol and Legal Innovation'. Available at https://dcubrexitinstitute.eu/2021/12/no-dimunution-article-2-northern-ireland-protocol/.

4 C. Brennan, R. Purdy and P. Hjerp, 'Political, economic and environmental crisis in Northern Ireland: the true cost of environmental governance failures and opportunities for reform' (2017) *Northern Ireland Legal Quarterly* 68 (2), 123-157.

Chapter 1 outlines the approach adopted in the preparation of this report and explores some of the parameters of the debate around the Windsor Framework, its interaction with the 1998 Agreement and the subsequent implications for environmental rights and other human rights which may be relevant to environmental protection. It outlines briefly the basis for a purposive, generous approach to interpreting both Article 2 of the Windsor Framework and the 1998 Agreement.

Chapter 2 explores how environmental rights and safeguards might be read into the RSE section of the 1998 Agreement and concludes that this covers a wide range of potential rights and safeguards.

Chapter 3 considers whether Article 2 of the Windsor Framework provides meaningful protection of environmental human rights. Central to this analysis are the principles of customary international law and the question of whether the recent Northern Ireland Court of Appeal judgment in *SPUC Pro Life Limited v Secretary of State for Northern Ireland (and others)* (2023) (the *SPUC* case or the *SPUC* judgment)[5] creates an appropriate test for Article 2(1) of the Windsor Framework in the context of environmental rights (the *SPUC* test). The analysis indicates that the *SPUC* test is problematic in an environmental context and that a more flexible test may be required given the complex nature of environmental law and because of the need for a more purposive, expansive approach justified in Chapter 1. Crucially, as highlighted in the subsequent Northern Ireland Court of Appeal's *Legacy* judgment, the *SPUC* test is only an interpretative 'aid and not a binding or rigid code'.[6]

Chapter 4 explores the broad impact of Brexit on environmental protection in Northern Ireland, providing the context for a closer examination of whether any diminution of environmental rights has occurred as a function of the Brexit process in general.

Chapters 5, 6 and 7 consider three practical case studies which illustrate how Article 2 of the Windsor Framework protections might be triggered now, or in the immediate future – exploring questions around air quality, procedural environmental rights and nature conservation. These case studies have been selected because of their significance for environmental protections, but also due to their diverse nature.

Chapter 8 draws together our overall conclusions. It establishes that Article 2 of the Windsor Framework has the potential to play a significant role in an environmental context despite the lack of express focus on environmental human rights, standards, or measures within the provision. However, the analysis also indicates that this potential is shrouded in complexity and will inevitably be shaped by the approach of the courts' interpretation of the scope of Article 2. Chapter 8 further includes an annotated table indicating some environmental measures that fall within the scope of Article 2.

5 *SPUC Pro Life Limited v Secretary of State for Northern Ireland (and others)* [2023] NICA 35, para 54.
6 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 96.

The main findings of the report can be summarised as follows:

- The RSE section of the 1998 Agreement protects a broad suite of rights, going beyond those expressly mentioned.[7] This includes the civil and political rights mentioned and the substantive and procedural human rights contained in the European Convention on Human Rights, but goes further. Human rights are indivisible, interdependent and interrelated. This means that all human rights have an environmental aspect, including those expressly contained in the 1998 Agreement. Conceptualising a healthy environment (e.g. clean air, a stable climate, water, soil, etc.) as a precondition for the enjoyment of all human rights is considered in Chapter 2.4. This is further supported by the RSE section addressing environmental matters in the provision on regional development, alongside the 1998 Agreement's support more generally for all-island cooperation on the environment. Together, this means that **there is significant scope for 'arguing that the 1998 Agreement establishes a wide range of procedural and substantive environmental rights and other human rights that can protect the environment**.

- Alongside these human rights, the **RSE section also provides for environmental safeguards** that can similarly fall within Article 2 of the Windsor Framework (and would further environmental and other human rights).

- The Northern Ireland Court of Appeal has considered the implications of Article 2 of the Windsor Framework in the *SPUC* case and has established a 'test' to help determine its applicability. **The Northern Ireland Court of Appeal in the *Legacy* judgment[8] provided an essential gloss, where it noted that the *SPUC* test is an interpretative aid, not a binding code.** This is the preferred approach as an overly rigid application of the six-part test could artificially limit the application of Article 2 of the Windsor Framework.

- A key purpose of the Windsor Framework is to prevent damage to the 1998 Agreement – in 'all its dimensions'.[9] This includes an express provision (Article 2) which is designed to prevent the rights established by the 1998 Agreement from being eroded post-Brexit. **Because the 1998 Agreement establishes an extensive range of rights and safeguards (subject to a**
- **purposive interpretation), including in the context of environmental protection, this also means that Article 2 of the Windsor Framework applies to a potentially extensive range of rights and safeguards**.

- Brexit has had a significant impact on the structures and laws designed to deliver environmental protection in Northern Ireland – mainly because

7 Ibid, para 115.
8 Ibid, para 96.
9 Windsor Framework Article 1(3).

the environment is an area of law which has been heavily influenced by the need to comply with EU environmental rules and standards. **Environmental rights are a category of rights particularly vulnerable to potential reduction, or 'diminution' as post-Brexit governing arrangements replace those that followed from EU membership. The same is true for environmental safeguards.**

- This analysis indicates that **post-Brexit diminution of environmental rights and safeguards across a range of areas are likely to fall within the scope of Article 2 and that these diminutions should be challenged in order to uphold the environmental rights of individuals in Northern Ireland** and, in some instances, on the island of Ireland.

Glossary of Terms

Abbreviations

BIC	British-Irish Council
CAP	Common Agricultural Policy
CJEU	Court of Justice of the European Union
DAERA	Department of Agriculture, Environment and Rural Affairs
DUP	Democratic Unionist Party
ECHR	European Convention on Human Rights
ECNI	Equality Commission for Northern Ireland
ECtHR	European Court of Human Rights
EU	European Union
NAPCP	National Air Pollution Control Programme
NGO	Non-governmental organisation
NIHRC	Northern Ireland Human Rights Commission
NIO	Northern Ireland Office
NSMC	North South Ministerial Council
OEP	Office of Environmental Protection
OSPAR	Oslo and Paris Convention for the Protection of the Marine Environment of the North-East Atlantic
REUL	Retained EU law
TCA	EU/UK Trade and Cooperation Agreement
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UNECE	United Nations Economic Commission for Europe
VCLOT	Vienna Convention on the Law of Treaties

Key Concepts

The 1998 Agreement: An international treaty that was signed between the UK and Ireland on 10 April 1998, comprised of two parts, the Multi Party Agreement which was also signed by the two States and the political parties and stakeholders in Northern Ireland, and the British-Irish Agreement signed only by the States on the same date. The provisions of the 1998 Agreement, in effect, brought an end to a prolonged period of intercommunal conflict in Northern Ireland known as 'The Troubles'.

The Windsor Framework: The Windsor Framework is the new title by which the Protocol on Ireland/Northern Ireland is now known, since 2023. It is a legal text that forms part of the EU-UK Withdrawal Agreement and makes a series of provisions regarding, primarily, Northern Ireland, but also Ireland. The stated objective of the Windsor Framework is to 'maintain necessary conditions for North-South cooperation, avoid a hard border, and protect the 1998 Agreement in all its dimensions' (Article 1(3)). To this end it makes provisions for certain EU laws – particularly concerning trade in goods – to continue to apply to the UK in respect of Northern Ireland, thereby negating the need for checks and controls to be implemented on the land border on the island of Ireland. This report focuses on Article 2 of the Windsor Framework, with other provisions only mentioned to the extent of their relevance to it.

The original Protocol: This phrase is used where we need to refer to the original version of the Windsor Framework/the Protocol on Ireland/Northern Ireland, prior to the changes introduced in 2023. Amendments to the text of the original Protocol and to arrangements for its implementation were agreed between the UK and EU in February 2023. Much of the substance of these amendments was laid down in a Joint Committee Decision 1/2023 subsequently adopted by the EU-UK Withdrawal Agreement Joint Committee. Among the agreed changes was the introduction of a new title by which the legal text would be known – the Protocol as amended by Joint Committee Decision 1/2023 is to be known as the 'Windsor Framework' – this is the title used throughout this report except when referring to the original (unamended) Protocol.

Customary International Law: refers to legal obligations binding on all states which gain widespread acceptance among international actors arising from established international practices of States repeated over time. This can be contrasted with international law obligations arising from international treaties.

Customary International Law principles of Treaty interpretation: Relevant when examining international agreements. The Vienna Convention on the Law of Treaties (VCLOT)[10] codifies many of the customary international law principles regarding interpretation of international law.

10 The Vienna Convention on the Law of Treaties 1969. Available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

Ecosystems Approach: This approach to environmental management recognises that various environmental elements cannot be managed in isolation from each other, and that each exists in an interconnected web which is the ecosystem. This is exemplified by the Convention on Biodiversity which expressly espouses an ecosystems approach to environmental management, based on best scientific evidence, and recognises humans and human society as part of the ecosystems of the earth.

Ecosystem Services: This concept describes the 'services' provided by a healthy, functioning ecosystem that are essential to human survival, health and wellbeing. They include clean air, clean water, food production (for example 35% of the worlds food crops require pollinators).[11] These also include the 'wellbeing' benefits provided by intact natural landscapes and ecosystems such as social, recreational, cultural and physical benefits to humans.

Environmental human rights/environmental rights: Human rights regarding the environment, encompassing the interlinked 'substantive' and 'procedural' environmental rights.

Environmental protections/safeguards: A wide-sweeping concept that encompasses both environmental rights and the array of environmental standards, measures, procedures, governance structures etc. that promote environmental rights and other rights in an environmental context/for environmental benefits.

Green/environmental interpretation/'Greening' existing human rights: This means the application of existing human rights (the right to life or the right to respect for private, family life and the home) in environmental rights contexts, such as finding that environmental pollution interferes with an individual's life, health, wellbeing or quality of life. A healthy environment is understood as a precondition for the enjoyment of all human rights. As such, it is possible to 'green' existing rights and identify a healthy environment as necessary to support or complement existing rights. It involves identifying environmental dimensions to existing rights that further those rights contained (expressly or implicitly) within a legal document, where environmental rights are not contained there themselves. For example, the right to life (which underpins other rights) and right to bodily integrity are furthered by clean air, water, soil etc, as is recognised by courts (including the European Court of Human Rights).[12]

Non-diminution/no diminution: This means a prohibition on the act, process or instance of diminishing or decreasing. In other words, 'No diminution grants no space for backward movement on rights. The snapshot of the law is fixed.'[13]

Polluter pays principle: those who create environmental harms should be responsible for the resulting costs and pay for the avoidance or management of harms.

11 A-M. Klein et al., 'Importance of pollinators in changing landscapes for world crops' (2007) 274 Proceedings of the Royal Society, B. 303–313.
12 See the discussions below, for instance, in Chapters 2 and 5.
13 O'Donoghue, n3.

Precautionary principle: in the case of scientific uncertainty, actions should still be taken to reduce, minimise or avoid environmental (or human health) harms/degradation to the environment. Alternatively: scientific uncertainty should not be used as a reason not to take measures to reduce, minimise or avoid environmental (or human health) harms/degradation to the environment.

Preventative principle: actions should be taken to reduce, minimise or avoid environmental (or human health) harms/degradation to the environment.

Procedural environmental human rights: These primarily include the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) rights, i.e. a right to access to environmental information; a right to participate in environmental decision-making; and a right to access to justice in environmental matters. These also encompass general fair procedures/fair trial guarantees in an environmental context, and many of the principles of 'natural and constitutional justice' recognised in the UK and Irish legal systems.

Relationship between environmental human rights and other human rights: Human rights are clearly interrelated, interdependent and indivisible[14], and other human rights and protections can foster environmental rights (and vice versa).[15] For instance, rights to life or health are dependent on a clean environment, clean water, clean air, adequate shelter, and freedom from discrimination in access to medical protection and rights protection etc. and simultaneously the right to life or procedural rights promote environmental rights.

Subsidiarity: A core principle of EU law (Article 5 TEU) that applies where the EU does not have exclusive competence, e.g. competence is shared between the EU and the Member States in environmental matters. Subsidiarity provides that the EU should only act if the desired objective cannot be effectively achieved by individual Member State action and can be better achieved at EU level. If the EU does act, it should only act to the extent necessary to achieve such objectives (i.e. proportionality).

Substantive environmental human rights: Refers to a right to a minimum level of environmental quality. For example, a right to a clean and healthy environment; a right to a sustainable, resilient environment; a right to a stable climate; a right to clean air and water etc. These can also include elements such as a right to food. These rights frequently are linked to the rights of future generations, as reflected in ideas of sustainability.

14 E.g. see Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April - 13 May 1968, UN Doc A/CONF.32/41 (1968), para 13; see also United Nations Audio Visual Library of International Law, Proclamation of Tehran at 18 September 2010; Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc A/CONF.157/23 (1993); World Conference on Human Rights, 'Vienna Declaration and Programme of Action', Report, Vienna, 14-25 June 1993, UN Doc A/CONF.157/23 (1993); 32 ILM 1661 (1993), I.5; UN Committee on the Rights of the Child, General Comment No.26 on children's rights and the environment, with a special focus on climate change (2023), point 13.

15 Ibid.

Chapter 1:

The Windsor Framework, the 1998 Agreement and the Question of Environmental Rights

1.1 Introduction

Northern Ireland has profound environmental challenges.[16] Prior to Brexit, the state of the environment and environmental governance had been highlighted on numerous occasions as being in dire need of reform and improvement.[17] Although Northern Ireland's environmental protections while part of the EU were far from perfect, pre-Brexit the EU made a major contribution to NI's environmental governance (particularly around the modernisation of environmental legislation and to some extent regulation) and ensured that it was at least possible to challenge and rectify many issues through the various available oversight and accountability mechanisms. There has been significant concern that the quality of environmental governance would decline even further post-Brexit,[18] an issue exacerbated by the protracted period of government collapse and the wranglings over the Windsor Framework between 2022 and 2024. Given this problematic context and evidence of significant ecological degradation, there is now a clearly recognised need for individuals in Northern Ireland to be able to assert their right to a healthy environment, or to draw on human rights more generally to help protect the environment – as well as for appropriate bodies to do similarly.

This report focuses on the relationship between Article 2 of the Windsor Framework,[19] which deals with the rights of individuals, and environmental protections.

16 E.g. V. Gravey, 'Wither Green Brexit? Northern Ireland's environment and the new Brexit Deal'. Available at https://dcubrexitinstitute.eu/2019/11/wither-green-brexit-northern-irelands-environment-and-the-new-brexit-deal/.

17 E.g. House of Commons Environment Committee, 'Environmental Issues in Northern Ireland (the 'Rossi' Report)' HC (1990-91) 39 (London: HMSO); R. Macrory, *Transparency and Trust: Reshaping Environmental Governance in Northern Ireland* (UCL Press, 2004); T. Burke, G. Bell and S. Turner, *Foundations for the Future: The Review of Environmental Governance* (Final report. May 2007); Brennan, Purdy and Hjerp, n4; S. Turner, 'Transforming Environmental Governance in Northern Ireland: Part One: The Process of Policy Renewal' (2006) *Journal of Environmental Law* 55.

18 S. Turner, 'Transforming Environmental Governance in Northern Ireland Part Two: The Case of Environmental Regulation' (2006) *Journal of Environmental Law* 18, 245; S.Turner, 'The Review of Environmental Governance in Northern Ireland' (2009) *Environmental Law Review* 2, 10–16; C. Brennan, 'The Enforcement of Waste Regulation in Northern Ireland: Deterrence, Dumping and the Dynamics of Devolution' (2016) *Journal of Environmental Law* (28) 3, 471-496; C. Brennan, M. Dobbs, V. Gravey, 'Out of the frying pan, into the fire? Environmental governance vulnerabilities in post-Brexit Northern Ireland' (2019) *Environmental Law Review* 21(2), 84-110; A. Hough, 'The Potential of the Good Friday Agreement to Enhance post-Brexit Environmental Governance on the island of Ireland' (2019) *Irish Planning And Environmental Law Journal* (2), 55-65.

19 Sometimes referred to as the 'Northern Ireland Protocol' or 'the Protocol' or, following agreement between the UK and EU on arrangements for its implementation in February 2023, the 'Windsor Framework'. Unless referring to the original, unamended text of the Protocol, the term 'Windsor Framework' is used throughout this report.

It does so in light of the relevant provisions of the 1998 Agreement, which are central to understanding Article 2.[20] While there has already been some significant, preliminary research undertaken regarding Article 2,[21] and into the environmental aspects of the 1998 Agreement,[22] and likewise regarding the role of other Windsor Framework provisions regarding the environment,[23] to-date there has been no investigation into the potential role of Article 2 in the context of the environment. This is unsurprising in a debate that has largely been dominated by trade and political concerns and where the parameters of Article 2 remain relatively opaque. However, as shall be seen, Article 2 holds great relevance for the environment, regarding both environmental rights and environmental protections (or safeguards) more generally. Article 2 of the Windsor Framework entails a binding commitment by the UK Government in an international agreement. It is connected to the 1998 Agreement because Article 2(1) creates a no diminution guarantee[24] for the rights and safeguards encompassed in the RSE section of the 1998 Agreement.[25] This means that to establish how Article 2 impacts on environmental rights, it is necessary to consider it in light of environmental rights and protections that we can read into the 1998 Agreement.

This Chapter first explains the relationship between human rights and the environment. It then provides a justification for an expansive/purposive approach to interpreting the 1998 Agreement and Article 2 of the Windsor Framework. As shall be seen in this chapter and across the report, we consider that there are several pathways to identifying relevant environmental rights and

20 The Good Friday/Belfast Agreement 1998. Available at: https://peacemaker.un.org/sites/default/files/document/files/2024/05/ie20gb980410northern20ireland20agreement.pdf. The agreement has no official name, and is variously called the Good Friday 1998, the Belfast Agreement 1998, the Northern Ireland Peace Agreement 1998 or British-Irish Agreement 1998, and hereinafter described as the 1998 Agreement.

21 E.g. T. Hervey, 'Brexit, Health and Its Potential Impact on Article 2 of the Ireland/Northern Ireland Protocol'. Report for the NIHRC, March 2022. Available at: https://nihrc.org/publication/detail/brexit-health-and-its-potential-impact-on-article-2-of-the-ireland-northern-ireland-protocol; NIHRC and ECNI, 'The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol'. Working Paper, December 2022. Available at: https://nihrc.org/publication/detail/nihrc-and-ecni-working-paper-the-scope-of-article-21-of-the-ireland-northern-ireland-protocol; A. Harvey, 'Human Trafficking and Article 2 of the Ireland/Northern Ireland Protocol'. Report for the NIHRC, March 2022. Available at https://nihrc.org/publication/detail/human-trafficking-and-article-2-of-the-ireland-northern-ireland-protocol; S. Craig and E. Frantziou, 'Understanding the Implications of Article 2 of the Northern Ireland Protocol in the Context of EU Case Law Developments' (2022) *Northern Ireland Legal Quarterly* 73, 65; A. O'Donoghue, 'Non-Discrimination: Article 2 in Context', in F. Fabbrini (ed), *The Law and Politics of Brexit,* (OUP, 2022); and T. Lock, E. Frantziou and A. Deb, '*The Interaction between the EU Charter of Fundamental Rights and the general principles of EU Law with the Ireland/Northern Ireland Protocol*'. Report for the NIHRC, March 2024. Available at: https://nihrc.org/publication/detail/nihrc-report-on-eu-charter-of-fundamental-rights-post-brexit.

22 Hough, n18.

23 E.g. V. Gravey and L. Whitten, 'The NI Protocol and the Environment: the implications for Northern Ireland, Ireland and the UK'. Environmental Governance Island of Ireland Network Policy Briefs 1/2021, March 2021. Available at: https://www.brexitenvironment.co.uk/research-projects/egii/; C. Brennan at al., 'Linking the Irish Enivoronment'. Report commissioned by NIEL and IEN, 2023. Available at:, https://ejni.net/wp-content/uploads/2023/06/Linking-the-Irish-Environment-Final-Report-24-May-2023.pdf; M. Dobbs and V. Gravey, 'Environment and Trade' in C. McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge University Press, 2022); and V. Gravey and L. Whitten, 'The Windsor Framework and the Environment'. Available at: https://www.brexitenvironment.co.uk/2023/03/07/the-windsor-framework-and-the-environment .

24 NIHRC and ECNI, 'The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol'. Working Paper, December 2022. Available at: https://nihrc.org/publication/detail/nihrc-and-ecni-working-paper-the-scope-of-article-21-of-the-ireland-northern-ireland-protocol.

25 While this is not a static guarantee, and is one which arguably requires a measure of alignment with the case law of the CJEU as it develops to interpret the relevant areas influenced by the RSE guarantees, it does not require the same degree of dynamic alignment that is necessary in relation to the laws listed in Annex I of the Protocol.

other human rights and safeguards that fall within the scope of Article 2 and that these pathways may provide an entry point to encompass a wide range of protections for people living in an area with profound environmental challenges.

1.2 The Relationship Between Human Rights and the Environment

According to the UN Human Rights Council, there are different ways of framing the relationship between human rights and the environment.[26] These different framings are capable of co-existing and do not necessarily rule one another out.[27] One approach is to conceptualise a 'healthy', 'adequate', 'clean', 'safe', 'sustainable' or 'ecologically balanced'[28] environment (which necessarily includes amongst other things a safe climate system) as a precondition for the enjoyment of human rights.[29] This approach underscores the fact that environmental degradation and dangerous global warming can affect the realisation of the whole spectrum of human rights including the right to life, health, food, water and development.[30]

A second approach understands human rights as a tool for securing environmental protection, both procedurally and substantively.[31] Procedural environmental human rights (or 'Aarhus rights')[32] like access to environmental information, public participation in decision-making and access to justice are seen as essential tools for ensuring good environmental decision-making and for vindicating substantive environmental rights. Procedural rights have also come to be recognised as standalone rights in themselves (e.g. Article 6 ECHR, customary and common law fair procedures rights).[33] A substantive environmental right could include a right to an adequate, safe, clean, healthy, productive, sustainable, harmonious and 'resilient' environment; a right to a stable climate; a right to clean air and water etc.[34] These rights can also include elements such as a right to food. It is also possible to recognise the

26 OHCHR, 'Analytical study on the relationship between human rights and the environment', Document No A/HRC/19/34 (2011), paras 7-8.
27 Ibid.
28 D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2011), p. 33.
29 OHCHR, n26, para 7.
30 See for example: Human Rights Committee, 'General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life' (2018), para. 65 where it was stated that '[e]nvironmental degradation, climate change and non-sustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life… The ability of individuals to enjoy the right to life, and in particular life with dignity, depends on measures taken by States parties to protect the environment against harm and pollution'.
31 Ibid at para. 8.
32 The procedural environmental human rights above were codified for the first time in an environmental context in a single instrument, known as 'The Aarhus Convention' and are commonly referred toas 'Aarhus Rights'. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) UNECE 1998 done at Aarhus, Denmark, 25 June 1998.
33 J. May and E. Daly, *Global Judicial Handbook on Environmental Constitutionalism* (UNEP 2019), p. 23; A. Hough, 'Characterising public participation as an international law norm' (2022) *Environmental Liability - Law, Policy and Practice* 27(5/6).
34 For examples of the varied and extensive nature of substantive environmental rights, see for instance: UNDP, OHCHR and UNEP, 'What is the Right to a Healthy Environment?'. Information Note, 2023. Available at: https://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf, p.9.

environmental dimensions of other established human rights.[35] It may be possible to give a 'green interpretation'[36] to existing human rights like the right to life and health through their application to environmental issues.

The added value of a standalone human right to some degree of environmental quality is that existing human rights (e.g., the right to life/health) arguably cannot be stretched to deal with certain types of environmental harms such as where the harm is confined to nature and the impact on humans is scientifically uncertain.[37] A standalone right to environment may encompass a broader rights set than that currently available under human rights law. The question of whether a standalone substantive environmental right is necessary ultimately depends on how broadly other rights, like the right to life and health, are interpreted in an environmental context.[38]

Neither the European Convention on Human Rights (ECHR) nor the European Social Charter contains a right to a healthy environment. However, as will be discussed in more detail in Chapter 2, the ECtHR has developed an extensive body of case law on environmental degradation by greening existing ECHR rights.[39] The EU Charter of Fundamental Rights of the EU (the Charter) does 'not sanction any individually justiciable right to environmental protection, or to an environment of any particular quality'.[40] However, Article 37 affirms at an EU constitutional level the 'principle' of 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and assured in accordance with the principle of sustainable development'.[41] In addition, Charter rights, which correspond to rights guaranteed under the ECHR, must be given the 'same meaning and scope' pursuant to Article 52(3) of the Charter. As will be discussed in more detail below, several ECHR rights – including Article 2 (right to life) and Article 8 (right to respect for private and family life) have been interpreted as providing indirect protection with regard to environmental matters. The most relevant provisions are Article 2 of the Charter on the right to life (corresponding to Article 2 of the ECHR) and Article 7 of the Charter on respect for private and family life (corresponding to Article 8 of the ECHR).

35 OHCHR, n26, para 8.
36 Boyd, n28, p. 35.
37 O. Kelleher, 'A critical appraisal of Friends of the Irish Environment v Government of Ireland' (2021) *Review of European Comparative and International Environmental Law* 30 (1), 138, p. 145; O. Kelleher, 'The Supreme Court of Ireland's decision in Friends of the Irish Environment v Government of Ireland (Climate Case Ireland). EJIL Talk, 9 September 2020. Available at: https://www.ejiltalk.org/the-supreme-court-of-irelands-decision-in-friends-of-the-irish-environment-v-government-of-ireland-climate-case-ireland/.
38 A. Jackson, 'Systemic climate litigation in Europe: transnational networks and the impacts of Climate Case Ireland' (2021) European Central Bank Legal Working Paper Series No. 21. Available at: https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp21~f7a250787a.en.pdf
39 Council of Europe, *Manual on Human Rights and The Environment* (Council of Europe Publishing, 2022), p. 34; see also: K.F. Braig & S. Panov, 'The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a Hilfssheriff in Combating Climate Change?' (2020) 35 *Journal of Environmental Law & Litigation* 261, 266-269.
40 G. Marin-Duran and E. Morgera 'Commentary on Article 37 of the EU Charter of Fundamental Rights-Environmental Protection'. Europa Working Paper No. 2013/02, 2013. Available at: https://doi.org/10.2139/ssrn.2267402.
41 This reflects the provisions on the environment in Articles 11 and 191 of the Treaty on the Functioning of the EU.

According to the United Nations Environment Programme, as of 2017 150 countries have enshrined individual environmental rights or state duties to protect the environment in their national constitutions.[42] A further seven countries have expressly engaged with climate change in their constitutions.[43] The increasing incorporation of environmental rights in regional treaties (e.g., 1981 African Charter on Human and Peoples' Rights, 1988 San Salvador Protocol, the 2004 Arab Charter and the 2012 Association of Southeast Asian Nations Human Rights Declaration) and domestic constitutions is significant as it points towards a growing consensus on the interdependence of human rights and a healthy environment.

In July 2022, the UN General Assembly passed a non-binding Resolution 76/300 recognising the right to a clean, healthy, and sustainable environment as a human right, noting the right is related to other rights and existing international law; affirming its promotion requires the full implementation of multilateral environmental agreements; and calling on states to 'scale up efforts' to ensure a clean, healthy and sustainable environment for all.[44] It is worth noting that the UK voted in favour of, and the EU (as an observer) 'welcomed' the adoption of Resolution 76/300.[45] The UK expressed some concern over the risk of ambiguity due to the absence of 'an international consensus on the legal basis of the human right to a clean, healthy and sustainable environment' and stated that it 'do[es] not consider that it has yet emerged as a customary right'.[46] However, significant for present purposes is the UK Government's acknowledgment that the 'the right to a clean, healthy and sustainable environment derives from existing international economic and social rights law - as a component of the right to an adequate standard of living, or the right to the enjoyment of the highest attainable standard of physical and mental health. As this resolution states, this right is "related to other rights and existing international law"'.[47] This statement signals a recognition by the UK of the indivisible, interdependent, interrelated nature of human rights (discussed below). It indicates the UK Government's tacit understanding that if economic and social rights are to be taken seriously, then it is necessary to recognise the important environmental dimension to these rights. It is an acknowledgment that a clean, healthy and sustainable environment is therefore a precondition for the enjoyment of other rights, but also that other rights are a tool for ensuring a certain quality of environment.

42 UN Environment Programme, '*Environmental Rule of Law: First Global Report*'. July, 2019. Available at: https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report#:~:text=NAIROBI%E2%80%94%2024%20January%202019%20%E2%80%93%20The,over%20the%20last%20four%20decades, p. 156

43 J. May and E. Daly, 'Global Climate Constitutionalism and Justice in the Courts' in J. Jaria-Manzano and S. Borràs (eds), *Research Handbook on Global Climate Constitutionalism* (Elgar, 2019), p. 240.

44 UN General Assembly, 'Resolution on the human right to a clean, healthy and sustainable environment', UN Doc A/RES/76/300 (2022).

45 UN General Assembly, 'Seventy-Sixth Session, 97th Meeting'. July, 2022. Available at: 'https://press.un.org/en/2022/ga12437.doc.htm.

46 Foreign, Commonwealth & Development Office, 'Explanation of vote on resolution on the right to a clean, healthy and sustainable environment: Statement delivered to the UN General Assembly at the adoption of resolution A/76/L.75'. July, 2002). Available at: https://www.gov.uk/government/speeches/explanation-of-vote-on-resolution-on-the-right-to-a-clean-healthy-and-sustainable-environment.

47 Ibid.

1.3 A 'Purposive' Approach to Interpretation

The justification for a purposive approach to interpreting the 1998 Agreement and Article 2 of the Windsor Framework stems from the principles of customary international law regarding treaty interpretation (as reflected in Articles 31 and 32 of VCLOT). It was accepted by the Northern Ireland High Court in its *Legacy* judgment in March 2024 that these principles should apply to interpreting both the 1998 Agreement and the Windsor Framework,[48] enabling the court 'to take a generous and purposive approach in interpreting article 2(1)' of the Windsor Framework[49] and therefore also the relevant section of the 1998 Agreement. This judgment also acknowledged that all ECHR rights were captured within Article 2 of the Windsor Framework via their engagement in the RSE section of the 1998 Agreement.[50] The reliance on the VCLOT and a purposive approach was subsequently supported by the Northern Ireland Court of Appeal in the same case on appeal,[51] who added that '[t]here is no reason to construe the broad language of the RSE chapter restrictively. That applies whether or not the VCLOT interpretative approach applies or not.'[52]

This purposive approach entails reading the provisions in 'good faith', literally (in light of the 'ordinary meaning' of relevant terms and phrases), and 'in their context in light of [the agreement's] objective and purpose'.[53] The understanding of context is broad,[54] including core provisions, preambles, annexes, connected agreements etc., e.g. the rest of the Withdrawal Agreement and the Windsor Framework, and the EU/UK Trade and Cooperation Agreement (TCA) (for the purposes of interpreting the Windsor Framework). Other considerations to be 'taken into account' include 'any relevant rules of international law applicable in the relations between the parties',[55] including therefore multilateral agreements that both parties are party to, e.g. the Aarhus Convention,[56] the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), and arguably UN General Assembly Resolutions (for the purposes of interpreting both the Windsor Framework and the 1998 Agreement). This provides a wide range of material to help guide both the interpretation of Article 2 of the Windsor Framework and the relevant provisions of the 1998 Agreement.[57]

48 *In the Matter of Martina Dillon and others* [2024] NIKB 11, paras 530-535.
49 Ibid, para 535.
50 Ibid, para 534.
51 *Dillon and others v Secretary of State for Northern Ireland,* [2024] NICA 59, paras 78-79 especially.
52 Ibid, para 115.
53 Article 31(1) Vienna Convention on the Law of Treaties 1969. Available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.
54 E.g. Article 31(2) Ibid.
55 Article 31(3)(c) Ibid.
56 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) UNECE 1998.
57 This in principle can be extended further through consideration of, for instance, preparatory works and the circumstances of the Agreement's conclusion, but this goes beyond the scope of this project for the main part. See Article 32 of the Vienna Convention on the Law of Treaties; and L. Sbolci, 'Supplementary Means of Interpretation' in E. Cannizzaro (ed.), *The Law of the Treaties Beyond the Vienna Convention* (OUP, 2011). Preparatory works were considered to a limited extent by the Northern Ireland High Court in *In the Matter of Martina Dillon and Others* [2024] NIKB 11, paras 550-553.

In light of this purposive, contextual interpretation, it is worth highlighting a few points:

- *Protection of the 1998 Agreement 'in all its dimensions':* Article 1 of the Windsor Framework, which outlines the objectives, notes that the Windsor Framework 'sets out arrangements necessary to…. protect the 1998 Agreement *in all its dimensions.*' [emphasis added][58]
- *North-South (and East-West) cooperation:* This is inherent to the 1998 Agreement[59] as reflected in, for instance, the North-South Ministerial Council (NSMC), the expressly identified areas of cooperation (including the environment) and the cross-border implementation bodies. Further, Article 1 of the Windsor Framework's objectives also include 'to avoid a hard border' and 'to maintain the necessary conditions for continued North-South cooperation'. This is complemented by Article 11 therein on 'other areas of North-South cooperation' and the obligation to 'maintain the necessary conditions for continued North-South cooperation, *including in the areas of environment…'* [emphasis added].[60]
- *Environmental and human rights focus points:* As noted below, numerous aspects of both documents reflect a respect for human rights broadly and a desire to promote the environment.

Further support for interpreting the 1998 Agreement and Article 2 of the Windsor Framework expansively can be derived from the international human rights law concept of the indivisibility, interdependence, and interrelatedness of human rights (discussed in Chapter 2). An ecosystem approach, which emphasises the inter-related nature of all aspects of ecosystems and therefore the environment, also justifies an expansive understanding of environmental rights and protections. Environmental protections regarding specific environmental issues work in a similarly interconnected way, e.g. clean air is dependent on the regulation of a range of interrelated issues from greenhouse gas emissions and biodiversity protection to soil and water quality.

1.4 Environmental Rights in the 1998 Agreement

Although not its specific focus, the 1998 Agreement mentions the environment[61] and environmental related issues at several points throughout the text.[62] This can be seen within the RSE section's explicit discussion of the aspects of spatial

58 The importance of this phrase is highlighted by the Northern Ireland Court of Appeal in *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 157, in flagging Article 2(1)'s location directly following on from the objectives of Windsor Framework.

59 Hough, n18.

60 The Windsor Framework's Preamble also refers to a mapping exercise undertaken jointly by the EU and the UK investigating areas of North-South cooperation underpinned by EU law, noting 20 areas regarding the environment and further complementary areas. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762820/Technical_note-_North-South_cooperation_mapping_exercise__2_.pdf; and https://www.parliament.uk/globalassets/documents/commons-committees/Exiting-the-European-Union/17-19/Correspondence/UK-Government-scoping-document-1.pdf.

61 Within the NSMC's areas for cooperation and the RSE's discussion of the regional development strategy.

62 S. Turner, 'Devolution as a Barrier to Environmental Reform: Assessing the Response to the Review of Environmental Governance in Northern Ireland', (2009) E*nvironmental Law Review* 11(3), 150 – 160; and Hough, n18.

planning in the requirement for a regional development strategy that covers '... social cohesion in urban, rural and border areas, protecting and enhancing the environment, producing new approaches to transport issues, strengthening the physical infrastructure of the region, developing the advantages and resources of rural areas and rejuvenating major urban centres' as well as an economic development strategy.[63] Environmental concerns are also evident in the twelve nominated areas for cooperation under Strand 2, such as environment, urban and rural development, inland waterways, aquaculture and the marine, agriculture, transport and human health. Indeed, the importance and relevance of the environment and environmental issues comes through in both the institutional provisions of the 1998 Agreement – particularly as regards cross-border cooperation on the island of Ireland – as well as in the sections on RSE that are most directly relevant to Article 2 of the Windsor Framework. Understanding a healthy environment as a precondition for the enjoyment of all rights illustrates the environmental dimension of existing rights like the rights to life and respect for private, family life and the home.

The positionality of environmental issues and environmental rights in the 1998 Agreement and the implications for Article 2 of the Windsor Framework are discussed in detail in Chapter 2 of this report.

1.5 The Windsor Framework and Environmental Rights

Article 2 of the Windsor Framework provides as follows:

Rights of individuals

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.

63 Which can be seen in the 'Economic Social and Cultural Issues' heading of the RSEO section of the 1998 Agreement.

Article 2, including its relationship with the environment, is explored in detail in Chapter 3 of this report via consideration of recent jurisprudence. Critical to assessing the scope of Article 2 of the Windsor Framework is the 'six-step test' adopted by the Northern Ireland Court of Appeal in the *SPUC* case. Although other case law is relevant to the area (e.g. *Angesom; AAA; AT*), the test in the *SPUC* case is the key current means before the courts for assessing Article 2's scope, as reflected in its subsequent use in the *Legacy* case[64] and the *Illegal Migration Act* case.[65] However, it is also worth noting at the outset that the application of the *SPUC* test in the context of the environment is problematic and a more purposive and nuanced test might be required.[66] This is an issue explored throughout this report and is also reflected in the subsequent judgment of the Northern Ireland High Court in the *Legacy* case, with the reference to a 'generous and purposive approach' to interpreting Article 2(1) of the Windsor Framework.[67] This judgment indicates that the *SPUC* case, although largely followed by the High Court, is not to be read restrictively and also that further developments may be expected in the future. Significantly, the Northern Ireland Court of Appeal in its more recent judgment in the *Legacy* case confirmed that the test is the *SPUC* case is only an interpretative 'aid and not a binding or rigid code'.[68]

1.6 Conclusion

This Chapter has introduced developments regarding a right to a healthy environment and some of the key relationships and considerations for examining Article 2 of the Windsor Framework in the context of environmental matters. It also provided a justification for a purposive, expansive approach to interpreting both Article 2 and the 1998 Agreement – which is strengthened by both the Northern Ireland High Court's and Court of Appeal's recent judgments in the *Legacy* case. This approach is further informed by the human rights and environmental focus points within both documents and also relevant international agreements that the EU and the UK have ratified.

This report now turns to the details of both the 1998 Agreement (Chapter 2) and Article 2 of the Windsor Framework (Chapter 3). It will demonstrate that there are potentially extensive avenues through which to challenge diminutions of environmental rights (or other human rights in an environmental context) via Article 2 of the Windsor Framework, with the caveat that a purposive interpretation of the scope of the Article and of the 1998 Agreement will be required for some of these rights to be operationalised. This will play out in

64 This includes both the Court of Appeal and High Court judgments: respectively *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59; and *In the Matter of Martina Dillon and others* [2024] NIKB 11.
65 E.g. *In the Matter of Northern Ireland Human Rights Commission's Application and JR295's Application* [2024] NIKB 35, paras 67 and 73.
66 NIHRC and ECNI, 'The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol'. Working Paper, December 2022. Available at:, https://nihrc.org/publication/detail/nihrc-and-ecni-working-paper-the-scope-of-article-21-of-the-ireland-northern-ireland-protocol, para 6.18.
67 *In the Matter of Martina Dillon and others* [2024] NIKB 11, para 535.
68 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 96.

the courts as challenges are taken in the coming years, however a potential expansive version of the Court of Appeal test in *SPUC* allows a preliminary analysis to be undertaken, with case studies below in the areas of air pollution, procedural environmental rights and nature conservation. As shall be seen, the applicability of Article 2 may be more or less challenging depending on the area in question.

Chapter 4 considers the impacts of Brexit on environmental protections in general terms, before Chapters 5, 6 and 7 consider three case studies in turn, focussing primarily on Article 2(1) (rather than Article 2(2)). These case studies provide some indicative analysis of how Article 2(1) might apply in a potential challenge in various contexts, but also of the limitations of the *SPUC* test as it applies in the complex arena of environmental law. Chapter 5 highlights that air quality is very closely linked to the right to life and is highly codified under EU legislative instruments. As such it is an area where diminution is obvious and application of the test in the *SPUC* case produces a positive confirmation of the applicability of Article 2 protections. Chapter 6's examination of procedural environmental rights, which are a specific form of human rights, aptly demonstrates the shortcomings of the *SPUC* test when applied to areas of law that are more complex, and where the boundaries between EU and domestic implementation of international law rights are blurred. Chapter 7's consideration of nature conservation is important because it illuminates a different perspective on the interpretation of Article 2 protections. Nature conservation is focussed primarily on the environment itself, rather than on human rights (or interests). As discussed in Chapter 7, the lack of a more obvious direct link with established human rights necessitates either a nuanced understanding of ecosystems and/or a more expansive, flexible interpretation of the rights in Article 2(1) and the 1998 Agreement or reliance on the provisions on safeguards therein. Together, the case studies enable a richer, more in-depth analysis of the area – mapping out some of the main developments in the area since Brexit and providing an initial evaluation of whether these indicate a potential breach of Article 2 or not.

Chapter 2:

Reading Environmental Rights into the 1998 Agreement?

2.1 Introduction

The Rights, Safeguards and Equality of Opportunity (RSE) section within the 1998 Agreement sets out provisions around human rights and economic and social development and is expressly captured by Article 2 of the Windsor Framework. This chapter explores how environmental rights are encompassed by the RSE section of the 1998 Agreement, which, while it doesn't expressly mention substantive environmental rights, does express environmental protection and enhancement goals, built environment and community development objectives, and guarantees participatory rights in environmental-decision making around these goals. This opens up potential for a broad purposive approach to environmental rights in the RSE section. Additionally, many substantive environmental rights are brought into the RSE by it's express incorporation of the ECHR.[69] While the focus is on *rights* as protected under the RSE (and by extension Article 2 of the Windsor Framework), this Chapter concludes with a brief reflection on the broader scope (focusing on the reference to safeguards) of the RSE section. Central to this discussion is the appropriateness of a purposive, generous approach to interpreting the 1998 Agreement, as confirmed by the Northern Ireland High Court in the *Legacy* case.[70] In doing so and reflecting the VCLOT, the High Court noted that while the starting point is the text of the RSE section,[71] '[i]f the ordinary meaning of the words civil rights is not apparent the court should look at the text of the agreement as a whole, having regard to its object and purpose, against the political and legal context in which the [1998 Agreement] was made'.[72] As shall be seen, the ordinary meaning of various provisions within the RSE section is broad and open textured, making it imperative that it is interpreted in light of the whole agreement, as the Northern Ireland Court of Appeal made clear in the *Legacy* judgment.[73] Indeed, this is further supported and understood by the historical nature of the 1998 Agreement, which was not initially intended as a binding legal text granting individual rights[74] – but instead contains broad, open-textured language that merits a flexible approach to interpretation.[75] Consequently, specific relevant aspects of the 1998 Agreement are highlighted before turning to the RSE section.

69 See Chapter 2, Section 2.5 for a more detailed coverage of how the ECHR protects substantive environmental rights.
70 *In the Matter of Martina Dillon and others* [2024] NIKB 11, paras 530-535.
71 Ibid, para 542.
72 Ibid, para 544.
73 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 115.
74 *In the Matter of Northern Ireland Human Rights Commission's Application and JR295's Application*, [2024] NIKB 35, para 67.
75 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 115.

2.2 Rights in the 1998 Agreement

The section on RSE most obviously addresses human rights with its recognition of 'the civil rights…of everyone in the community' which encompasses commitments, e.g. regarding equality, non-discrimination, the European Convention on Human Rights, the creation of a Bill of Rights (to go beyond the ECHR), etc.[76] The RSE section is also complemented by sections elsewhere in the 1998 Agreement on, for example, justice and decommissioning, which draw on and reflect a range of human rights. In addition, the Declaration of Support at the start of the 1998 Agreement, also indicates its rights-focus when it refers '*to the protection and vindication of the human rights of all*', and various safeguards under Strand 1. The 1998 Agreement is an international human rights treaty and thereby, for instance, subject to the international human rights and environmental law principle of non-regression or non-retrogression, as a principle of customary international law,[77] as discussed in Chapter 3 in the context of the contrasting phrase of 'no diminution'.

When read in conjunction with the Declaration of Support (and the context more broadly at the time), it also simply provides a basis to argue that a core purpose of the 1998 Agreement is to bring peace, provide a broad range of human rights and ensure a high quality of life for all those falling within the scope of the 1998 Agreement. Thus, the fuller quotation from the Declaration of Support states: '*But we can best honour [those who have died or been injured in the Troubles and their families] through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.*' This is important because, for instance, it could be argued that a narrow interpretation of the content of the RSE section could be taken, and by listing particular rights implicitly indicated a decision to not include any further ones. as arguably listing particular rights could mean not wanting to include any further ones. Notably, such a narrow interpretation was rejected by the Northern Ireland Court of Appeal in its *Legacy* judgment.[78] Instead, as confirmed by the Court of Appeal, what we see in the section on the RSE and the subsequent sections is a prioritisation of specific contextual rights, while still noting that these are not exhaustive and that the broad ideas of 'a fresh start' and 'the human rights' in the Declaration of Support are also relevant. The immediate need was to address expressly the most contentious or urgent issues in Northern Ireland, including elements regarding decommissioning and democracy, while acknowledging the relevance and value of human rights more generally. Thus 'respect for fundamental human rights is clearly a core objective of the parties to the Agreement'.[79]

76 1998 Agreement, RSE 'Human Rights', para 1.

77 N. Bryner, 'Never Look Back: Non-Regression in Environmental Law' (2022) *University of Pennsylvania Journal of Intl Law* 555; and A. Mitchell, & J. Munro, 'An International Law Principle of Non-Regression from Environmental Protections' (2023) *International & Comparative Law Quarterly* 72(1), 35-71. Mitchell and Munro discuss its relevance to human rights generally, including (at p. 65) through 'its origins in Article 30 of the Universal Declaration of Human Rights' and citing literature including on the International Covenant on Civil and Political Rights.

78 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 115.

79 *In the Matter of Martina Dillon and others* [2024] NIKB 11, para 545; and *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 79.

2.3 Environmental Aspects of the 1998 Agreement

The 1998 Agreement mentions the environment and environmental related issues like spatial planning and human health several times throughout, a focus that was described as forward-thinking for the time in an agreement of its nature.[80] These are present within both the institutional provisions regarding cross-border cooperation and also within the sections on RSE and related aspects.

Under the Strand 2 arrangements the NSMC is charged with responsibility for the six implementation bodies prescribed, for all-island co-operation and for action in the twelve nominated areas of cooperation set out in the Annex to Strand 2. The first mention of environment in the 1998 Agreement can be seen under the Strand 2 arrangements where the environment (encompassing 'environmental protection, pollution, water quality, and waste management') is one of the twelve nominated areas for cooperation/joint action listed in the Annex to Strand 2. Further, this indicative list of areas in which cooperation may happen is not prescriptive or exclusive in relation to cross-border cooperation.

Additional areas have environmental implications (agriculture, transport, waterways, EU programs, aquaculture/marine, health, urban/rural development), showing the important and unavoidable nature of environmental cooperation on the island.[81] It also highlights that environmental matters will be relevant to the work of multiple implementation bodies, providing a potential link for Article 2(2) of the Windsor Framework if other criteria are fulfilled.[82] Not only has there been considerable focus at the NSMC level on the environment, but as highlighted above three of the implementation bodies set up subsequently by Ireland and Northern Ireland have environmentally relevant remits: the Special EU Programmes Body, which has managed considerable amounts of EU funding for different environmental projects; as well as Waterways Ireland and the Foyle, Carlingford and Irish Lights Commission (encompassing the Loughs Agency) which are charged with joint management of various water bodies.

The 1998 Agreement also provides in Strand 3 that:

> 'the BIC [British-Irish Council] will exchange information, discuss, consult and use best endeavours to reach agreement on co-operation on matters of mutual interest within the competence of the relevant Administrations. Suitable issues for early discussion in the BIC could include transport links, agricultural issues, environmental issues, cultural issues, health issues, education issues and approaches to EU issues. Suitable arrangements to be made for practical co-operation on agreed policies.'

The BIC has during its lifetime dealt with a diverse range of environmental issues, including food waste, recycling, invasive and non-native species,

80 Turner, n62; and Hough, n18.
81 Brennan et al., n23.
82 See Section 3.5 below.

climate adaptation and the UN Sustainable Development Goals.[83] The area of Collaborative Spatial Planning (and related area of Housing) is obviously of environmental significance, as is the issue of Energy.[84] This strengthens the basis for saying that environmental protection is a fundamental matter across the 1998 Agreement and also lays some of the foundations for arguing that potentially the BIC could be a relevant body for Article 2(2) of the Windsor Framework in the context of the environment – again, subject to other criteria being fulfilled.

2.4 The RSE Section as a Basis for Environmental Rights and Protections

Rights Safeguards and Equality of Opportunity

As highlighted at the outset of this report, the RSE section of the 1998 Agreement is the key provision from the perspective of Article 2 of the Windsor Framework. It has a sub-section entitled 'Human Rights', which contains a standalone human rights guarantee and provides:

'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* [emphasis added]:

- 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 RSE section continues on for another 4 pages of provisions (UN Repository

83 British-Irish Council Communique, 9 November 2018 Available at: https://www.britishirishcouncil.org/resources/thirty-first-summit-isle-of-man-communique-9-november-2018-2/thirty-first-summit-isle-of-man-communique-9-november-2018-2/; British-Irish Council, 'Areas of Work: Environment', 23 March 2018. Available at: https://www.britishirishcouncil.org/resources/environment-ministerial-communique-23-march-2018-2/environment-ministerial-communique-23-march-2018-2/; British-Irish Council Annual Report 2017. Available at: https://www.britishirishcouncil.org/resources/annual-report-2017/annual-report-2017/.

84 Ibid.

version, pages 18 -21), including the following headings:

- 'UK Legislation', requiring the domestic implementation of the ECHR throughout the UK & NI.
- 'New Institutions in Northern Ireland' establishing (among other matters) the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission.
- 'Comparable Steps by the Irish Government' requiring similarly implementation of the ECHR and establishment of a Human Rights Commission (IHREC), and an obligation to ensure 'at least' equivalent levels of protection for human rights as pertains in Northern Ireland. Other obligations related to introductions of Employment Equality and Equal Status Legislation.
- 'A Joint Committee' made up of representative from the Human Rights Commissions either side of the border and charged with development of an all-island charter of rights.
- 'Reconciliation and Victims of Violence' acknowledging victims of the violence, the need to remember and learn from it, as well as the need move forward from it towards greater social integration in Northern Ireland. It set out the need for a range of community-based supports and funding to facilitate this.
- 'Economic Social and Cultural Issues' which highlighted the need for sustained economic growth and stability, social inclusion, improvements in women's participation in public life. To achieve this, it mandated:
    - A new regional development strategy for Northern Ireland which would consider the environment, transport, physical infrastructure, as well as urban, rural and border area rejuvenation.
    - A new economic development strategy for NI, encompassing short, medium and long-term planning.
    - Employment equality measures.

All of the strategies mentioned were required to be subject to public consultation.

It is unfortunate that in the case law dealing with the ambit of the RSE in relation to Article 2(1) of the Windsor Framework to date, the Courts appear to have largely overlooked the full scope and breadth of this section of the 1998 Agreement, regularly citing and referring to only section 1 of it with the list of human rights. However, the *Legacy* judgments of both the Northern Ireland High Court and the Court of Appeal provide an important counterpoint to this, by highlighting the appropriateness of a broad understanding of civil rights[85] and then consideration of paragraphs 11 and 12 regarding victims of violence.[86] From analysis of the entire RSE section, there is a strong argument that it encompasses broad rights to have a say in economic, social, and spatial

85 E.g. *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 115.

86 *In the Matter of Martina Dillon and others* [2024] NIKB 11, paras 556-561. *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 117.

planning, and basic principles of environmental democracy. There is therefore a strong basis for a reading that encompasses environmental-procedural human rights and protections.

Scope of the RSE Section

Craig *et al*. argue that the RSE section was 'intended to reflect the most prominent aspirations of the parties' and as such 'covers a broad range of civil, political, economic and social rights.'[87] It is on this basis that Craig *et al*. argue that the list of rights 'affirm[ed] in particular' in the RSE was not exhaustive.[88] That the list is not exhaustive has been confirmed by both the Northern Ireland High Court and Court of Appeal in the *Legacy* judgment.[89] As noted above, in the latter judgment, the Court of Appeal highlighted that the section encompasses a broad suite of rights, 'intended to extend much further than those rights specifically listed in para 1'.[90]

Further evidence to suggest that RSE should be understood to encompass a broad range of rights, not just those listed, is the 'Human Rights' sub-heading. It is noteworthy that the sub-heading refers to 'Human Rights' and not just civil rights.[91] Further, as noted by the High Court in the *Legacy* judgment, the broader context of the 1998 Agreement supports fundamental human rights generally, informing the interpretation of 'civil rights'.[92] It is also an established, and indeed 'undisputed'[93] concept within international human rights law that 'human rights are indivisible, interdependent, interrelated and of equal importance for human dignity'.[94] These three principles are sometimes used interchangeably[95] to describe the equal importance and status as well as the mutually reinforcing

87 S. Craig et al., 'European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland'. Report for the ECNI, NIHRC and IHREC, December 2022. Available https://nihrc.org/publication/detail/european-union-developments-in-equality-and-human-rights-the-impact-of-brexit-on-the-divergence-of-rights-and-best-practice-on-the-island-of-ireland, p. 17.

88 Ibid.

89 *In the Matter of Martina Dillon and others* [2024] NIKB 11, para 540.

90 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 115.

91 Further, as noted in *In the Matter of Martina Dillon and others* [2024] NIKB 11, paras 545-547, the broader context of the 1998 Agreement supports fundamental human rights generally, informing the interpretation of 'civil rights',

92 *In the Matter of Martina Dillon and others* [2024] NIKB 11, paras 545-547.

93 International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* 1997.

94 Ibid. See also: the preambular recognition in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights that the ideal of human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone can enjoy civil and political rights, as well as economic, social and cultural rights; United Nations, *Final Act of the International Conference on Human Rights – Proclamation of Teheran* (1968) where it was stated that '[s]ince human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights, is impossible'; UN Commission on Human Rights, *The Limburg Principles on the Implementation of the Implementation of the International Covenant on Economic Social and Cultural Rights* (1987) where it was observed that '[a]s human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political,and economic, social and cultural rights'; World Conference on Human Rights, *Vienna Declaration and Programme of Action* (1993) which proclaimed that '[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'. The Vienna Declaration and Programme of Action was endorsed by UN General Assembly Resolution A/RES/48/121 (1993). For a helpful overview of the indivisibility of human rights, see generally: N. Subic, 'Social Rights in the context of the European Arrest Warrant: the rights to an adequate standard of living, health and education in detention' (PhD thesis, UCD Sutherland School of Law 2021), Chapter 4.

95 D.J. Whelan, *Indivisible Human Rights* (University of Pennsylvania Press, 2010), p. 1.

dynamic between different categories of rights: effective implementation of one category of rights (e.g., economic, social and cultural rights) can contribute to, and is often required for, the effective implementation of other categories (e.g., civil and political rights) and *vice versa*.[96]

This international human rights law concept of indivisible, interdependent and interrelated human rights lends further support to the argument that the list of rights referred to in the RSE is non-exhaustive. In other words, if the listed rights are to be given effect to, they are likely to require other supporting and complementary rights, including a healthy environment/environmental rights. The preamble of the British Irish Agreement in the 1998 Agreement also supports this reading insofar as it affirms both parties' commitment 'to full respect for, and equality of, *civil, political, social and cultural rights*'.[97] The language of the RSE section itself (the use of the words 'in particular') indicates that the provision protects more than just the rights listed. Further evidence of the potentially broad scope of protection of rights under the RSE section is the reference to everyone 'in the community,' a term left undefined. Noting how this part of the 1998 Agreement also contains obligations on the Irish Government to incorporate the ECHR into Irish law, McCrudden argues that the term 'community' here seems to relate to 'those on the island of Ireland' rather than just those in Northern Ireland – this interpretation is in keeping with the overarching objective stated in Article 1(3) of the Windsor Framework to set arrangements necessary to address the 'unique circumstances *on the island of Ireland*' in the context of the UK's EU withdrawal.[98]

Another possible argument for a broad and evolving understanding of the rights protected under the RSE is the principle of human dignity which underpins the modern human rights architecture, as seen in the preambular references to the concept in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and Article 1 of the EU Charter of Fundamental Rights of the EU.[99] According to McCrudden, the basic minimum content of the principle of dignity can be summarised as follows: every human being possesses an intrinsic worth, merely by being human; this intrinsic worth should be recognised and respected by others; and the intrinsic worth of the individual requires that the state exists for the sake of individual human beings and not *vice versa*.[100]While it has been difficult to advance a consensus understanding of

96 Ibid, p 2. See also: H. Quane, 'A Further Dimension to the Interdependence and Indivisibility of Human Rights? Recent Developments Concerning the Rights of Indigenous Peoples' (2012) *Harvard Human Rights Journal* 25, p. 49.

97 Preamble to the 1998 Agreement [emphasis added]. See also: NIHRC and ECNI, 'The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol'. December 2022. Available at: https://nihrc.org/publication/detail/nihrc-and-ecni-working-paper-the-scope-of-article-21-of-the-ireland-northern-ireland-protocol, para 3.8.

98 C. McCrudden, 'Human Rights and Equality' in C. McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (2022, CUP), section 12.2.1.

99 The Preambles to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights each refer to 'the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' Article 1 of the Universal Declaration of Human Rights declares that '[a]ll human beings are born free and equal in dignity and rights'. Article 1 of the EU Charter of Fundamental Rights recognises 'human dignity… [as] inviolable. It must be respected and protected'. For a recent example, see: *CG v The Department for Communities in Northern Ireland,* Case C-709/20, 15 July 2021.

100 C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) *The European Journal of International Law* 19 (4) 655, p. 723.

dignity beyond this common minimum core, McCrudden points to the important institutional role for dignity as an interpretative principle to assist the further explication of a catalogue of rights.[101] Understanding the catalogue of rights protected under the RSE as being underpinned by the principle of dignity lends further support to the argument that the list should not be closed. As highlighted by McCrudden, the principle of dignity may continue to 'generate more rights over time as its implications are better understood or changes occur that give rise to new situations that require the application of the… principle [of dignity] for the first time'.[102] This is particularly relevant to the environmental context: as James May and Erin Daly put it '[h]uman dignity and environmental outcomes are inextricably intertwined'.[103] It is worth noting that human dignity was raised and rejected as a 'standalone right' in the recent *Legacy* judgment,[104] with a need to examine this issue further, but this does not prevent the concept being used to help understand and inform the RSE section more generally.

The idea that the RSE section was only the starting point for human rights and equality protections in Northern Ireland, and would develop further, is supported by both the RSE section's paragraph 2 on the incorporation of the ECHR into Northern Ireland law and paragraph 4 which envisages a Northern Ireland Bill of Rights. The RSE section also provides that the Northern Ireland Human Rights Commission will be invited 'to consult and to advise on *the* scope for *defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights*, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience [emphasis added]'.

Finally, as mentioned above, the content of the RSE section is far broader than the list of civil rights typically highlighted, and extends to issues like spatial planning, economic planning and public participation in these areas.

Environmental Rights in the RSE Section?

In terms of environmental rights, while the 1998 Agreement does deal expressly with the environment,[105] it does not do so in much detail in the RSE section. Within the RSE section, the only express reference to environmental protection is found under the sub-heading 'Economic, Social and Cultural Issues.' This sub-heading states that the 'British Government will make rapid progress with a new regional development strategy for Northern Ireland, for consideration in due course by the Assembly, tackling the problems of a divided society and social cohesion in urban, rural and border areas, *protecting and enhancing the*

101 Ibid, p. 681.
102 Ibid.
103 May and Daly, n33, p. 93.
104 *In the Matter of Martina Dillon and others* [2024] NIKB 11, paras 592-602 especially; and subsequently *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 137.
105 For example, as noted, environment is one of the 12 nominated areas of co-operation for the North-South Ministerial Council as listed in the annex to Strand 2 of the 1998 Agreement. Environmental issues also come within the remit of the British Irish Council as set out in Strand 3 of the 1998 Agreement.

environment, producing new approaches to transport issues, strengthening the physical infrastructure of the region, developing the advantages and resources of rural areas and rejuvenating major urban centres [emphasis added]'. The RSE section expressly requires public consultation in these spatial and economic planning instruments. The RSE section makes no express or direct reference to a substantive right to a certain quality of environment; however, this is not the end of the matter. Based on the above arguments for a purposive reading of this section, it is possible to identify implied environmental rights, a 'green' interpretation of existing rights and indirectly incorporated environmental rights via other documents, like the ECHR, that should also be guaranteed under the section.

Exploring Implied Rights in the RSE Section

In terms of a reading of the RSE section that encompasses implied environmental rights, it is necessary to examine what is contained in the indicative list of rights in the RSE section and to then consider these rights in light of the rest of the 1998 Agreement, including its potentially broad scope and the references to the environment. In so doing, we can arguably infer that the RSE section should also protect procedural environmental rights or 'Aarhus rights'.[106] For example, the right to freedom of political thought, the right to pursue democratically national and political aspirations, and the right to seek constitutional change by peaceful and legitimate means are all closely connected to notions of democracy and public participation, which have arguably emerged as norms of international environmental human rights law.[107]

The rights of public participation in decision-making, access to information, while international democratic norms, can also be comfortably grounded in the domestic constitutional democratic traditions of freedom of speech, freedom of association and the right to participate in civil and political life of the State. A reasonably strong argument can be made that procedural environmental rights – which are important tools for promoting and strengthening environmental democracy[108] – could be understood as a sub-set of these constitutional, democratic civil and political human rights listed in the RSE section. Environmental democracy – which could be understood as 'public participation in environmental decision-making, an enhanced form of representative government, and a discursive dialogue that includes active listening to nature'[109] – is just one subject-specific expression of the broader concept of democracy. As Emily Barritt notes, procedural environmental rights 'facilitate the machinery of democratic engagement, both by allowing access to decision-making

106 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) UNECE 1998.
107 A. Hough, 'Conceptualising Public Participation'. Presentation at UCC's Annual Law and Environment Conference. April, 2022. Available at: https://www.ucc.ie/en/media/projectsandcentres/lawandtheenvironment/conferenceresources/AlisonHough-ConceptualisingPublicparticipation.pdf.
108 E. Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship* (Hart Publishing, 2020), p. 146.
109 Ibid at p. 14.

processes, and by ensuring that access is meaningful by providing access to adequate information and also legal redress for failures of participation through an emphasis on access to justice'.[110]

This reading of environmental-procedural human rights/environmental democracy rights as protected by the RSE section carries even more weight because of the express requirement for public participation in the development of all of the regional, economic and employment strategies mentioned in the RSE section, with the regional strategy explicitly encompassing environmental, transport and infrastructural matters. It is more difficult to imply a substantive right to a clean, safe, healthy and sustainable environment as being a corollary or implicit under the non-exhaustive list of rights guaranteed under the RSE section, other than to the extent that it is common sense that such a right is a necessary precondition to all other rights like the rights to life and health.

A 'Green' Interpretation/'Greening' Existing Human Rights Listed in the RSE Section

Before discussing the main arena in which established human rights have been 'greened' under the ECHR (discussed below) – we briefly examine here how express rights under the RSE section itself might be given a 'green' or 'environmental' interpretation. It may be possible – conceptualising a healthy environment as a precondition for the enjoyment of all human rights – to give certain rights protected under the RSE section an 'environmental' or 'green' interpretation. For example, to adopt an environmental perspective *vis-à-vis* 'the right to equal opportunity *in all social and economic activity,* regardless of class, creed, disability, gender or ethnicity [emphasis added]'. The sub-section entitled '*Economic, Social* and Cultural Issues [emphasis added]' in the RSE section requires the UK Government to progress a new regional development strategy 'tackling the problems of a divided society and social cohesion in urban, rural and border areas, *protecting and enhancing the environment*, producing new approaches to transport issues, strengthening the physical infrastructure of the region, developing the advantages and resources of rural areas and rejuvenating major urban centres [emphasis added]'. While the provision is now quasi-redundant insofar as the duty has been discharged and is also a 'safeguard' for the purposes of Article 2 of the Windsor Framework (discussed below), it still assists with a contextual and purposive reading of the equal opportunities/non-discrimination right guaranteed under the RSE section. In particular, it shows a recognition that economic, social and cultural issues are dependent on and include 'protecting and enhancing the environment'.

If this interpretation were to be accepted, it might be possible to give the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity an environmental or green interpretation. This might also be understood as a way to vindicate certain dimensions

110 Ibid at p. 146.

of a substantive right to a healthy environment, for example, prohibiting discrimination in relation to the enjoyment of a healthy environment. It is possible to identify other rights protected under the RSE section that could also be deployed to protect what might be considered aspects of a substantive right to a clean, safe healthy and sustainable environment. For example, it is certainly conceivable that the right to free political thought could be used as a tool within the broader environmental protection context. The right to free political thought could be deployed to challenge any future restrictions on the right to engage in peaceful environmental protest or for failures to protect environmental defenders from harassment. In this way, a right protected under the RSE section could potentially be used to vindicate protection of environmental rights defenders and freedom of expression, association and assembly in environmental matters).

Indirect Incorporation of Environmental Rights via Other Instruments

Other human rights can be pulled within the scope of the RSE section, via reference to other instruments. Crucially, the RSE section requires that the UK complete the incorporation of the European Convention of Human Rights (ECHR), which is discussed in the following sub-section.

2.5 ECHR and the Environment

The focus here is on the ECHR and how the ECtHR has developed a body of case law to address environmental matters using existing ECHR rights, in line with the overarching goal of this chapter, i.e. to establish the existence of environmental rights under the RSE section of the 1998 Agreement.[111] It should be briefly noted that the ECHR has been incorporated into UK domestic law *via* the Human Rights Act 1998, including through interpretative obligations and remedies. The ECHR enshrines civil and political rights and freedoms but does not explicitly guarantee a right to some minimum level of environmental quality. Over the years, there have been several proposals to adopt an additional protocol to the ECHR to recognise a right to a healthy environment, but such a protocol has still not materialised.

In May 2023, the Heads of State and Government of the Council of Europe met at the Council's Fourth Summit and adopted the Reykjavík Declaration. The Reykjavík Declaration affirms that 'human rights and the environment are intertwined and that a clean, healthy and sustainable environment is integral to the full enjoyment of human rights by present and future generations'.[112] However, it stops short of a commitment to adopt an additional protocol to legally require a safe, clean, healthy and sustainable environment under the ECHR.

111 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 117, stating that victims' rights are encompassed within 'civil rights' in the BGFA chapter and given effect by ECHR Articles 2,3,6 and 14.

112 Reykjavík Declaration at the 4th Summit of Heads of State and Government of the Council of Europe. Document No.CM (2023)57. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680ab364c#_ftn1.

Even though the ECHR does not include an express right to a healthy or decent environment,[113] the ECtHR has developed an extensive body of case law on environmental degradation by greening existing ECHR rights.[114] Environmental pollution or degradation cases are usually heard under Articles 2 (right to life) and 8 (right to respect for home, private and family life) of the ECHR. Article 2 protects the right to life and imposes a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction.[115] This means that public authorities have a duty to take steps to guarantee the right to life, even when the right is threatened by private persons or activities not directly connected to the State. Article 8 guarantees the right to respect for one's home, private and family life. Article 8 protects individuals against arbitrary interference by public authorities, but it may also require public authorities to adopt positive measures to secure the right to respect for home, private and family life.[116] The right to respect for home, private and family life is not absolute and there may be circumstances, where an interference with these rights is justifiable under Article 8(2) of the ECHR. Per Article 8(2), the interference must be in accordance with the law and pursue a legitimate aim, such as the economic well-being of the country or the protection of the rights/freedoms of others.

The ECtHR's jurisprudence concerning the environment has also involved Article 1 of Protocol No.1 (the right to property), Article 10 (right to freedom of expression), Article 6 (right to a fair trial) and Article 13 (right to an effective remedy). Article 1 of Protocol No.1 may require public authorities to guarantee certain environmental standards.[117] Public authorities are not just required to respect this right through non-interference, but may also be required to take positive measures to protect the right especially where there is a direct link between the measures an applicant might legitimately expect from the public authority and his/her effective enjoyment of their possessions.[118]

Article 10 guarantees the right to receive and impart information and ideas; however, the ECtHR has not interpreted the right as imposing a general obligation to collect and proactively disseminate environmental information.[119] However, the ECtHR has found that Articles 2 and/or 8 may nevertheless be violated where there is a failure to ensure a right of access to environmental information, in certain circumstances.[120]

113 *Kyrtatos v Greece,* Application no. 41666/98, Judgment of the First Section of 22 August 2003, para 52; *Hatton and Others v the United Kingdom,* Application no. 36022/97, Judgment of the Grand Chamber of 8 July 2003, para 96.

114 Council of Europe, *Manual on Human Rights and The Environment* (Council of Europe Publishing, 2022), p. 34; see also: Braig & Panov, n39, p. 266-269.

115 See: *Öneryıldız v Turkey,* Application no. 48939/99, Judgment of the Grand Chamber of 30 November 2004, para 71; *Budayeva and Others v Russia,* Application no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of the First Section Court of 20 March 2008, para 128.

116 *Guerra v Italy,* Application no. 116/1996 735/932, Judgment of the Grand Chamber of 19 February 1998, para 58.

117 Council of Europe, *Manual on Human Rights and The Environment* (Council of Europe Publishing, 2022) 61.

118 Ibid. See: *Öneryıldız v Turkey,* Application no. 48939/99, Judgment of the Grand Chamber of 30 November 2004, para 134; *Budayeva and Others v Russia,* Application no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of the First Section Court of 20 March 2008, para 172.

119 Council of Europe, *Manual on Human Rights and The Environment* (Council of Europe Publishing, 2022), p. 68. See: *Guerra v Italy,* Application no. 14967/89, Judgment of the Grand Chamber of 19 February 1998.).

120 Ibid at n73. *Öneryıldız v Turkey,* Application no. 48939/99, Judgment of the Grand Chamber of 30 November 2004, para 90; *Guerra v Italy*, Application no. 14967/89, Judgment of the Grand Chamber of 19 February 1998, para 60.

Article 6 guarantees a right, in the determination of civil rights and obligations, to a fair and public hearing within a reasonable time by an independent and impartial tribunal. The Court has found that for this right of access to a court to be invoked, there must be a direct link between the environmental hazard and the ECHR rights invoked.[121] In the case of a serious, specific and imminent environmental risk, Article 6 may be invoked if the danger reaches a degree of probability which makes the outcome of the proceedings directly decisive for the rights of the individuals concerned.[122] Environmental NGOs may also invoke the right of access to a court under Article 6(1) but they will not necessarily enjoy such a right when they are only defending a broad public interest.[123] As will be discussed further below, in its recent *Klimaseniorinnen v Switzerland* ruling, the ECtHR expanded its rules on environmental NGO standing for the specific context of climate litigation in recognition of 'the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing in this context'.[124] Article 13 guarantees a right, for those with an arguable claim that their ECHR rights have been violated, to an effective remedy before a national authority.

The main focus here is on the applicability and positive obligations arising from Articles 2 and 8 of the ECHR in the context of environmental matters.

Applicability of the ECHR

The ECtHR's environmental case law establishes that a general deterioration of the environment is not sufficient to trigger the application of the ECHR.[125] The environmental degradation must also attain a 'level of severity' necessary for there to be 'actual interference with the applicant's private sphere'.[126]

In *Hardy and Maile v UK,* it was stated that the 'assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects.[127] The general context of the environment should also be taken into account'.[128] The threshold is unlikely to be met if the detriment complained of is negligible in comparison to the environmental hazards inherent in life in every modern city.[129] The ECtHR has also acknowledged that 'severe environmental pollution' may adversely affect individuals' right to private and family life without seriously endangering their health.[130]

121 Council of Europe, *Manual on Human Rights and The Environment* (Council of Europe Publishing, 2022),p. 89. *Balmer-Schafroth and Others v Switzerland,* Application no. 22110/93 26, Judgment of the Grand Chamber of August 1997, para 40.
122 Ibid.
123 Council of Europe, *Manual on Human Rights and The Environment* (3rd edn, Council of Europe Publishing, 2022) p. 90. See also: *L'Erablière A.B.S.L. v Belgium,* Application no. 49230/07, Judgment of the Chamber of 24 February 2009.
124 *Verein Klimaseniorinnen Schweiz and Others v Switzerland,* Application no. 53600/20, Judgment of 9 April 2024, para 499.
125 *Kyrtatos v Greece,* Application no. 41666/98, Judgment of the First Section of 22 August 2003, para 52.
126 *Fadeyeva v Russia,* Application no. 55723/00, Judgment of the First Section of 9 June 2005, para 70.
127 *Hardy and Maile v United Kingdom,* Application no. 31965/07, Judgment of the Fourth Section Court of 14 February 2012, para 188.
128 Ibid.
129 Ibid.
130 *López Ostra v Spain*, Application no. 16798/90, Judgment of the Chamber of 9 December 1994, para 51.

The 'Greening'/Giving an 'Environmental' Interpretation of Existing ECHR Rights

According to Katharina Franziska Braig and Stoyan Panov, the 'greening' of the ECHR is based on an evolutionary-dynamic interpretation – that is, on the interpretation of the ECHR as a 'living instrument' – and on the doctrine of positive obligations.[131] The ECtHR has identified several positive obligations in the environmental field, including procedural and substantive obligations:[132]

1) an obligation to grant access to, and to actively provide environmental information;[133]
2) an obligation to guarantee public participation in environmental decision-making;[134]
3) an obligation to grant access to an effective review procedure, preferably before a court, regarding environmental matters;[135]
4) an obligation to put in place legislative and administrative frameworks to minimise environmental risk by regulating the licensing, setting up, operation, and control of hazardous activities[136] and a duty to monitor and ensure compliance with these rules;[137]
5) a duty to conduct studies, research, and environmental impact assessments to ensure compliance with the precautionary principle;[138]
6) an obligation, to meet adequate safety precautions in potentially dangerous situations;[139]
7) an obligation to prosecute and punish polluters causing environmental damage;[140] and
8) an obligation to deal with omissions by the State and inefficient measures.[141]

Until recently, the ECtHR's case law has applied to smaller scale, localised environmental dangers compared to a systemic issue like climate change.[142]

131 Braig & Panov, n39, p. 272.
132 Ibid, p. 273. The list included in the core text is adapted from Katharina Franziska Braig & Stoyan Panov's summary of positive environmental obligations under the ECHR.
133 *Guerra v Italy*, Application no. 14967/89, Judgment of the Grand Chamber of 19 February 1998.
134 *Hatton and Others v the United Kingdom,* Application no. 36022/97, Judgment of the Grand Chamber of 8 July 2003; *Taşkin et al. v Turkey*, Application no. 46117/99, Judgment of the Third Section of10 November 2004.
135 *Taşkin et al. v Turkey*, Application no. 46117/99, Judgment of the Third Section of 10 November 2004. Article 6 and 13 are usually relevant to the right of access to justice.
136 *Öneryıldız v Turkey*, Application no. 48939/99, Judgment of the Grand Chamber of 30 November 2004, para 89-90; *Tătar v Romania*, Application no. 67021/01, Chamber judgment of 27 January 2009.
137 *Branduse v Romania,* Application no. 6586/03, Judgment of 7 April 2009.
138 *Tătar v Romania*, Application no. 67021/01, Chamber judgment of 27 January 2009.
139 *Budayeva and Others v Russia,* Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of the First Section of 20 March 2008.
140 *Öneryıldız v Turkey,* Application no. 48939/99, Judgment of the Grand Chamber of 30 November 2004, para 91.
141 *Oluic v Croatia*, Application no. 61260/08, Judgment of the First Section of 20 August 2010.
142 L. Burgers and T. Staal, 'Climate action as positive human rights obligation: The Appeals Judgment in *Urgenda v The Netherlands*', in J.E. Nijdam, & W.G. Werner (*eds*.), *Netherlands Yearbook of International* Law *2018: Populism and International Law (*Springer Vol. 49, 2019), p. 223.

For example, the Court has tended to deal with the impacts of environmental pollution on ECHR rights resulting from a single chemical plant,[143] an explosion at a particular landfill site,[144] or a severe mudslide at a localised site after heavy rain.[145] In its April 2024 ruling (referred to above) the ECtHR in its landmark ruling of *Klimaseniorinnen v Switzerland* applied the ECHR to climate change for the first time.[146] The ECtHR found, amongst other things, that 'Article 8… encompass[es] a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life'.[147] According to the Court, 'to do its part to ensure such protection… a State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change'.[148] The ECtHR found that Switzerland had breached its positive obligations under Article 8 because it had failed to put in place an adequate national regulatory framework (with quantified emissions limits/carbon budgets); it had failed to meet past targets; and had also failed to act in good time and in an appropriate and consistent manner in setting and implementing climate laws and policies.[149]

The applicability of ECHR rights to climate change has already been considered by national courts. For example, in the landmark *Urgenda* case, the Dutch Supreme Court held that the Government had a positive obligation under Articles 2 and 8 ECHR to take measures to counter the genuine threat of dangerous climate change and that such measures must be 'reasonable and suitable,' timely and consistent with 'due diligence.'[150] The turn towards ECHR rights to challenge the inadequacy of states' climate policies points towards the evolving and adaptive nature of the ECHR.

For a state to be held responsible for a failure to discharge a positive obligation, there must be a risk of harm which the state knew or ought to have known of, and a failure on the part of the state to exercise due diligence by adopting 'necessary'[151] and 'appropriate'[152] measures to prevent or minimise the risk of harm.[153] In *Budayeva*, the Court noted that positive obligations under Article 2 and 8 ECHR 'largely overlap' in the context of environmental harm.[154]

143 *Guerra v Italy,* Application no. 14967/89, Judgment of the Grand Chamber of 19 February 1998.
144 *Öneryıldız v Turkey*, Application no. 48939/99, Judgment of the Grand Chamber of 30 November 2004.
145 *Budayeva and Others v Russia,* Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of the First Section of 20 March 2008.
146 *Verein Klimaseniorinnen Schweiz and Others v Switzerland*, Application no. 53600/20, Judgment from 9 April 2024.
147 Ibid at para 519. Note that while the ECtHR found it unnecessary to examine the applicability of Article 2 of the ECHR in the present case (see para 536), it confirmed that the positive obligations in the environmental context under Articles 2 and 8 of the ECHR largely overlap. See para 292.
148 Ibid at para 545.
149 Ibid at paras 573-574. Note that the Court also found a breach of Article 6(1) on the basis that the domestic courts had failed to adequately consider the substance of the applicants' complaint, see: paras 629-640.
150 *Netherlands v Urgenda Foundation,* ECLI:NL:HR:2019:2006, Judgment from 20 December 2019, paras 5.3.3 and 5.6.2.
151 *Öneryıldız v Turkey,* Application no. 48939/99, Judgment of the Grand Chamber of 30 November 2004, para 101.
152 *Budayeva and Others v Russia,* Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of the First Section of 20 March 2008, para 128.
153 H. Duffy and L. Maxwell, 'People v Arctic Oil before Supreme Court of Norway – What's at stake for human rights protection in the climate crisis?' EJIL: Talk!, 13 November 2020. Available at: https://www.ejiltalk.org/people-v-arctic-oil-before-supreme-court-of-norway-whats-at-stake-for-human-rights-protection-in-the-climate-crisis/.
154 *Budayeva and Others v Russia,* Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of the First Section of 20 March 2008), para 133.

According to Ole Pedersen, the potential significance of this overlap is that state responsibility under both Article 2 and 8 may be triggered where there is a risk of harm and not just where there is concrete, materialised harm.[155]

In recognition of the notion that social and technical aspects of environmental problems can be difficult to assess, the ECtHR acknowledges that national authorities are better placed to determine the best policy in given circumstances.[156] In other words, the Court affords States a wide margin of appreciation in determining how to strike a balance between competing interests.[157] In *Klimaseniorinnen v Switzerland,* the Court adapted its approach to the margin of appreciation in the context of climate change – finding that states have a reduced margin of appreciation when it comes to the necessity to tackle climate change and to set 'the requisite aims and objectives', while maintaining a wide margin of appreciation in choosing policies and measures to meet those targets.[158]

In *Öneryıldız v Turkey*, the ECtHR acknowledged that 'an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources'.[159]

In *Hatton v UK*, the applicant alleged that Government's policy on night flights at Heathrow Airport violated Article 8. In finding that there had been no violation, the Grand Chamber recalled that in 'matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight'.[160] The UK's policy on flying had been held by the UK courts to be compatible with domestic law, and was according to the Government, necessary to the economic interests of the country as a whole. However, the Court has also made clear in its case law that the breadth of the margin of appreciation still depends on multiple factors like context, the nature of the right at issue, its importance for the applicant, and the nature of the impugned activities.[161]

The ECtHR still has jurisdiction to assess whether a public authority has approached a problem with due diligence and has taken all the competing interests into consideration.[162] This due diligence requirement also has a bearing on the burden of proof. The burden of proof in relation to the effects of environmental hazards may not be placed entirely on the individual as the state is often the only one to have the relevant information. The Court notes

155 O. Pedersen, 'The European Court of Human Rights and International Environmental Law', in J. Knox and R. Pejan (eds.), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), p. 87.
156 *Hatton and Others v the United Kingdom,* Application no. 36022/97, Judgment of the Grand Chamber of 8 July 2003, para 97.
157 Ibid, para 100.
158 *Verein Klimaseniorinnen Schweiz and Others v Switzerland*, Application no. 53600/20, Judgment from 9 April 2024, para 543.
159 *Öneryıldız v Turkey,* Application no. 48939/99, Judgment of the Grand Chamber of 30 November 2004, para 107.
160 *Hatton and Others v the United Kingdom,* Application no. 36022/97, Judgment of the Grand Chamber of 8 July 2003, para 97.
161 *Buckley v UK,* Application no. 20348/92, Judgment of the Chamber of 29 September 1996, para 74.
162 *Fadeyeva v Russia,* Application no. 55723/00, Judgment of the First Section Court of 30 November 2005, para 128.

that 'the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community'.[163] In relation to *Klimaseniorinnen v Switzerlan*d, the Court 'draws inspiration from' its existing environmental case law on the application of the ECHR to environmental matters, but also expressly develops a more 'appropriate and tailored approach' due to the particularities of climate change (e.g., inadequacy of states' past climate action and the threat to human rights, the causal complexity, and need for intergenerational burden sharing).[164] The three major areas of innovation in the judgment – a broadening of its approach to NGO standing, spelling out states' positive obligations in the context of climate change[165] and differentiated margin of appreciation for setting targets and for choosing policies – relate to the gravity and nature of the threat posed by climate change.

There is thus a burgeoning jurisprudence of the ECtHR on the application of the ECHR to environmental matters and now climate change which points towards the indirect existence of environmental rights under the RSE section of the 1998 Agreement.

While the question of potential infringements of Article 2(1) of the Windsor Framework will be addressed in more detail in Chapters 5, 6 and 7, it is worth briefly mentioning here that the test for a breach of ECHR rights in an environmental context at the ECHR level and under the Windsor Framework is arguably quite different.[166] While states typically enjoy a wide margin of appreciation in the context of environmental harms at the ECHR level, this does not seem to be the case for environmental rights incorporated via the 1998 Agreement/Human Rights Act 1998 and now protected under Article 2(1) of the Windsor Framework. For an infringement of such environmental rights under Article 2(1), there simply needs to be a diminution of such a right as a result of Brexit. There is no mention of the Government enjoying any margin of appreciation in the text of Article 2(1) nor in the Court of Appeal's interpretation of the provision in its *SPUC* case.[167]

2.6 Environmental Safeguards within the RSE Section

The focus up to now has been on identifying how environmental human rights could be read into the RSE section of the 1998 Agreement. However, it is

163 Ibid.
164 Ibid at para 410-422.
165 For a discussion of the innovative approach to NGO standing and how the ECtHR spelled out States' positive human rights obligations in the context of climate change, see: O. Kelleher and A. Jackson, 'What does the latest European climate judgment mean for Ireland?'. RTE Brainstorm, 12 April 2024. Available at: https://www.rte.ie/brainstorm/2024/0412/1443063-european-court-of-human-rights-landmark-climate-judgment-switzerland-portugal/.
166 Cf Northern Ireland Court of Appeal in *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 119, referring to some of the distinctions between the Victims' Directive and the related ECHR Articles. However, it is not simply the content of the relevant EU legislation that differs from the ECHR rights, but also the nature of the protection provided under the Windsor Framework compared to under the ECHR
167 *R v DC* [2023] NICA 25.

important to stress that the RSE section, and by extension Article 2(1) of the Windsor Framework, clearly guarantees more than just human rights. The title of the section also explicitly refers to safeguards and equality of opportunity. The reference to safeguards is of particular relevance to the present report because it maps onto the wide-sweeping concept of environmental protections used throughout the report and examined in detail in Chapters 4-7. This impacts the scope of the RSE section and thereby Article 2(1) in two ways, both of which are facilitated by a purposive interpretation of the provisions.

First, safeguards may be considered because they contribute to specific rights contained within the RSE, including via the ECHR. They provide insights and guidance, including supporting the justification for an environmental gloss or reading of the rights contained within the RSE section. Second, safeguards are simultaneously included as something separate from, and independent of, rights or equality of opportunity. They are thereby protected via Article 2(1) of the Windsor Framework irrespective of whether they further human rights or not. While they do promote human rights, the extra step linking the two may prove challenging to establish in court. This latter interpretation has the potential to expand the scope of the RSE section and thereby Article 2(1) significantly, including in the context of the environment.

These arguments are based on a purposive interpretation of the RSE section, in conjunction with the references therein to 'protecting and enhancing the environment' in the context of a new regional development strategy to be developed by the UK Government for Northern Ireland, including 'developing the advantages and resources of rural areas'. They are further enhanced by the eco-system approach noted in Chapter 1, which emphasises the inter-related nature of all aspects of eco-systems and therefore the environment. Environmental protections regarding specific environmental issues work in a similarly interconnected way e.g., clean air (as discussed in chapter 5 which is closely connected to the right to life/health) is dependent on the regulation of a range of interrelated issues from Greenhouse Gas emissions and biodiversity protection to soil and water quality. The argument therefore goes that, based on a purposive reading of the RSE section, it should also encompass an array of environmental standards, measures, procedures, governance structures etc. that 'protect[t] and enhance[e] the environment'.

Linking briefly to Article 2 of the Windsor Fraamework, it is not necessary that the phrases here are precise and specific because they do not need to be independently justiciable or to meet the criteria for direct effect.[168] Nor do we need to know the level of protection to be achieved because, as discussed below, the baseline level to be examined is that provided via the EU initially rather than within the 1998 Agreement. We are simply interested in whether environmental safeguards are within the scope of the RSE section and what is their broad remit.

168 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, paras 83-84.

2.7 Conclusion

This chapter shows that there are a myriad of reasons why the list of rights enumerated in the RSE section of the 1998 Agreement should be understood as non-exhaustive, including the language of the whole RSE section, the need to read the four pages of it in its entirety, and in the context of the surrounding sections; the idea that human rights are indivisible, interdependent, interrelated; and the links between the interpretative principle of human dignity and the environment. Understanding the RSE section to have a broad scope, it is then possible to identify express and implied procedural environmental rights under the section, rights that should be given 'green' interpretation, and incorporated environmental rights *via* the ECHR and the Human Rights Act 1998. Work on the Northern Ireland Bill of Rights signals how environmental rights could develop in Northern Ireland in future. The broad scope of the RSE section can also extend to environmental protections/safeguards, making this a potentially fruitful avenue for potential challenges.

Chapter 3:

Establishing the Scope of Article 2(1) of the Windsor Framework

3.1 Introduction

This chapter examines the potential of the Article 2(1) of the Windsor Framework to apply to environmental rights and other human rights in an environmental context. The obligations in Article 2(2) are separate from, but nonetheless linked to, paragraph 1 and these are also considered briefly in this chapter.

As a reminder, Article 2 provides as follows:

> *Rights of individuals*
>
> 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.[169]

Article 2(1) is simultaneously clear and ambiguous. The Northern Ireland Court of Appeal in the *Legacy* case considered it sufficiently clear, precise and unconditional that it had direct effect in the UK by virtue of its incorporation into domestic law via the legislative 'conduit pipe' provided in section 7A of

169 Reflecting, to an extent, para 53 of the 'Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union'. Document No. TF50 (2017) 19 – Commission to EU 27, 8 December 2017. Available at: https://commission.europa.eu/system/files/2017-12/joint_report.pdf. Sylvia de Mars et al., 'Continuing EU Citizenship "Rghts, Opportunities and Benefits" in Northern Ireland after Brexit'. Report for NIHRC and IHREC, March 2020, p. 42. p.42. de Mars et al. note that Article 2 'is a long way short of comprehensive and dynamic non diminution of the broad range of EU rights protections suggested by the Joint Report.' For similar commentary regarding the earlier versions of Article 2, see: C. McCrudden, 'Brexit, Rights and the Northern Ireland Protocol to the Withdrawal Agreement'. Available at: https://www.thebritishacademy. ac.uk/publications/europe-futures-brexit-rights-ireland-northern-ireland-protocol-withdrawal-agreement/.

the EU (Withdrawal) Act 2018.[170] Its scope and nature of protection, however, rely primarily on the (ambiguous) content of the RSE section of the 1998 Agreement[171] and the content (and related structures/mechanisms) of EU law. This makes understanding the provision somewhat of a treasure hunt.

In examining the provision, this chapter draws on the test adopted by the Court of Appeal in the *SPUC* case, but it will primarily be reflecting on the text of the provision itself, and also in light of other relevant Windsor Framework provisions, the rest of the Withdrawal Agreement and the TCA. It will also take account of subsequent judgments that have shed further light on Article 2. Significantly, this includes (i) the Northern Ireland High Court's judgment in the *Legacy* case, which supports an expansive, purposive approach to interpretation of Article 2(1) and the related 1998 Agreement provisions and (ii) the Court of Appeal's judgment in the *Legacy* case which confirmed that the test in *SPUC* should not be rigidly applied.[172]

3.2 Application of the 'Six-Step' Test in *SPUC*

Before engaging directly with the text of Article 2(1) of the Windsor Framework, it is worth highlighting the 'six-elements test', set out by the Northern Ireland Court of Appeal in the *SPUC* case. The Court indicated there that each of the following 6 steps must be fulfilled before a breach of Article 2(1) is established:

A right (or equality of opportunity protection) included in the relevant part of the 1998 Agreement is engaged.

i. That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020.
ii. That Northern Ireland law was underpinned by EU law.
iii. That underpinning has been removed, in whole or in part, following withdrawal from the EU.
iv. This has resulted in a diminution in enjoyment of this right; and
v. This diminution would not have occurred had the UK remained in the EU.

While this test has much to recommend it in terms of clarity, some caveats must be flagged in relation to its scope and application.

170 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, paras 85-86.
171 As noted by the Northern Ireland High Court, the 1998 Agreement is noted for its 'constructive ambiguity' and the RSE section was not intended 'to create binding legal rights and obligations': *In the Matter of Northern Ireland Human Rights Commission's Application and JR295's Application*, [2024] NIKB 35, para 67. Article 2(1) creates a new role for this section and thereby poses considerable challenges for interpretation.
172 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 96.

First, this chapter's primary purpose is to identify the potential applicability and parameters of Article 2 in the environmental field. Therefore, the focus must initially be on the 1998 Agreement and then the EU level, before turning to Northern Ireland. Thus, the order of issues/points addressed herein varies from the Court of Appeal's test in *SPUC*, as in that case a specific Northern Ireland measure was being challenged. Second, as discussed below, as well as simply the need to take an expansive, purposive approach to applying the test, two caveats in particular should be highlighted regarding points (ii) and (iii). One of the issues that emerges from the analysis is that the Court of Appeal judgment in *SPUC* may be essentially too tailored to its individual factual and legislative circumstances, and therefore does not provide a comprehensive, universal set of criteria for determining the scope of Article 2(1) in all circumstances. This is discussed in more detail below but is important to bear in mind from the outset.

This test represents a useful starting point for analysing whether rights/safeguards fall within the scope of Article 2(1) of the Windsor Framework. When all the criteria set out above are fulfilled, it creates a positive confirmation that the given right/safeguard is most likely within the ambit of Article 2(1) of the Windsor Framework. However, there are rights/safeguards which might not fulfil all of the elements of the above test, but which nevertheless can be seen to potentially fall within the scope of Article 2(1). In the detailed analysis of Article 2(1)'s application conducted in the case studies set out in Chapters 5-7 below, it is noted that these criteria may not be universally applicable. It does appear therefore that this is a useful set of criteria for 'ruling in' a right/safeguard within the scope of Article 2(1), but less useful when it comes to definitively 'ruling out' a right/safeguard from the scope of Article 2(1).

In particular, detailed exploration of different practical scenarios during this research has shown that the requirement (ii) that the right 'was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020' and (iii) that the right be 'underpinned' by EU law may cause difficulty. These requirements are also not evident on the face of Article 2(1) but were additional criteria formulated by the Court of Appeal in the *SPUC* case. In light of this, it is worth noting once more that the Court of Appeal noted that the *SPUC* test is merely an interpretative aid and not a rigid, binding code.[173]

3.3 Scope of Article 2(1) of the Windsor Framework

Ambiguity – Flexibility of RSE Beyond the *SPUC* Test

Article 2(1) of the Windsor Framework provides limited independent guidance or clarity as to its scope. The only express reference is to protection against discrimination and then implicitly through the EU laws included within Annex 1.[174]

173 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 96.
174 It is worth noting as an aside, that those EU laws are capable of being added to by the EU and UK acting jointly,

However, crucially paragraph 1 states '*including* in the area of protection against discrimination, as enshrined in the provisions of Union law listed…' [emphasis added] – not only therefore is the area not exhaustive, but arguably because it is the sole area noted in the paragraph the implication is to the contrary: i.e. multiple other types of rights and safeguards must be relevant for the purposes of Article 2(1).

This brings us to the core focus of the paragraph, being that the relevant subject matter must be 'as set out' within 'that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity'. In considering this, the overall objectives of the Windsor Framework, including the intent to protect 'all dimensions' of the 1998 Agreement,[175] should also be borne in mind, i.e. a purposive, generous approach to interpretation should be taken as discussed in Chapter 1 and supported by the *Legacy* judgment.[176]

Crucially, while the *SPUC* test only refers to rights and equality of opportunity, both Article 2(1) of the Windsor Framework and the RSE section also include safeguards (even via a simple textual interpretation)[177] – this is a key element for considering the scope and application of Article 2(1). As discussed in Chapter 2, there is clear potential to include environmental rights and greened rights (directly and via documents such as the ECHR), but also environmental safeguards or protections that are central to environmental law. This seems even clearer in light of the judgment in the *Legacy* case with its broad purposive approach to the scope of Article 2(1). Clearly, the relevant, individual rights and safeguards must be identified for specific issues. This is examined in further detail in Chapters 5, 6 and 7 when considering the application of Article 2(1) to specific case studies.

EU Competence

A further element in Article 2(1) primarily relates to the nature/extent of the protection discussed below, but is also of significance in determining the scope: namely that the rights must be affected by the UK's withdrawal from the Union. To achieve this, the EU must have included these rights and/or provided standards or mechanisms or similar that supported such rights expressly, implicitly or perhaps indirectly. The implication is that the EU must normally have some competence in the field. This approach was confirmed by the Northern Ireland High Court in February 2022 in its earlier judgment in the *SPUC* case regarding abortion and non-discrimination,[178] where the High Court

although this also now attracts the Article 13(4) 'Stormont brake' procedure arising from the domestic implementation of Windsor Framework arrangements (see Appendix 1).

175 Article 1(3) Windsor Framework; the interpretive relevance of Article 1(3) was also highlighted in *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 157.

176 A caveat should be flagged, which is that where other Windsor Framework provisions adequately address the relevant element of the 1998 Agreement, an expansive interpretation to Article 2 might be unnecessary.

177 While the High Court *Legacy* judgment adopted the *SPUC* test and therefore the reference to rights and equality of opportunity, when discussing the scope of Article 2(1) it also referred to safeguards alongside the rights and equality of opportunity, e.g. *In the Matter of Martina Dillon and others* [2024] NIKB 11, paras 534 and 536.

178 *In the matter of SPUC Pro Life Limited* [2022] NIQB 9.

ruled that the EU had no competence to regulate abortion – despite having some limited competence in health matters,[179] the relevance to abortion of the EU Charter of Fundamental Rights and the EU having ratified the UN Convention on the Rights of Persons with Disabilities,[180] and Article 8 of the ECHR in certain circumstances.[181] However, this reflects an excessively narrow interpretation of Article 2(1) and one that gives pause for concern.

Nonetheless, for our purposes in the context of environmental rights and protections more generally, the EU has a more extensive version of shared competence in environmental matters, as reflected in Article 191 - 194 Treaty on the Functioning of the EU (TFEU), and there is a range of relevant rights to be found in EU law – including in the EU Charter of Fundamental Rights and in secondary legislation. This means that these environmental matters are clearly within the scope of Article 2(1) of the Windsor Framework if they are within the scope of the RSE section of the 1998 Agreement. Consequently, the question of competence should not be an issue for Article 2(1) in the area of the environment. This reflects the approach in the Northern Ireland High Court's *Illegal Migration Act* judgment, where the court simply noted the EU's competence and moved on to address other issues.[182] It is important to bear in mind that the EU's capacity to act in an area of shared competence is circumscribed by the obligation to meet the conditions laid down in Article 5 TFEU (i.e. the tests of subsidiarity[183] and proportionality[184]). The EU has exercised extensive legislative power in the area of the environment. This is discussed further below.

Underpinning by EU Law

Point (iii) in the *SPUC* case states that the relevant Northern Ireland measure (giving effect to the RSE) must be 'underpinned by EU law'. A substantial swathe of Northern Ireland environmental measures derives from EU environmental law (see Chapters 4-7) and is supported by more general EU law (e.g. primacy and effectiveness). However, this is not always the case and Article 2(1) of the Windsor Framework does not expressly mandate that the Northern Ireland measure or RSE be underpinned by EU law (even as broadly understood under the Withdrawal Agreement), but simply that the diminution results from withdrawal from the Union. In light of Article 2(1)'s text and also

179 The competence in the area of health is technically shared as reflected under Article 168, Treaty on the Functioning of the EU, but is only shared to the extent outlined in the provision therein.

180 European Commission, 'United Nations Convention on the Rights of Persons with Disabilities - Employment, Social Affairs & Inclusion'. Available at: https://ec.europa.eu/social/main.jsp?langId=en&catId=1138#:~:text=The%20UN%20Convention%20says%20that,signed%20and%20ratified%20the%20convention.

181 The Court however did broadly recognise the relevance of the EU Charter of Fundamental Rights and the UN Convention on Rights of Persons with Disabilities 'as Union law' to Article 2 of the Windsor Framework, but not in the specific context of the case in question. See *In the Matter of SPUC Pro Life Limited* [2022] NIQB 9, paras 104-105, 115, 118 and 131.

182 *In the Matter of Northern Ireland Human Rights Commission's Application and JR295's Application*, [2024] NIKB 35, para 74.

183 Article 5(3) of the Treaty on European Union.

184 Article 5(4) of the Treaty on European Union.

in light of the need for an expansive, purposive interpretation, there is an argument that the Northern Ireland measure giving effect to the RSE should simply be 'underpinned by EU membership' or, at the very least, an expansive understanding of 'underpinned by EU law'. This could impact significantly on the scope of Article 2(1), including in environmental matters.

For example, there are elements of the common law, administrative law (including case law and legislation/courts rules) and constitutional law that support the right of access to justice. These frequently will not have been created or introduced into domestic law as a result of EU law, but they are part of the regime that helped deliver on and implement EU obligations and laws. Further, there are many areas under the Aarhus Convention Article 3(8) (protection of environmental defenders), Article 7 (public participation in policies), Article 8 (public participation in legislation), and Article 9 (access to justice in environmental matters), where the EU has not legislated.

Yet, the Windsor Framework itself suggests that the purpose of the Article 2(1) of the Windsor Framework is to support all of the rights, safeguards, and equalities in the RSE section, not just the ones that originate from EU law. This is suggested by the plain meaning of Article 2(1), but also by reading the related provisions of the Windsor Framework, including Articles 1(3) and the Preamble, which commits strongly to maintaining all of the conditions needed for continued cross-border co-operation as well as protection of the 1998 Agreement in all its dimensions. The conditions for cooperation include the shared rights matrix in both jurisdictions originating from the RSE guarantees. Not all of these rights are underpinned by EU law. If Article 2(1) is to truly help achieve the Windsor Framework's objective of maintaining the conditions for North – South cooperation, it must be read to encompass more than a guarantee of non-diminution of those rights explicitly underpinned by EU law. Instead, it must extend to all of the rights necessary for the maintenance of cross-border cooperation. The text of the Windsor Framework clearly supports a broad purposive reading of Article 2(1) and the rights it protects.

For the purposes of the discussions on the scope of Article 2(1) of the Windsor Framework it is important to bear in mind that the initial interpretation of the Northern Ireland Court of Appeal in the *SPUC* case may be confined to the particular nuances of the laws under discussion there and may not bear out as comprehensive criteria for determining the scope of Article 2(1). While the language of underpinning EU law is a useful rule for positive confirmation of when a right is likely to fall within Article 2(1), it is inadvisable to argue that it is a comprehensive criterion for ruling out application of Article 2(1) to a particular law - the individual matter should be examined in detail.

RSE Given Effect in Northern Ireland

To have a diminution, some level of protection must have existed previously. Step (ii) of the *SPUC* test reflects this by requiring that the right (or safeguard,

if read more broadly as discussed above) must have been given effect in whole or in part in Northern Ireland by the end of the transition period. The main point to flag is that this should not be permitted to enable Northern Ireland or other actors to rely on the failure of Northern Ireland to give proper effect to obligations under EU law that existed at the time, as a means to say that there is no diminution/Article 2(1) of the Windsor Framework is not breached. If the right or safeguard *ought* legally to have been given effect to (in part or fully) by that date, this should suffice for point (ii).[185] This also has knock-on implications for considering the issue of a diminution, i.e. it is a diminution relative to what was protected under EU law and what *ought* to have been the case in Northern Ireland prior to Brexit.

For instance, if on Brexit day there was an EU regulation, or a directive post-transposition and implementation deadlines, regarding clear air or water, where Northern Ireland was under a legal obligation at the time to have given effect to it (e.g. via transposition, implementation and enforcement), then Northern Ireland/the UK's failure to fulfil that obligation cannot be used as an excuse to say that there was no relevant Northern Ireland measure and thereby no diminution.

This argument is implicitly supported by the Northern Ireland High Court's and Court of Appeal's discussion of direct effect in the *Legacy* case, with the point being that the individuals had rights due to the EU Victims' Directive and could rely on the direct effect of provisions where there was not full and proper implementation and application of the Directive. In other words, the rights could be given effect to in Northern Ireland by Northern Ireland measures implementing and applying the Directive properly *or* by the availability of relying on the direct effect of the Directive's provisions.[186] However, it is also possible to go beyond direct effect and rely on NI's obligations (at the time) to comply with EU law and the potential of complaints and enforcement actions by the European Commission and Member States against other Member States for breach of obligations under EU law[187] and the duty of sincere cooperation.[188] This could apply for failure to transpose, implement or enforce EU law adequately. For instance, an individual could have made a complaint to the European Commission that the UK had failed to implement legislation on drinking water and the Commission could subsequently take an enforcement action against the UK to compel compliance.[189]

185 For a similar argument, see NIHRC and ECNI, 'The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol'. Working Paper, December 2022. Available at: https://nihrc.org/publication/detail/nihrc-and-ecni-working-paper-the-scope-of-article-21-of-the-ireland-northern-ireland-protocol, para 5.10.

186 *In the Matter of Martina Dillon and others* [2024] NIKB 11, paras 562-570; *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, paras 123-125.

187 See Articles 258-260 of the Treaty on the Functioning of the European Union.

188 Article 4(3) Treaty on European Union.

189 E.g. B. Jack, 'Environmental Law in Northern Ireland', in S. McKay and M. Murray (eds.), *Planning Law and Practice in Northern Ireland* (Routledge, 2017), pp.154–55.

Individuals with Potential Standing?

Finally, it is worth considering briefly who would or would not be able to avail of the provision (beyond the 'dedicated mechanism'). Article 2 of the Windsor Framework does not specify this, although Article 4 of the Withdrawal Agreement[190] provides that Article 2 is, in effect, directly applicable in the UK insomuch as individuals can rely on the rights encompassed by it and challenge any breach of the same in UK courts. This has been upheld most recently by the NI Court of Appeal in its *Legacy* judgment.[191] While there is no recourse for challenges to be brought to the CJEU there is an obligation for its case law to be followed and/or granted 'due regard'.[192] Arguments could be made regarding citizenship, residency or otherwise. Indeed, through links with the 1998 Agreement and references there to 'everyone in the community', McCrudden has noted the potential to argue that the option of Article 2 is limited to those in Northern Ireland, before signalling the weakness of this narrow construction.[193] It seems apparent that the 'community' may encompass those on the island of Ireland impacted by a relevant diminution;[194] insomuch as this means individuals resident *outside* Northern Ireland (e.g., in a border county of Ireland) could nonetheless bring an Article 2, legal action it is potentially highly significant in the environmental context where transboundary harms can easily arise.

This approach would be consistent with several other relevant areas of law that influence interpretation. For example, the Aarhus Convention (which mandates access to justice in environmental matters) has an explicit guarantee that the rights will be exercisable without discrimination as to citizenship or domicile.[195] The provisions of the ECHR similarly are considered to be exercisable by non-citizens. There are therefore good grounds for arguing those affected by diminutions in environmental rights as a result of Brexit should have a cause of action before the NI/UK Courts under Article 2(1) of the Windsor Framework. This means that individuals, irrespective of whether they are British or Irish citizens or not, who suffer a diminution in rights as a result of Brexit, in or linked to NI, for example through lowered environmental standards or worsening cross border air pollution, may have a right of court action against the UK Government.

The second key element regarding standing relates to the focus on 'rights of individuals'. This is not as restrictive as it might first appear. Under Article 4(1) of the UK-EU Withdrawal Agreement 'legal or natural persons' can rely directly on provisions contained or referred to in the text, including the Windsor Framework,

190 Article 4(1) Withdrawal Agreement 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. 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.'

191 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 85.

192 As per Article 13(2) Windsor Framework; see also 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?'. NI Office, 2020, para. 29.

193 McCrudden, n98, p. 145.

194 Ibid.

195 Article 3(9) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) UNECE 1998.

provided the conditions for direct effect are met. As per the *Legacy* case, Article 2(1) of the Windsor Framework meets these conditions and has direct effect.[196] Additionally, the Aarhus Convention, which is partially implemented in EU law and to which the UK is a party, defines the public who can avail of the Conventions rights as (Article 2(4)): '"The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups'. This is important because NGOs, trade unions and various civil society bodies are essential to the protection and enforcement of human rights, whether in the environmental context or otherwise. Further, aspects such as the right of protest, including in an organised form, are clearly linked to freedom of expression, freedom of association,[197] and political engagement but are also undertaken typically in groups. As discussed in Chapter 2, these types of rights are clearly included within the RSE section of the 1998 Agreement and thereby within the potential scope of Article 2(1) of the Windsor Framework.

3.4 Nature of Protection

Having considered the potential scope of Article 2(1) of the Windsor Framework, the next key question is what obligations are imposed and thereby what protections are created? Article 2(1) imposes a clear, strict duty on the UK to ensure that there should be 'no diminution' that 'results from' Brexit of the relevant 'rights, safeguards or equality of opportunity' in the 1998 Agreement. However, before considering how this might function in practice, it is necessary to interrogate what 'no diminution' entails, including in light of alternative terminology that could have been and frequently is used, related principles of customary international law,[198] and alternative approaches and language used elsewhere in the Windsor Framework and in the TCA. In particular, ideas of progressive realisation and non-regression/retro-regression in contrast with 'no diminution'.[199] The main overall argument is that no diminution is something that appears, both textually and in light of the surrounding provisions, to be a stricter, more absolute obligation than that of non-regression.

196 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 310(a).

197 For example, in the Irish Constitution the Article 40.6 right of free association expressly encompasses the right to form associations and trade unions. See also Article 11 of the ECHR. Further, the link between forming societies, free association, access to justice and democratic participation is recognised in a recent declaration by the UN Special Rapporteur on Human Rights Clément Nyaletsossi Voule in 2021: 'Access to justice, the rights to freedom of peaceful assembly and association, and the strengthening of civic space are inextricably linked. They all represent a combination of human rights and enabling rights. They enable individuals to express themselves collectively and participate in shaping their societies and are also instrumental in advancing human rights, the rule of law, democracy, peace and sustainable development.'

198 The concept of non-diminution in Article 2, acting as it does to prevent backsliding from a set of standards, would seem naturally to fall within the context of the international law principle of non-regression or non-retrogression, and the principle progressive realisation.

199 While distinct and complementary concepts, they are closely interrelated and are frequently treated as related aspects of the same customary international law principle. This merging of the two is visible in Multilateral Environmental Agreements (MEAs) such as the Escazu Agreement 2018 which in Article 3 lists the applicable principles and groups progressive realisation and non-regression together in 3(c). It is also seen in EU/UK Trade and Cooperation Agreement's level playing field provisions where, within the provisions on non-regression, there are also obligations, for instance, to 'continue to strive to increase their respective levels of environmental protection or respective levels of climate protection' (Article 7.5 in Trade & Cooperation Agreement, Part 2, Title XI)

Continued Alignment?

Article 2(1) of the Windsor Framework does not encompass a general obligation of continued alignment. An exception exists regarding the EU laws relating to discrimination listed in Annex 1 of the Windsor Framework (see Appendix 1) as these are to apply under Article 2 as they are updated or amended by the EU as per Article 13(3) of the Windsor Framework and are to be interpreted in line with relevant developments in CJEU case law, as per Article 13(2) of the Windsor Framework.[200] Unlike those EU laws listed in Annexes 2 to 5 of the Windsor Framework, however, the Annex 1 EU laws are not subject to CJEU jurisdiction for the purposes of implementing the latter, whereas it does for the former. Nonetheless, there is a strong argument that other EU laws relevant to Article 2(1) but not listed in Annex 1 must be read in light of the on-going CJEU caselaw developments, as these are simply statements/interpretations of the existing law.[201] However, no general obligation exists to align, for instance, with EU legislative developments in the field of rights. That said, there is some flexibility within the provision in interpreting what was EU law at the time of Brexit and thereby in determining whether a diminution might or might not have occurred/occur in future (see the Table below). Notably, it is also possible for new EU laws to be added to those already listed in Annex 1 of the Windsor Framework, as per its Article 13(4), provided the UK and EU agree to do so.[202]

An Obligation of Improvement or Progressivity?

Although on the face of the provision, there is no express obligation of progressivity (or even high levels of protection of the relevant rights etc), an argument could be made that Article 2(1) of the Windsor Framework encompasses implicitly an obligation of progressivity. This is not on the basis of the text, but on its focus on individual rights, as read in light of customary international law. Obligations for progressive improvement are most common in human rights instruments. For example, the Universal Declaration of Human Rights highlights the need for 'progressive measures, national and international' to secure the implementation of its human rights obligations. The International Covenant on Economic, Social and Cultural Rights 1968 in Article 2(1) promotes 'progressively' realising human rights. The Inter-American Convention on Human Rights, 1969, similarly states that parties should achieve the full realization of human rights 'progressively, by legislation or other appropriate means'. The progressivity principle can also typically be seen in international environmental

200 Thus, O'Donoghue, n21, p. 90, notes that there are 'two rights strands. Some rights are not specified but nonetheless come with guarantees of non-diminution, while others are listed in the Annex but subject to change and evolution. In combination, this requires constant vigilance of their content and enforcement.

201 Craig and Frantziou, n21, pp. 67-68; and Lock, Frantziou and Deb, n21, pp. 63-65. Contrast however, *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 143, which seemingly indicates a narrower approach focussing on the law as understood on the relevant date and excluding subsequent judgments. If the case does indeedindicate such a narrow approach, then this is unnecessarily restrictive and does not reflect the idea that the CJEU is in principle simply 'stating' what the law is.

202 Following the conclusion of the Windsor Framework, any pursuit of an addition to Annex 1 EU laws may attract a so-called 'Stormont Brake' procedure – see Appendix 1 of this report for detail.

agreements such as the Paris Agreement, in which Article 3 requires progress over time and Article 4 requires progression with successive nationally determined contributions. If this approach were to be taken (alongside the concept of 'no diminution'), arguably this would extend the UK's obligations regarding the RSE to also enhance protections over time. This is supported to an extent by the NIO's Explainer on Article 2 of the Windsor Framework when discussing the 'future-facing element' of their commitment under Article 2, where they state that 'future developments in best practices in the area of human rights and equalities in the rest of the UK, the EU and rest of the world will be taken into consideration as the commitment is implemented',[203] as discussed in the *Legacy* case.[204]

'No Diminution' or Non-Regression?

Non-regression is widely recognized in environmental and human rights law as a customary principle of international law.[205] The International Union for Conservation of Nature's World Commission on Environmental Law laid out a definition for the principle of non-regression and its significance for the enjoyment of human rights and for environmental protection in its 2016 World Declaration on the Environmental Rule of Law, i.e. that 'States… shall not allow or pursue actions that have the net effect of diminishing the legal protection of the environment or of access to environmental justice'.[206] Non-regression does not mandate absolute adherence to prior standards but rather prohibits unjustifiable departures from prior standards, and necessitates a proportionality approach to any reduction in rights.[207]

No, or non-, diminution is sometimes conflated with non-regression or non-retrogression.[208] However, these are distinct terms. Article 2(1)'s 'no diminution' entails an obligation of result[209] to ensure no reduction in the relevant rights, safeguards or equality of opportunity. It thus acts as a failsafe, ensuring a minimum level of protection at the level of the status quo (at the time of

203 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?'. NI Office, 2020. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907682/Explainer__UK_Government_commitment_to_no_diminution_of_rights__safeguards_and_equality_of_opportunity_in_Northern_Ireland.pdf, para 7.

204 *In the Matter of Martina Dillon and others* [2024] NIKB 11, para 554.

205 Bryner, n77.

206 International Union for Conservation of Nature, 'World Declaration on the Environmental Rule of Law 2016'. Available at: http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-091064.pdf

207 Supreme Court of Justice of Costa Rica (Corte Suprema de Justicia de Costa Rica), Voto No. 7294-98 de las 16:15, 13 October 1998. See also: L. Helfer & E. Voeten, 'Walking Back Human Rights in Europe?' (2020) European Journal of International Law 31(3), 797- 827.

208 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?'. NI Office, 2020. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907682/Explainer__UK_Government_commitment_to_no_diminution_of_rights__safeguards_and_equality_of_opportunity_in_Northern_Ireland.pdf, p.6. Also, noted by Craig et al., n87, p.20.

209 E.g. *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, paras 85 & 87; and NIHRC and ECNI, 'The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol'. Working Paper, December 2022. Available at: https://nihrc.org/publication/detail/nihrc-and-ecni-working-paper-the-scope-of-article-21-of-the-ireland-northern-ireland-protocol, para 4.8.

Brexit).[210] Change is not required[211] but is permitted, provided it does not lead to a diminution.[212] Therefore, the UK and Northern Ireland Governments will have little scope for lowering any standards caught within the scope of Article 2(1).

Besides the textual difference between 'non-regression' and 'no diminution', and the arguments for taking a purposive interpretation of Article 2(1) of the Windsor Framework, there is also evidence that an active choice was made to use 'no diminution' in Article 2, rather than one of the alternative phrases. First, as noted, non-regression is more commonly occurring and can be seen in various international agreements. Variations of it are also considered as fundamental principles in different contexts. No diminution, however, is a far rarer breed within legally binding documents.[213]

Second, and of particular importance in the context of the Windsor Framework, is that the level playing field provisions[214] in the TCA include the concept of non-regression. Article 7.2 of the relevant section of the TCA[215] is entitled 'non-regression from levels of protection'. Within this, Article 7.2(2) imposes an express obligation on both the EU and the UK not to 'weaken or reduce… its environmental levels of protection or its climate levels of protection below…' those in place at the end of the transition period. Read in conjunction with Article 7.1, we discover that this is an obligation regarding the *overall* levels of environmental protection and not an absolute obligation.[216] The TCA is a subsequent agreement between the EU and the UK, where similar terminology of no diminution could have been used as in the Windsor Framework, but the

210 E.g. S. de Mars et al., 'Continuing EU Citizenship "Rights, Opportunities and Benefits" in Northern Ireland after Brexit'. Report for IHREC and NIHRC, March 2020. Available at: https://nihrc.org/uploads/publications/Rights_Opportunities.pdf, 41-42; and in 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?'. NI Office, 2020. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907682/Explainer__UK_Government_commitment_to_no_diminution_of_rights__safeguards_and_equality_of_opportunity_in_Northern_Ireland.pdf.,p.7, stating that the provision is 'preventing *any* reduction…' [emphasis added].

211 Two caveats should perhaps be added here: 1) this is relative to what the situation *ought* to have been at the time of Brexit, as noted above and 2) arguably the law should be read in light of the continuing interpretations by the CJEU.

212 E.g. NIHRC and ECNI, 'The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol'. Working Paper, December 2022. Available at: https://nihrc.org/publication/detail/nihrc-and-ecni-working-paper-the-scope-of-article-21-of-the-ireland-northern-ireland-protocol, para 4.8. However, it is worth noting in the environmental context (and this will be returned to at a later stage), that regulatory divergence itself may lead to a diminution of environmental protections and thereby rights, e.g. regulatory divergence in the context of transboundary river basins, cross-border protected sites, or diseases such as avian flu. This is as it makes effective cooperation and coordination much more challenging. E.g. Brennan et al., n23; and M. Dobbs, S. Hamill and R. Hickey, 'Land Law and Land Use', (2023) *Irish Studies in International* 34:2, 149-185.

213 Article X of Annex 4 of the Constitution for Bosnia and Herzegovina provides that 'No amendment to this Constitution may eliminate or diminish any of the rights or freedoms referred to…', with similar connotations to 'no diminution' as is reflected in J.D. Yeager, 'The human rights chamber for Bosnia and Herzegovina – a case study in transitional justice', (2004) *International Legal Perspectives* 14, 44, p. 52 stating that this provision 'mandated' 'no diminution in the protection of human rights'. O'Donoghue, n21, on p. 102 notes the use in South Africa in an interim constitution regarding language rights.

214 Trade & Cooperation Agreement Part 2, Title XI. This is the level playing field for open and fair competition and sustainable development. See European Parliament, 'Briefing – The Level Playing Field for Labour and Environment in EU-UK Relations'. April 2021. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690576/EPRS_BRI(2021)690576_EN.pdf; and A. Jordan, V. Gravey, B. Moore and C. Reid, 'EU-UK Trade Relations: Why Environmental Policy Regression Will Undermine the Level Playing Field and What the UK Can Do to Limit it'. Brexit and Environment Network Research Paper on the Level Playing Field, 2020.

215 Trade & Cooperation Agreement Part 2, Title XI.

216 Article 7.1 states that 'For the purposes of this Chapter, "environmental levels of protection" means the levels of protection provided overall in a Party's law which have the purpose of protecting the environment, including the prevention of a danger to human life or health from environmental impacts, including in each of the following areas…'

choice was made to use contrasting phrases. This indirectly provides further support for the interpretation of no diminution above. At the very least it would indicate there should be no diminution of the levels of protection in each individual regime/area and arguably in each individual measure. While the focus here has been on the TCA components regarding the environment, it should be noted that the TCA includes similar provisions on labour and social elements. The language likewise includes 'non-regression', so the TCA does not offer a simple distinction between no diminution for a select few/core human rights and non-regression for the environment. Instead, it indicates a broader choice of non-regression in the context of trade/level playing field and no diminution regarding rights.

Consequently, it appears that for the purposes of Article 2(1) of the Windsor Framework that there was a clear choice made to use 'no diminution', rather than other, more common alternatives, and that this has significant legal implications. Therefore, Article 2(1) seemingly does not impose a requirement regarding the degree or number of diminutions – it is an obligation to ensure 'no' diminutions. Murray *et al.* therefore note that 'while the non-diminution guarantee is an absolute promise to avoid backwards steps, non-retrogression is a more flexible device which allows backwards steps if they are justified according to a set of criteria.'[217] The absolute nature of the obligation is relevant also for comparisons to requirements to take actions regarding breach of rights under the ECHR or Human Rights Act 1998 or otherwise, where, for instance, a breach must be serious or there must be an immediate risk.

Identifying Diminutions?

A significant point to highlight has been noted by the Northern Ireland Human Rights Commission (NIHRC) previously: 'the no diminution requirement applies to the substance of the rights protected as well as to the procedural safeguards relevant to implementation and enforcement of rights. Changes to the status of EU-derived law, which for example, excluded specific EU general principles, changed how courts interpret that law, and/or reduced or limited the means by which rights can be asserted or enforced, could therefore potentially constitute a diminution of rights.'[218]

What amounts to a potential diminution in the context of the environment and environmental human rights is discussed in more detail across the forthcoming chapters, but it is important to note that a diminution would not only be: there

217 C. Murray et al., 'Discussion Paper on Brexit', Working Paper for IHREC, January 2018. Available at: https://www.ihrec.ie/app/uploads/2022/08/Discussion-Paper-on-Brexit.pdf , p. 12. The authors continue by warning of the 'danger' that the non-diminution guarantee might be 'diluted by association with rules of non-retrogression'. See similarly, O'Donoghue, n19, p. 94 noting that non-diminution 'has a singular meaning' and does not permit any 'backward movement'.

218 NIHRC and ECNI, 'Submission of the NIHRC and ECNI to 'Retained EU Law: Where next?' - an inquiry by the European Scrutiny Committee', 11 April 2022. Available at: https://niopa.qub.ac.uk/bitstream/NIOPA/15203/1/NIHRC%20ECNI%20Submission%20to%20ESC%20Cttee%20on%20Retained%20EU%20Law%2011%20April%202022.pdf, para 3.2.

was an express right and now it no longer exists or is no longer binding. It could also, for instance, be enabled by a change in governance structures undermining conditions that support access to justice, reductions in standards for drinking water or air, weakening monitoring or enforcement mechanisms etc.

Consideration should not be given only to binding EU law, but to EU law and governance mechanisms more broadly. Even if it is accepted that there must be 'underpinning EU law' of a binding nature (see above), EU law is developed, interpreted and enforced on a daily basis. For example, soft law instruments, such as Commission Communications or technical guidance documents proliferate and are used by the relevant competent authorities and the courts in interpreting and applying the binding provisions. The comparison is not with a simple directive provision as laid out on paper, but, for instance, in light of its interpretation by the CJEU. On this last point, it also is worth noting that the CJEU has even looked to international treaties/agreements in interpreting EU concepts, including those within the Charter of Fundamental Rights. Where the CJEU has not yet conclusively interpreted a relevant EU provision, it may be appropriate to consider international agreements or alternative sources to help understand and evaluate the EU law before determining if a diminution has occurred or is likely to occur.[219]

Furthermore, in the context of environmental human rights and other human rights in an environmental context, cross-border cooperation and governance are fundamental to their effective protection. Harvey has argued that Article 2(1) of the Windsor Framework in conjunction with the RSE section of the 1998 Agreement 'is certainly broad enough to cover any diminution of rights resulting from the loss of measures of practical cooperation that are so integral to the protection of trafficked persons.'[220] This is likewise the case regarding environmental harms where nature is permeable and, for instance, transboundary air and water pollution occur constantly. This need for cross-border and all-island cooperation in an environmental context is reflected in the environment being one of the 12 listed areas of cooperation for the NSMC (as discussed in Chapter 2) and one of the 'other areas' of North-South cooperation listed in Article 11 of the Windsor Framework.

Finally, to fall within Article 2(1) of the Windsor Framework, a key condition is that the diminution 'results from [the UK's] withdrawal from the Union'. This requirement is relevant to the scope as discussed above, but also is fundamental to the extent or nature of protection: diminutions that are not clearly resulting from Brexit are not protected against under this provision. Therefore, if the UK could have lawfully diminished relevant protections while a member of the EU, then this is not relevant for Article 2(1).

219 Building on Craig and Frantziou's arguments, n21, if it were clear that the CJEU were likely to interpret an EU law underpinning a RSE in a specific way, this would then be useful to determine if a diminution had occurred/were likely to occur.

220 Harvey, n21, p. 42.

However, this phrase could also impact on the interpretation of 'no diminutions'. There is a logical (if somewhat speculative) argument that, if the protections of the relevant rights (etc.) would have been higher in Northern Ireland 'but for' Brexit, then there is a diminution relative to what would otherwise have been the case. In other words, the comparison is not simply with the protections on 'Brexit day', but also (to some limited extent) with the protections that arise on an on-going basis. This would imply that there is a limited obligation of keeping pace with EU protections – despite, the logic, this would prove very challenging to have accepted by the courts and is an issue that merits further investigation.

The parameters here are challenging to identify and while some actions obviously fall within Article 2(1) of the Windsor Framework, for others it is harder to determine whether a potential diminution truly 'results from' Brexit or not, as can be highlighted by consideration of various scenarios:

Change	Is any consequent diminution likely to be one that 'results from' Brexit?
The UK/Northern Ireland reduces standards or the level of protection of relevant rights (etc.) that were imposed on Member States by EU law at the time of Brexit	Yes
The UK/Northern Ireland no longer is bound by or has access to EU governance mechanisms, bodies and structures (e.g. the European Environmental Agency, European Food Safety Authority, the European Commission or the Court of Justice of the EU) in the manner that occurred pre-Brexit	Yes
The UK/Northern Ireland is no longer bound by specific international laws (e.g. Water Convention),[221] where previously bound as an EU Member State	Yes
The UK decides to leave the ECHR (participation required by the EU, but not technically legally obliged)	Legally, the UK could in principle have left the ECHR while a member of the EU, but, in practice and logically, any diminution still 'results from' Brexit;[222]

221 The UK is no longer bound by some international laws that it had not independently ratified, where it had previously been bound as a member of the EU. See UKELA, 'Brexit and Environmental Law - the UK and International Environmental Law after Brexit, 2017'. Available at: https://www.ukela.org/common/Uploaded%20files/brexit%20docs/international%20env%20law%202017.pdf>.

222 This links back to the point above regarding the situation where the RSE/ Northern Ireland measure giving effect to the RSE is underpinned by something other than binding EU law – highlighting the significance of not having an automatic restriction linked to measures being underpinned by EU law (especially a narrow interpretation thereof).

The UK/Northern Ireland does not develop and adopt equivalent evolving laws/policies, where these were part of EU law/policy pre-Brexit but the relevant deadline for transposition/ implementation had not passed, e.g. regarding single-use plastics	It appears logical (and open to the courts to decide) that any diminution 'results from' Brexit, but this does not reflect the understanding of the UK/the Northern Ireland Office or the Court of Appeal in *SPUC*,[223] whose comments indicate that the provision must have been part of Northern Ireland law at the end of the transition period.[224]
The UK/Northern Ireland does not develop and adopt equivalent evolving laws/policies, where these were not part of EU law/policy pre-Brexit but were being developed (and where adopting equivalent laws is not required, for instance, under Article 13 of the Windsor Framework)	It is arguable that any diminution 'results from' Brexit, but equivalent to ideas of 'lost opportunity' it would likely be necessary at least to show that the eventual EU law/policy was very likely to be developed/expected. A real, tangible opportunity and not simply a possibility in principle. Even then, this does not reflect the narrower UK interpretation of the provision and it is unlikely to be adopted. Where the law/policy was not previously contemplated it would be very challenging to establish that there is a diminution resulting from Brexit, e.g. if the UK were members, would this law/policy have materialised? What of something like the EU Nature Restoration Regulation? The lack of applicability is due to non-membership, but there was no guarantee it would be adopted or in what form – so, even here, can its non-applicability be clearly determined as a diminution that results from Brexit? Even under an expansive interpretation of 'results from', this would be very challenging to establish.

223 *SPUC Pro Life Limited v Secretary of State for Northern Ireland (and others)* [2023] NICA 35, para 54.

224 E.g. 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?'. NI Office, 2020. Available at : https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907682/Explainer__UK_Government_commitment_to_no_diminution_of_rights__safeguards_and_equality_of_opportunity_in_Northern_Ireland.pdf, pt.7, As a side note and as noted above, if the deadline had passed and transposition and implementation were incomplete or flawed pre-Brexit, it should not matter whether the EU provisions had direct effect or not – NI/the UK could have been compelled to rectify the matter and therefore any diminution relative to what ought legally be the case (where the EU law remains the same) should be considered to result from Brexit.

The UK/Northern Ireland does not develop or adapt their laws/policies/practices to reflect CJEU developments that are new interpretations of EU law that was binding on/within Northern Ireland at the end of the transition period.	A strong argument exists that any diminution 'results from' Brexit.[225] This seemingly contrasts with the Northern Ireland Court of Appeal's approach to CJEU judgments, but not conclusively.[226]
The UK/Northern Ireland does not fund policies/ bodies adequately to help promote and uphold relevant policies/laws/rights, because its econo my is struggling.	Diminutions may result from Brexit, but this will be highly challenging to prove. For instance, Brexit has impacted funding for specific pur poses (e.g. the loss of EU ring-fenced funding), the economy and the need for extra resources for a range of purposes (e.g. to review and adapt areas previously (co-)regulated by the EU or where EU bodies provided expertise). However, economies are also in flux regularly, NI's economy is frequently in a poor way, the lack of a functioning Stormont Executive poses challenges for the Northern Ireland budget etc. If elements were mandated by EU membership (in cluding specific ring-fenced funding), that is clearly easier to establish, but otherwise there are high hurdles to meet.

3.5 Article 2(2) of the Windsor Framework – Related Work of Relevant 1998 Agreement Institutions

Article 2(2) of the Windsor Framework complements Article 2(1). It is focussed on the 'related work' of relevant institutions. It is of arguably broader scope in some ways, but the obligation is more nebulous and likely harder to use in litigation. Perhaps for this reason it has not received the same attention as Article 2(1), but nonetheless it is essential to consider, and some elements clearly fall within its scope. From a human rights' perspective, it should be borne in mind that any relative loss in support for bodies, including the NSMC, NIHRC, ECNI, or other 1998 Agreement bodies would undermine their abilities to undertake the full range of their activities – including those directly relevant to human rights, such as under Article 2(1).

The main focus herein is on Article 2(2) itself, with some consideration given to which bodies might be captured. It is important to bear in mind (i) the justifications for an expansive interpretation of both Article 2 of the Windsor Framework and the 1998 Agreement, (ii) the scope of what falls within the RSE

225 Craig and Frantziou, n21, pp. 67-68; and Lock, Frantziou and Deb, n21.
226 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 143.

section of the 1998 Agreement for the purposes of Article 2(1) and (iii) the focus points/work of the 1998 Agreement more generally (as outlined in Chapter 2). These will all help to interpret Article 2(2) and determine its potential scope and role, thereby also reducing the need to expand on some elements in detail.

Direct Effect

In light of the dualist nature of the UK, in order to be availed of by individuals before the national courts, Article 2(2) must be incorporated within the domestic regime. As with Article 2(1) of the Windsor Framework, this requires that the provision meet the criteria of direct effect (clear, precise and unconditional), thereby bringing the 'conduit pipe' of section 7A of the EU (Withdrawal) Act 2018 into play. However, unlike Article 2(1), this has not yet been decided conclusively by the courts.

The provision is clearly unconditional, imposing an obligation on the UK Government that is not caveated or made conditional in any fashion. However, the issue of clarity and precision is debatable and links to the issues of scope and nature of protection below. We would argue that, while the precise contours of the provision remain fuzzy, there is sufficient content that clearly falls within the scope to render it directly effective. This is supported in part by the Northern Ireland Court of Appeal having recognised in the *Legacy* case that the related Article 2(1) of the Windsor Framework has direct effect, albeit this does not guarantee the same judicial conclusion would/will be reached for Article 2(2).

Scope

As mentioned, Article 2(2) of the Windsor Framework focuses on the 'related work of the institutions set up pursuant to the 1998 Agreement, including [human rights/equality bodies] … in upholding human rights and equality standards'.

First, 'related work' is not defined, other than through an indication that it goes beyond 'upholding human rights and equality standards'. There is clearly a link, via Article 2(1) of the Windsor Framework, to the content of the RSE section of the 1998 Agreement – seemingly both the work in generally supporting those RSE in Northern Ireland and the work in ensuring that the RSE are not diminished due to Brexit (i.e. in the supervision and enforcement of Article 2(1)). However, there appears to be a potential variation in scope here from Article 2(1) in that it could be possible that once a relevant body is identified, the scope of the provision could be stretched based on their general nature, purposes and activities. Of note, one of the listed bodies is the 'Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland',[227] which emphasises the potential for related work to encompass cross-

227 See also Article 14 of the Windsor Framework in this respect.

border/all-island components and indeed extend beyond Northern Ireland – even though the obligations are on the UK. This highlights the significance of cross-border cooperation that is a fundamental aspect of the 1998 Agreement more generally and respected by the Windsor Framework, e.g. in its Preamble, Article 1 and Article 11.

There is also thereby an argument to be made that, in particular for the three listed bodies but also for any other relevant bodies, their full range of activities should have a presumption of falling within the scope of Article 2(2) of the Windsor Framework. This raises interesting questions regarding bodies such as the NSMC (whose six areas include the environment) or bodies such as the Loughs Agency (discussed below). In particular, around how flexible Article 2 can be in encompassing 'related work' once there is some link with the section on RSE and they are 'upholding human rights and equality standards'. For instance, if a narrow interpretation is taken regarding what measures give effect to RSE, e.g. so that general environmental protections as in the case of nature protection are not considered to further rights such as the right to life, could it nonetheless be argued that they fall within the 'related work'? Or, indeed, would 'related work' encompass elements such as public engagement mechanisms, facilitating cross-border cooperation, funding activities etc.? A strong argument could be made that they should be included, whether they directly address the RSE or are ancillary to them.

Second, however, the work must be of the relevant institutions 'set up pursuant to the 1998 Agreement'. It is obvious that this includes the three bodies mentioned above, the NSMC, a range of other political bodies created under the 1998 Agreement and listed 'implementation bodies',[228] such as Waterways Ireland and the Special EU Programmes Body. Anything aside from an excessively narrow (so narrow as to defeat its general purpose) interpretation of Article 2(2) of the Windsor Framework would also encompass the relevant work of a wider range of bodies established under the 1998 Agreement to discharge key implementation roles, e.g. the Loughs Agency, which is an agency of the Foyle, Carlingford and Irish Lights Commission (itself a listed implementation body).[229]

Third, despite Article 2(2) being part of the Windsor Framework, the EU and EU law play a backseat here. There is no additional criterion regarding the impacts of Brexit or consideration of EU law (other than indirectly in considering the nature of the obligation). There is no immediate need to consider EU competence or actions in reflecting on the scope of Article 2(2). In contrast with Article 2(1), in principle, the focus is simply on the 1998 Agreement bodies and their work. This also indicates that the work is not limited to either pre- or post-Brexit work or issues – although it might be affected by Brexit, if this were

228 These were provided for under the 1998 Agreement and subsequently established by the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland establishing implementation bodies, Treaty Series No. 51 (2000) Cm 4706, 8 March 1999.

229 North South Ministerial Council. Available at: https://www.northsouthministerialcouncil.org/north-south-implementation-bodies

to lessen or increase the activities of the relevant bodies or make their activities more burdensome.

Together therefore, the scope appears to apply to a potentially very wide range of activities, e.g. the NSMC's efforts at cross-border cooperation and collaboration across their areas of competence, including the environment; Waterways Ireland and the Loughs Agency's day-to-day roles regarding transboundary water bodies; the broad work of the 3 bodies mentioned in Article 2(2), including in supervising and enforcing Article 2, but also in all of their functions that existed prior to Brexit (reflecting an increased workload).

Nature of protection

Article 2(2) of the Windsor Framework imposes an obligation on the UK to 'continue to facilitate the related work'. This is a seemingly clear, but extremely challenging obligation to pinpoint. It is, as yet unclear as to whether this could include: creating and maintaining standards and/or governance mechanisms; ensuring a strong economy and adequate funding; ensuring general peace and stability; and avoiding regulatory divergence on the island or indeed between the island of Ireland and Great Britain, considering the cross-border bodies mentioned in Article 2(2) of the Windsor Framework and more generally 'set up pursuant' to the 1998 Agreement and the conditions needed to foster cross-border cooperation. Although it could be argued that each of these possibilities could fall within the intended nature of the protection, the precise point at which the UK is in breach of the provision and to a level that a court would enforce it is opaque to say the least. A fundamental question that remains unanswered as of yet in this context is whether 'facilitate' could be construed as meaning to assist, enable or not hinder.

The answer is most likely along the lines of: it will be much easier to avail of Article 2(2) of the Windsor Framework where the UK Government actively hinders or undermines the related work (whether intentionally or not), rather than where they have simply not undertaken a desirable action. In part this is because typically there are numerous ways in which a government could facilitate a given action. Nonetheless, this could be very useful, e.g. if UK policy/legislation leads to considerable regulatory divergence between Northern Ireland and Ireland, this would make the work of the Joint Committee or the NSMC much more challenging. This could arguably even be used if, for instance, the UK were to prevent Northern Ireland in matching future regulatory developments in Ireland.

A duty under Article 64 of The Education Reform (Northern Ireland) Order 1989 to 'encourage and facilitate the development of integrated education' in Northern Ireland was considered by the Northern Ireland High Court in 2014.[230] The Northern Ireland Department in question 'accepts that it is under an Article

230 *Drumragh Integrated College's Application* [2014] NIQB 69.

64 duty to encourage and facilitate integrated education in Northern Ireland and that this duty *has practical consequences and legislative significance which includes taking positive steps or removing obstacles which inhibit the statutory objective*' [emphasis added].[231] Subsequently, the court states in the case that '[t]he creation of an additional difficulty is the opposite of encouraging and facilitating'.[232] The case largely focusses on issues of financing, clearly considered to be a significant means of 'facilitating', but this is by no means considered to be the sole means. The duty considered by the High Court here is a distinct duty and context, but nonetheless can provide some limited insights as to how Article 2(2) might be interpreted.

Regarding Article 2(2) of the Windsor Framework, the UK Government generally and the Northern Ireland Office more specifically have identified that 'resourcing of the dedicated mechanism' is essential. Thus, while the NIHRC and ECNI pre-existed Article 2, their expanded functions require additional funding to 'ensure proper scrutiny of the UK Government's implementation of the Article 2 commitment and cover, among other things, new policy and research functions and communications and education activities.'[233] Without additional funding, this would undermine the potential to ensure oversight of rights and protections – whether under Article 2 or otherwise. However, they are not the sole bodies expressly mentioned in Article 2(2) (and for example of there is no mention of the Joint Committee) and the scope is more flexible still, in applying to relevant bodies 'set up pursuant' to the 1998 Agreement undertaking related work. While clearly the UK is not solely responsible for these bodies, a failure to adequately resource other relevant bodies – such as the BIC and British-Irish Intergovernmental Conference – could amount to a breach of Article 2(2) – not just in the oversight of Article 2, but in the day-to-day activities encompassed within their 'related work'.[234] In considering this, it should be borne in mind that the shifting political and legal landscape, beyond overseeing Article 2(1), makes general functions more challenging (and more resource-intensive) and likewise the need and potential for cross-border cooperation may be impacted.[235] This would clearly have knock-on impacts regarding what supports might be necessary. Further, as Murray and Rice note, there have been considerable funding cuts previously that would need to be reversed, along with the additional funding to match additional roles.[236]

231 Ibid, para 27.
232 Ibid, para 59.
233 E.g. 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?'. NI Office, 2020. Available at: https://assets.publishing.service.gov.uk/government/uploaads/system/uploads/attachment_data/file/907682/Explainer__UK_Government_commitment_to_no_diminution_of_rights__safeguards_and_equality_of_opportunity_in_Northern_Ireland.pdf, p.30.
234 On this point it is notable that the typical scope of British-Irish Intergovernmental Conference meetings includes issues concerning rights and equality which could therefore be considered 'related' for the purposes of Article 2(2). For example the most recent British-Irish Intergovernmental Conference covered security cooperation and paramilitary activities as well as citizenship and rights matters in view of changes in UK immigration law; see Northern Ireland Office, 'Joint Communiqué of the British-Irish Intergovernmental Conference January 2023'. Available: https://www.gov.uk/government/news/joint-communique-of-the-british-irish-intergovernmental-conference-january-2023
235 E.g. O'Donoghue, n21, p. 99.
236 C. Murray and C. Rice, 'Beyond Trade: Implementing the Ireland/Northern Ireland Protocol's Human Rights and Equalities Provisions' (2021) *Northern Ireland Legal Quarterly* 72 1, p. 28.

A final thought should be given to the idea of continuation – i.e. of continuing to facilitate the related work of the bodies. The support pre-Brexit might not have been identical or might have been through a different means, but it should not be interpreted excessively narrowly. For instance, if the UK's membership of the EU meant that the EU provided funding, expertise or shared regulatory frameworks that facilitated the work of the bodies, then the UK should continue to facilitate this even if they did not actively seek to hinder the work of the bodies. The boundaries become even less clear in the context of external elements (e.g. major political, economic, or environmental shifts) that are not due to the UK impact on the workload, needs and/or resources of the 1998 Agreement bodies. The extent to which Article 2(2) requires enhanced support in such a situation is currently unclear to say the least.

Article 2(2) of the Windsor Framework was considered briefly by the High Court in the *Legacy* judgment.[237] It was argued therein that the legislation at the heart of the case was in breach of Article 2(2), as it impeded the work of the NIHRC. The High Court stated that:

> 'If the applicants' argument is correct then any legislation which is in breach of the Convention or the [Windsor Framework] could in practice breach article 2(2). There is nothing in the Act which prevents the NIHRC from reviewing the adequacy and effectiveness of law and practice relating to the protection of human rights, in bringing proceedings (indeed, the NIHRC has played a prominent role in these proceedings) and in conducting relevant investigations.'[238]

While the Court's reluctance to open potential floodgates is understandable, especially where unnecessary for the case in hand, this restrictive approach nonetheless goes against the wording of the provision. The NIHRC does indeed retain powers regarding review, investigation and litigation, but where legislation seeks to limit these or effectively hinders the NIHRC's (or other relevant bodies') work in the relevant areas, it would seem possible to breach Article 2(2) of the Windsor Framework and merit further investigation. Considering the UK Government's acknowledgement that funding of the dedicated mechanism bodies is an essential part of Article 2(2), it should also be considered that imposing extra burdens on the dedicated mechanism bodies that eat into existing resources does 'frustrate' their functions and could be in breach of Article 2(2).

3.6 Conclusions

This Chapter has identified the parameters of Article 2(1) of the Windsor Framework, subject to what falls within the relevant RSE section of the 1998 Agreement. It has analysed this issue in light of justifications for an expansive

237 *In the Matter of Martina Dillon and others* [2024] NIKB 11, paras 614-625.
238 Ibid, para 624.

approach to interpretation and in light of the *SPUC* test outlined above, while noting that we consider the latter primarily useful as a shortcut to identify what falls within Article 2(1) and not necessarily in identifying what is ruled outside its parameters. The following points can be highlighted regarding Article 2(1) as central to its application:

A relevant right, safeguard or equality of opportunity (RSE) (as per the 1998 Agreement) must be identified;

- This RSE must have been given effect (to some extent) in Northern Ireland at the end of the transition period, or it is possible to clearly identify an obligation that Northern Ireland *ought* to have given effect to;[239]
- Those Northern Ireland measures (or obligations that ought to have been given effect to) should be underpinned by EU law (broadly understood) or EU membership – the expansive interpretation called for in Chapter 1 would justify a broad understanding of underpinned by EU law (being the phrasing in *SPUC*), but also simply applying EU membership as an alternative criterion (without a requirement that they be underpinned by EU legislation);
- No diminution of any sort may occur of these RSE as a result of Brexit.

Crucially, Article 2(1) of the Windsor Framework constitutes an unqualified obligation to ensure *no* diminution 'results from' Brexit. The requirement to ensure no diminution occurs is not conditional on the degree, or gravity of any diminution, but rather the obligation is one of result and absolute. This contrasts with requirements for action to be taken regarding breach of rights under the ECHR or Human Rights Act 1998. Therefore, where the subject matter falls within the relevant section of the 1998 Agreement, then it must not suffer a diminution due to Brexit. If it simply changes or if the diminution is not clearly due to Brexit, then Article 2(1) does not apply.

Our examination of Article 2(2) of the Windsor Framework has been relatively light touch, largely because it is, as yet, substantially untested, and also because it is open to a very broad application. Article 2(2) requires identifying the 'related work' (linked through Article 2(1) to the RSE section of the 1998 Agreement) of relevant 1998 Agreement bodies. The discussion in Chapter 2 regarding the RSE section of the 1998 Agreement provides a basis to highlight the work of the Commissions, the NSMC, Loughs Agency, Waterways Agency etc. regarding the environment and argue that suitable support must be maintained – including in light of the evolving context and any extra pressures. Article 2(2) therefore arguably calls for the continued support of a wide range of bodies' work on environmental protection (even if their primary purpose is not environmental or expressly human rights), as they nonetheless promote the objectives and goals found within the RSE section.

239 See also discussion in Chapter 3.4 of this report. There is a further argument to be made, based on the expansive interpretation, that the prohibition on diminution should also include those that would not have arisen 'but for' Brexit – this would thereby include situations where the EU has enhanced environmental standards and protections since the end of the transition period.

The nature of the support owed is ambiguous. Some (not tokenistic) financial support at a minimum will be required, but also potentially general administrative, regulatory and capacity supports as best possible - in particular, where those same types of supports were provided by the UK pre-Brexit or where Brexit has created extra burdens. Such supports should be adapted to address any changes in workload, resource requirements and finances of these bodies. Further, there are arguments that the continued support should include elements such as regulatory alignment or supports to address challenges raised by increased regulatory divergence arising due to Brexit.

Overall, Article 2(2) of the Windsor Framework seems reasonably flexible and sufficiently broad in scope to apply in the context of the environment, including relevant to rights and safeguards. However, any challenge would need to identify clearly how support was provided before and how this has lessened or become inadequate. The High Court's *Legacy* judgment highlights the need to make this case very clearly, in light of the swift dismissal of the argument therein.

Chapter 4:

Brexit and Environmental Protection in Northern Ireland

4.1 Introduction

Chapters 2 and 3 have explored the RSE section of the 1998 Agreement and the scope of Article 2 of the Windsor Framework. The foregoing analysis indicates that a broad range of environmental protections fall within the ambit of the Article 2 protections. To begin to establish areas at risk of potential post-Brexit diminution, it is therefore necessary to consider the impact of Brexit on environmental protection in Northern Ireland. This Chapter first provides a brief overview of the EU's contribution to Northern Ireland environmental governance prior to Brexit – highlighting strengths and weaknesses of both substantive and procedural elements (e.g. core laws, the role of the Commission and CJEU, how slow it can be etc). Second, it then considers the general impacts of Brexit on environmental protections, including the withdrawal itself from the EU and core EU/UK legal agreements, as well as some indirect[240] impacts from the domestic legal and policy responses, which demonstrate some overall considerations that will be of general use for any evaluation of whether a potential diminution has occurred across a wide range of areas including those explored in detail in chapters 5,6 and 7.

4.2 EU Contribution to Northern Ireland Environmental Protections and Governance

The EU's Contribution to Environmental Law and Policy Across Europe

The starting point is to note that the EU has shared competence in the environmental field.[241] It is not an exclusive competence and can only be exercised in conformity with the principles of conferral and subsidiarity,[242] where the objective of the proposed action cannot be sufficiently achieved by Member State level action, but where the objective can be better achieved by action at EU level, by reason of scale and effects of the proposed action (Article 5(3) TFEU & Protocol No.2 on the application of subsidiarity and proportionality). Nonetheless it is sufficient to facilitate the EU in legislating and developing policy in the field – something that it has done to a very significant extent, with 'several hundred' pieces of hard law,[243] complemented by a raft of soft law

240 The more indirect elements, e.g. knock-on effects on the economy, are relevant but are not discussed herein due to reasons of limited scope and capacity.
241 Article 4 Treaty on the Functioning of the European Union .
242 Article 5 Treaty on European Union.
243 https://www.europarl.europa.eu/erpl-app-public/factsheets/pdf/en/FTU_2.5.1.pdf, p.4.

instruments. The UK REUL Dashboard cites some 1930 pieces of EU legislation within the responsibility of DEFRA alone (which would therefore fall similarly within DAERA's responsibility)[244] – while many would be technically regarding agriculture/food, they would also impact on environmental matters.

The EU's contribution in the environmental field is multifaceted. As well as helping to develop, promote and conclude international and regional agreements regarding environmental and other human rights, it has done similarly regarding broader environmental agreements such as the Basel Convention,[245] the Convention on Biodiversity 1992, the United Nations Framework Convention on Climate Change 1992 (UN FCCC), the Convention for the Protection of the Marine Environment of the North-East Atlantic 1992 (the OSPAR Convention) etc. Within the EU, whether in implementing these international and regional agreements or in developing EU policy and law, the EU has used a wide range of mechanisms. The substantive law includes Treaty level objectives (e.g. a high level of environmental protection), environmental principles (prevention, precaution, polluter pays and source) and elements regarding the role of science, which are all binding on the EU institutions in developing, implementing and enforcing EU environmental law;[246] secondary legislation comprised of directives,[247] regulations and decisions; complementary soft law instruments,[248] in particular technical guidance documents such as BREFs (best available technique reference documents) within the context of industrial emissions; and the judgments of the CJEU.[249] This is complemented through a wide range of softer mechanisms, such as the role of the European Environment Agency in providing and sharing information; formal and informal networks (e.g. as in the case of chemicals or genetically modified organisms); and incentives, in particular through funding that is ring-fenced, e.g. via the Common Agricultural Policy, Horizon Europe funding, Leaf awards, as well as aspects of INTERREG and the European Regional Development Fund.

Finally, the general EU governance structures are central to the successes of EU environmental policy and law, including the political institutions in creating it, the European Commission in providing guidance, monitoring and enforcing it, the CJEU in developing its interpretation and enforcing it,[250] and the Commission

244 The UK REUL Dashboard only includes legislation made in Westminster and not in devolved legislatures. Competence in the field of the environment and agri-food is largely devolved and therefore the scope of environmental REUL applicable in Northern Ireland (as well as in Scotland and Wales) can be assumed to be largely equivalent to that of DEFRA.

245 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1994.

246 Article 191 Treaty on the Functioning of the European Union. This is also supplemented by Article 11 Treaty on the Functioning of the European Union's integration principle, mandating the integration of environmental considerations within other EU policy.

247 These include both framework directives, as in the case of waste, water and air, but also more specific directives and regulations.

248 See for instance, M. Dobbs and O. Stefan, 'EU Soft Law in the UK on the Eve of Brexit: (not) Much Ado About Nothing?,' in M. Eliantonio et al. (eds.), *EU Soft Law in Member States: Theoretical Findings and Empirical Evidence,* (Bloomsbury/Hart, 2020).

249 For an overview of some recent relevant CJEU judgments see G. van Calster, 'Significant EU Environmental Cases: 2021 – 2022', (2023) *Journal of Environmental Law*35(2), 251–264. The range and role of CJEU judgments in environmental protection is highly significant, in interpreting and enforcing EU environmental law. See for instance the discussion regarding nature conservation law below.

250 E.g. Jack, n189.

and EU Ombudsman[251] for their role regarding complaints and individual communications. This is supplemented by the roles of Member States (and their competent authorities) in implementing and enforcing the law domestically, as well as individuals and in holding Member State governments and the EU institutions to account through EU complaint, consultation and intervention processes. It is a highly intricate web of actors and mechanisms that addresses a wide range of environmental fields, including waste, water, air, chemicals, nature and most recently to an extent regarding soil.

It is worth noting that while EU environmental law does not attempt to achieve maximum harmonisation, it does provide for some standard setting, common procedures, EU level definitions and interpretations (within legislation, soft law and the CJEU's judgments) and shared governance mechanisms, all of which (at least in principle) lead to a degree of regulatory alignment across the EU and facilitate transboundary cooperation. Indeed, some components of EU environmental law mandate consultations and/or cooperation on a transboundary basis, e.g. regarding environmental impact assessments where significant transboundary impacts might occur[252] or in the context of transboundary river basins.

The EU's Contribution to Northern Ireland Environmental Protection

In considering the EU's contribution to Northern Ireland environmental law and governance, it is worth noting that Northern Ireland has a very poor history regarding the environment.[253] This is due to a myriad of reasons that do not need to be detailed here, but include 'The Troubles' conflict, political instability (including during periods of devolution, direct rule, and limbo), limited finances, competing priorities and so on. Northern Ireland has been decried as a climate laggard[254] and as the 'dirty corner of the UK',[255] which itself does not have a strong environmental reputation. Thus, prior to Brexit, the need for reform and improvement was highlighted on numerous occasions.[256]

If Northern Ireland environmental law is examined, it is apparent that much of it derives from (i) UK-wide or central UK Government origins (e.g. some to do with water or nature conservation) and (ii), in particular, the EU. Northern Ireland has been heavily dependent on the EU especially for the creation and adoption of environmental laws across a wide range of areas. Gaps remain where the EU

251 E.g. CEE Bankwatch Network, 'EU Ombudsman launches investigation into financing of Europe's largest fossil fuelsproject'. December 2020. Available at: https://bankwatch.org/press_release/eu-ombudsman-launches-investigation-into-financing-of-europe-s-largest-fossil-fuels-project.

252 E.g. See Article 7 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L26/1, as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L124/1.

253 Brennan, Purdy and Hjerp, n4.

254 E.g. C. Keating, ''Leaving our climate laggard status behind': Northern Ireland's net zero climate target to pass into law'. Business Green, 2002. Available at: https://www.businessgreen.com/news/4046262/northern-ireland-enshrine-net-zero-climate-target-law.

255 E.g. Gravey, n16.

256 See n17.

has not legislated, e.g. regarding soil/contaminated land, and is sometimes quite bare or in need of development where the EU has only provided a minimal level of harmonisation, e.g. regarding noise. Nonetheless, pre-Brexit, a significant body of environmental law existed in Northern Ireland that derived primarily from the EU.[257]

The potential for the UK and thereby Northern Ireland to be held to account through enforcement actions and the imposition of fines by the CJEU was a major tool in the development of Northern Ireland environmental law in accordance with EU law – Northern Ireland transposition, implementation and enforcement might still have been slow, flawed, and ultimately incomplete but the threat of infraction proceedings in particular helped bring significant improvements.[258] As Brennan *et al.* have noted, 'the accountability and enforcement mechanisms designed to ensure EU law is transposed and implemented throughout Member States have played an important coercive role in ensuring that the devolved government has at least attempted to achieve some level of compliance'.[259] Similarly, the Aarhus rights[260] (discussed above and below) have proven especially important in Northern Ireland where there has been no independent environmental agency, where there are limited finances and where agriculture plays such a significant role.[261] In addition, the influence of EU law across the island of Ireland also facilitated cooperation on numerous environmental fronts including in nature conservation (e.g. all-island approaches to invasive species), river basin management and environmental impact reporting. This has been supported through funding sources, such as PEACE funding.[262]

Although Northern Ireland environmental protections while part of the EU were far from perfect, pre-Brexit, the EU played a significant role within NI's environmental governance architecture and ensured it was possible (at least in principle) to challenge and rectify many issues through the various available oversight and accountability mechanisms. Article 2 of the Windsor Framework does not imply that EU membership led to a perfect scenario, but simply that individuals should not suffer a diminution as a result of Brexit. In considering any potential diminutions, it should be considered that it is not merely the loss of specific laws that might lead to a diminution, but also the loss of funding or governance mechanisms such as the CJEU's role in enforcement or interpretation.

257 Sharon Turner, 'Transforming Environmental Governance in Northern Ireland: Part One: The Process of Policy Renewal' (2006a) *Journal of Environmental Law* 18, 55.
258 E.g. Jack, n189.
259 Brennan, Dobbs and Gravey, n18.
260 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) UNECE 1998.
261 Sharon Turner and Ciara Brennan, 'Modernising environmental regulation in Northern Ireland: a case study in devolved decision-making' (2012) *Northern Ireland Legal Quarterly* 63 (4), 509-32.
262 See: Brennan et al., n23; and Dobbs, Hamill and Hickey, n212.

4.3 Direct Impacts: UK Withdrawal, Withdrawal Agreement, and TCA

When the UK left the EU, the general provisions of the EU Treaties ceased to apply in NI. Although an obvious substantive impact of Brexit – and notwithstanding the novel requirements under the Windsor Framework for some EU laws to still have effect in Northern Ireland (see Appendix 1 of this Report) – the end of the general application of EU Treaties removed important policy objectives[263] and legal principles[264] (e.g. precautionary and preventative principles, polluter pays etc.) regarding the pursuit and achievement of environmental protections in Northern Ireland as part of Member State UK. Further, the majority of substantive EU laws in the area of environmental protection ceased to generally apply *as EU laws* as well as the structures for implementation, oversight, and enforcement of the same including, in particular, the end of European Commission oversight and removal from the general jurisdiction of the CJEU (subject to the Windsor Framework-related exceptions – again see Appendix 1). Alongside this, the loss of access to relevant EU funding initiatives and EU knowledge networks in the environmental field is another important and detrimental Brexit impact.

As well as accounting for the impacts of the fact of UK withdrawal from the EU legal *acquis* and governance structures, we must also consider the impacts of the terms of that withdrawal, and arrangements for future cooperation, as agreed between the EU and UK in the UK-EU Withdrawal Agreement (including the Windsor Framework) and later the TCA.[265]

The main text (excluding protocols) of the **EU-UK Withdrawal Agreement** does not directly address the environment.[266] However, the **Windsor Framework** addresses the environment explicitly in Article 11 and also, in passing, in its Annexes 2 and 5. The most substantive Windsor Framework provision on environmental matters, set out in Article 11, concerns the continued facilitation of North-South cooperation in the area of environmental policy. Importantly, the obligations of Article 11 are internally referent to the Windsor Framework which, under its terms, must be 'implemented and applied so as to maintain the necessary conditions for continued North-South cooperation' including in the areas of the environment. Regarding governance, Article 11 also mandates the UK-EU Joint Committee, set up to oversee the implementation of the Withdrawal Agreement in its entirety, to 'keep under constant review' the extent to which that Article 11 obligation for the

263 For example, the Article 11 Treaty on the Functioning of the European Union obligation for 'environmental protection requirements [to] be integrated into the definition and implementation the Union's policies and activities' alongside Article 114 Treaty on the Functioning of the European Union, providing for approximation of Member State laws and implementation of EU policy objectives at national level to consider and account for 'the protection of the environment'.

264 In particular Articles 191 – 193 Treaty on the Functioning of the European Union introduce the principle objectives for EU environmental policy; these include: preserving, protecting, and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.'

265 See Brennan et al, n23.

266 The Protocol on Gibraltar also makes mention and provision related to environmental policy and protections – the details of which are unnecessary to review for the purpose of this report.

maintenance of necessary conditions for North-South cooperation (including in environmental matters) continues. In this respect, recommendations from the Specialised Committee, which can in turn (under Windsor Framework Article 14) receive inputs from the NSMC and North-South implementation bodies (including Article 2(2) of the Windsor Framework bodies e.g., Waterways Ireland, Loughs Agency etc.), may also be considered and incorporated into UK-EU Withdrawal Agreement Joint Committee recommendations to the EU and UK regarding the implementation of Article 11. Overall, the obligations created by Article 11 of the Windsor Framework and, by proxy the Windsor Framework in general, are more on the level of policy principle than legal obligation when it comes to environmental protections.

The **EU-UK Trade and Cooperation Agreement** does not generally compel the EU or the UK to comply with each other's standards. It is thereby open to both sides to reduce regulatory baselines provided that they comply with their own internal or international obligations. This introduces the risk that one or the other might lower their standards or not implement, or enforce effectively, existing standards, in order to obtain a competitive advantage for their industries.[267] Consequently, the EU (in particular) negotiated to ensure the inclusion of level playing field provisions within the TCA[268] – seeing it as one of their own 'red lines' considering how interlinked the markets were and remain,[269] even while the UK sought freedom to diverge. While TCA provisions are not directly relevant to Article 2 of the Windsor Framework, insomuch as obligations contained therein *may* offset the likelihood of diminutions of rights in scope of Article 2, they are worth briefly noting. Reflecting their raison d'être should not be thought that environmentally relevant TCA provisions are either broad in scope or easy to enforce.

There are some individual specific provisions,[270] for instance, a shared objective of achieving net zero by 2050[271] and cooperation on animal welfare, antimicrobial resistance, and sustainable food systems.[272] However, the two key provisions relevant to the environment within the level-playing field content are found within TCA Articles 7.2 and 9.4 and relate to non-regression and 're-balancing measures' respectively.

Article 7.2 creates two main obligations regarding non-regression in the field(s) of environmental matters and climate. It imposes a general obligation to 'continue to strive to increase their respective levels of environmental or respective levels of climate protection'[273] – this is positive to include and

267 P. Mariani and G. Sacerdoti, 'Trade in Goods and Level Playing Field'. Brexit Institute, Working Paper No. 7/2021. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797021 7.

268 Trade & Cooperation Agreement Part 2, Title XI. This is the level playing field for open and fair competition and sustainable development. See European Parliament, 'Briefing – The Level Playing Field for Labour and Environment in EU-UK Relations'. April 2021. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690576/EPRS_BRI(2021)690576_EN.pdf; and A. Jordan, V. Gravey, B. Moore and C. Reid, 'EU-UK Trade Relations: Why Environmental Policy Regression Will Undermine the Level Playing Field and What the UK Can Do to Limit it'. Brexit and Environment Network, Research Paper on the Level Playing Field, 2020.

269 L. Petetin and M. Dobbs, *Brexit and Agriculture* (Routledge & CRC Press, 2022), p.199.

270 Trade and Cooperation Agreement Part 2, Title I and Title XI.

271 Ibid, Title XI, Article 1.1(3)

272 Ibid, Title XI, Article SPS.2(2).

273 Ibid, Title XI, Article 7.2(5).

reflects some political will in favour of environmental/climate matters, but it is difficult to enforce despite being a binding obligation as it is essentially aspirational rather than requiring specific steps or outcomes.

Alongside this, in Article 7.2(2), there is a crucial obligation on both the UK and the EU not to 'weaken or reduce… its environmental levels of protection or its climate levels of protection below…' those in place at the end of the transition period. On first examination, this appears a forceful, practical tool for environmental protection. However, first, this obligation is not regarding each individual environmental measure or regime, but instead is an obligation not to lower the *overall* level of environmental protection.[274] This is quite difficult to determine and to identify, as, for instance, what if the level of protection is increased/maintained in Scotland but decreased in Wales? Or if it is increased/maintained in animal welfare and water quality, but reduced in air quality? Second, Article 7.2 provides that the weakening or reduction must be one that is 'in a manner affecting trade or investment between the Parties'. This curtails the scope of the non-regression obligation quite considerably and also raises a further evidential hurdle.[275]

Article 9.4 provides an alternative and complementary means of protection. It reflects the issue that the level playing field might be affected by not just reductions in levels of protection, but also increases and that parties might be deterred from taking environmental (or other justified) measures if they are placed at a competitive disadvantage – something that would also undermine Article 7.2's obligation to 'strive to increase'. Article 9.4 therefore addresses 'a more systematic undermining of the level playing field',[276] by introducing a re-balancing mechanism. It 'provides that where substantial divergence exists (including due to increases in protection) and impacts on trade, the party impacted may take 'rebalancing measures' including unilaterally imposing tariffs'.[277] These 'may help to give a push to raise standards in the Party that is seen as lagging behind',[278] leading to a 'sensitive, dynamic alignment'.[279] However, the re-balancing measures must be proportionate and temporary, with procedural requirements regarding consultation, arbitration etc,[280] and are very challenging to use and of limited practical value.[281]

274 Ibid, Title XI, Article 7.2 read in conjunction with Article 7.1. 'For the purposes of this Chapter, "environmental levels of protection" means the levels of protection provided overall in a Party's law which have the purpose of protecting the environment, including the prevention of a danger to human life or health from environmental impacts, including in each of the following areas…'

275 There are further considerations regarding the enforcement mechanisms, but they are unnecessary to address for the purposes of this research. House of Lords, 'Beyond Brexit: food, environment, energy and health'. Chapter 4: Environment and climate change. Available at:. https://publications.parliament.uk/pa/ld5801/ldselect/ldeucom/247/24707.htm#:~:text=Article%207.2%2C%20%27Non%2Dregression,trade%20and%20investment%20between%20the; V. Gravey, 'The Brexit Deal and the Environment: Pretty Ambitious yet Pretty Irrelevant?'. Brexit Institute, 2021. Available at: http://dcubrexitinstitute.eu/2021/02/the-brexit-deal-and-the-environment/; and Petetin and Dobbs, n269, pp.202-203.

276 Petetin and Dobbs, n269. p. 202.

277 Mary Dobbs and Viviane Gravey, 'Environment and Trade' in C. McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge University Press, 2022), p. 248.

278 A. Matthews, 'Level Playing Field Provisions in the EU-UK TCA'. CAP [Common Agricultural Policy] Reform, 2021. Available at: http://capreform.eu/level-playing-field-provisions-in-the-eu-uk-tca/.

279 Petetin and Dobbs, n269, p. 203.

280 E.g. Article 9.4.(2) and Article 9.4.(3)(c).

281 Gravey, n275.

Consequently, as well as providing support for the interpretation of 'no diminution' proposed in this Report, as discussed in Chapter 3, these provisions also provide for some limited complementary mechanisms to help uphold environmental standards and thereby indirectly the related rights. As stated, these provisions *may* help partially offset potential diminutions in the area of the environment, but they are not equivalent to EU membership and do not ensure diminutions will not arise.

4.4 Indirect Impacts: UK Replacement Initiatives

UK withdrawal from the EU and the agreed terms on which it was enacted cannot, in isolation, account for the overall substantive impacts of Brexit on Northern Ireland and environmental protections therein. To understand the implications overall we must also consider domestic legislation and initiatives that succeeded the loss, or superseded pre-existing, EU legislation and initiatives in relevant areas. While an exhaustive account is unnecessary for our purposes, several key pieces of UK legislation, and their sufficiency (or otherwise) in comparative context to the EU-derived legislation they replaced, are important to briefly review. It should also be noted that these were in preparation for and/or in response to the UK's withdrawal from the EU, in some cases off-setting potential diminutions and in some cases creating, or potentially creating further diminutions.

The **European Union (Withdrawal) Act** 2018 (as amended) is the primary legislative mechanism for the domestic implementation of UK withdrawal from the EU.

From the perspective of environmental protection, the EU (Withdrawal) Act 2018 in general and its provision regarding REUL in particular provided a very significant safeguard against what otherwise could have been the automatic disapplication of the majority of (EU-derived) domestic legislation in the field of environmental policy due to the particular prominence of the EU in its development during UK membership. On the other side of the coin, however, the creation of broad regulation-making powers for UK Ministers to amend, revise or revoke the same (EU-derived) domestic environmental legislation (REUL) with limited oversight under the EU (Withdrawal) Act 2018 introduced new deregulatory risks. In view of the removal of EU environmental principles and the decoupling of (pre-Brexit) EU laws from the principles and institutions of the EU, without a UK initiative to replace these, implementation of the 2018 Act alone may have led to a severe decline in domestic protections; as it happened, the UK did bring in its own landmark new environment legislation.

The **Environment Act**[282] **(2021)**, adopted in November 2021 and approved for application in Northern Ireland in March 2022[283], is the primary piece of UK legislation that makes provision specifically for environmental protection in

282 Environment Act 2021.
283 The Environment (2021 Act) (Commencement and Saving Provision) Order (Northern Ireland) 2022 NISR 2022/54.

view of the removal of EU law and governance mechanisms. A key intention underlying the Act was to avoid an environmental governance gap in the wake of Brexit.[284] To this end it introduced domestic environmental principles and an obligation for UK Ministers to publish policy statements regarding their application in policy-making processes (sections 17-19).[285] The Environment Act 2021 also mandated the setting of long-term environmental targets in 'priority areas' of air, water, biodiversity, resource efficiency and waste reduction (sections 1-7); as well as mandating the preparation of Environmental Improvement Plans on the part of UK Ministers (sections 8-15). On governance, the Environment Act 2021 provided for the establishment of an Office for Environmental Protection (OEP) to scrutinise, advise, and perform some enforcement functions regarding the implementation of aspects of 2021 Act, and the targets/Environmental Improvement Plans developed under it, in England and in Northern Ireland.[286]

The passing of the Environment Act 2021 was an important milestone in UK environmental law. Its introduction of statutory obligations for long-term targets and improvement plans accompanied by a new oversight and enforcement body are welcome from the perspective of environmental protections and reduction of harms. Crucially, however, the 2021 Act is not as comprehensive in policy terms as EU environment laws (in whose absence it was passed) and nor are its provisions for enforcement as stringent as those that apply in the EU context. For example, UK targets developed under the 2021 Act to implement UK environmental principles are not legally binding, whereas the EU environmental principles are in the TFEU and are legally binding. Additionally, the oversight powers of the OEP are limited to 'public authorities' and do not allow actions of individuals or businesses to be monitored in relation to the implementation of Environmental Improvement Plans or long-term targets.

The **United Kingdom Internal Market Act** 2020 is another important landmark piece of legislation passed in view of Brexit and its domestic legal implications which is of contextual relevance for environmental protections. The 2020 Act introduced two new 'market access principles' to govern trade between England, Scotland, Wales, and Northern Ireland in view of the removal of EU law and policy frameworks; these subject to the obligations of the Windsor Framework, being upheld in regard to NI. Under the UK Internal Market Act 2020 principles of mutual recognition and non-discrimination, goods and services that are recognised as and available for sale in one part of the UK must be recognised as and available for sale in another part of the UK. The 2020 Act market access principles do not, however, apply to the production and sale of goods in Northern Ireland due to the Windsor Framework.

284 C. Burns and V. Gravey, ' The Environment Act: Finally here but what comes next for UK environmental governance?'. Brexit and Environment, 2021. Available at: https://www.brexitenvironment.co.uk/2021/11/23/finally-uk-environment-act/.

285 The environmental principles introduced by Environment Act 2021 are: the principle that environmental protection should be integrated into the making of policies; the principle of preventative action to avert environmental damage; the precautionary principle, so far as relating to the environment; the principle that environmental damage should as a priority be rectified at source; and the polluter pays principle (section 17(5)).

286 See Office for Environmental Protection. Available at: https://www.theoep.org.uk/

However, changes introduced to the original Protocol, by the political agreement by the UK and EU and adopted by the Joint Committee as integrated into the renamed Windsor Framework are, *potentially* important insomuch as they provide for partial and conditional non-application of some EU laws that otherwise apply in Northern Ireland to goods entering its market from Great Britain and which are sold or used there, subject to conditions.

While the primary impact of UK Internal Market Act 2020 concerns trade, in practice it *may* have an indirect detrimental effect on levels of environmental protection across the UK with even the potential for rights-based consequences in certain scenarios. The logic is as follows – the market access principles are likely to create a 'lowest common denominator' regulatory environment whereby if authorities in one part of the UK wish to introduce higher regulatory obligations for traders/producers (including for the purpose of environmental protection) they will be required to do so in the knowledge that those traders/producers are likely to be disadvantaged by the inflow of goods and services from elsewhere in the UK where the regulatory obligations are lower. Under the original iteration of the Protocol, the market in Northern Ireland was protected from this 'lowest common denominator' effect of the 2020 Act in relation to goods regulation. With the revisions to the original Protocol, introduced as a consequence of the Joint Committee implementing the UK EU political agreement in the Windsor Framework, the Northern Ireland market is newly exposed to this deregulatory preference of the UK Internal Market Act 2020 albeit still only in a specified area of goods entering Northern Ireland from Great Britain via a specific 'green lane' or 'UK internal market scheme' process. Nonetheless the 2020 Act, read together with the Windsor Framework, creates the possibility of goods being sold on the Northern Ireland market which have been produced according to lower standards of environmental protections than those which existed pre-Brexit.

The **Retained EU Law (Revocation and Reform) Act 2023** (REUL Act) has similarly indirect and hypothetical implications for environmental protections in NI. Under the REUL Act as passed a specific list of (previously) retained EU law (REUL) has been revoked in the UK and the (moderated) supremacy and general principles of EU law that had continued (under EU (Withdrawal) Act 2018) no longer apply to REUL (as was); the Act also made provision for (previously) REUL to hitherto be known as 'assimilated law'. The REUL Act also granted UK Ministers powers to amend, revise, restate or revoke (now) assimilated laws via secondary legislation. Importantly, under the REUL Act, any revision or replacement of (previously) REUL cannot cause an increase in regulatory 'burden' which is broadly defined to include: a financial cost; an administrative inconvenience; an obstacle to trade or innovation; an obstacle to efficiency, productivity, or profitability; a sanction affecting lawful activity (section 14(10)). The powers created by the REUL Act therefore introduce a strong deregulatory preference to policy-making in areas of (pre-Brexit) EU competence, including in respect of environmental law. For environmental protections in Northern Ireland (except those required by Article 2 of the Windsor Framework) the significance of the REUL Act is twofold: (1) it makes EU-derived environmental standards less

secure due to the removal of supremacy and general principles; and (2) creates a statutory deregulatory preference in areas of environmental law and policy. Notably, the REUL Act is subject to the EU (Withdrawal) Act 2018 in general and its section 7A in particular which provides for the implementation of the Windsor Framework in domestic law, changes cannot therefore be made under the REUL Act which would undermine UK obligations under the Windsor Framework, including Article 2.

4.5 Conclusion

Brexit has put environmental protection legislation in Northern Ireland on a less secure footing. Considered in isolation, the removal of relevant EU Treaty objectives, substantive law obligations, oversight mechanisms and enforcement procedures collectively results in a diminution in the level of environmental protection experienced in NI. Steps taken domestically, however, have partially offset the general reversal of protections that flowed from Brexit. The 'retention' of the majority of substantive EU laws, at least initially, via the EU (Withdrawal) Act 2018 alongside the passage of a major new piece of dedicated legislation, the Environment Act 2021, served to mitigate otherwise detrimental impacts, in environmental protection terms, of UK withdrawal from the EU. It is also the case that the UK replacement initiatives are not as robust as those of the EU, particularly with regard to enforcement.[287] Alongside domestic schemes, the commitments agreed between the EU and UK in the TCA regarding non-regression play an important safeguarding role in the post-Brexit UK/Northern Ireland landscape when it comes to the environment however, as noted above, the TCA provisions may prove difficult to enforce, including due to a lack of specificity.

Overall, the UK provisions and institutions for environmental protection after Brexit, including those that flow from the TCA, are not as robust as the EU provisions and institutions they replaced. This is particularly significant in Northern Ireland which had its own pre-existing governance deficits even before Brexit. Further, the shared regulatory context of the EU creates the potential for less coherent environmental governance/regulation across the island of Ireland as a whole, i.e. regulatory divergence, increasing governance challenges and also potentially leading to subsequent diminutions.[288] This is exacerbated by the loss of significant funding streams (including environmental and cross-border, including environmental cross-border funding). There have therefore been actual and potential diminutions in environmental protections across the UK, including NI, as a consequence of Brexit. From an Article 2(1) of the Windsor Framework perspective, the key question to determine a breach is, whether or not relevant RSE and underpinning EU laws in Northern Ireland are engaged in these actual/potential diminutions. While, drawing on preceding Chapters (particularly 2 and 3), it may be possible to argue that the regressive impact

287 E.g. M. Lee, 'Accountability for Environmental Standards after Brexit', (2017) *Environmental Law Review* 19:2, 89-92.
288 E.g. Ibid. and Dobbs, Hamill and Hickey, n212.

of Brexit on environmental protections has already resulted in a diminution of RSE underpinned by EU laws due to the loss of EU enforcement mechanisms together with the comparatively weak UK replacements,[289] it is also the case that doing so without reference to specific examples of regimes/laws and related rights impacted is difficult. To substantiate and strengthen any such case for an Article 2 diminution of rights due to lost environmental protections, looking more closely at specific policy examples is likely to be necessary.

289 There is also an argument to be made that the changes, especially where they lead to regulatory divergence or impose extra governance burdens, may raise issues under Article 2(2).

Chapter 5:

Downgrading Air Quality Laws: a Potential Diminution?

5.1 Introduction

This chapter will focus on whether any diminution of the environmental human rights under the ECHR as a result of Brexit for the purposes of Article 2(1) of the Windsor Framework can be identified. As discussed in Chapter 2, there is quite a strong basis to read these 'greened' ECHR rights into the RSE section of the 1998 Agreement. Therefore, this chapter will refer to 'greened' ECHR rights – although similar arguments could be made in relation to other environmental rights identified under the RSE section of the 1998 Agreement. Rather than considering the question of a diminution in these rights in the abstract, this section considers a concrete case study of the recent downgrading of air quality protections in UK[290] to tease out how a diminution of these indirectly incorporated environmental rights could occur. Air quality provides a particularly powerful example because of the clear and immediate link between clean air and the enjoyment of a range of human rights (e.g., right to life and health).[291] There is also an emerging institutional understanding of EU air quality laws as a 'tangible expression of fundamental rights'.[292]

This short case study should, however, come with a methodological health warning. The controversial weakening of the UK's National Emissions Ceiling Regulations 2018 through the removal of key provisions (as discussed further below) is an evolving situation. The landscape is therefore still subject to change even between the drafting and the publication of this report. However, the analytical basis applied in this case study in relation to a potential diminution of environmental human rights incorporated via the ECHR will remain relevant even if the UK Government does reverse its decision to revoke these provisions. More generally, it is worth noting again that this analysis necessarily incorporates a degree of informed speculation as questions relating to environmental rights and Article 2 of the Windsor Framework are novel and have not yet been settled by case law.

290 See generally: H. Horton, 'UK government 'ignoring green watchdog' over air quality rules'. The Guardian, 2023. Available at: https://www.theguardian.com/environment/2023/aug/04/uk-government-ignoring-green-watchdog-over-air-quality-rules.

291 See for example: OHCHR, 'Report of the Special Rapporteur on human rights and environment on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', Document No. A/HRC/40/55, 2019, focusing on the right to breathe clean air and the negative impacts of air pollution on the enjoyment of various human rights.

292 O. Kelleher, 'Possibilities for a right to clean air after Case C-61/21 *JP v Ministre de la Transition écologique and Premier ministre*' (2023) *Irish Journal of European Law* 25, 133, p. 140.

5.2 Background

In May 2023, the UK Government produced a list of REUL to be automatically revoked unless action is taken by ministers to retain them by 31 October 2023.[293] Regulations 9 and 10 of the National Emissions Ceiling Regulations 2018 (the UK's statutory instrument implementing the National Emission Reduction Commitments Directive) [294] and a related EU Commission Implementing Decision[295] were included on this so-called 'kill list'.[296] This decision is controversial as until now, the National Emissions Ceiling Regulations have been a key instrument for improving air quality in the UK. These air quality laws aim to achieve levels of air quality that do not have a significant negative impact on human health and the environment by setting an absolute cap on the amount of five major air pollutants (nitrogen oxides, non-methane volatile organic compounds, sulphur dioxide, ammonia and fine particulate matter) that can be emitted. The National Emissions Ceiling Regulations are REUL and transposed the legally binding emission reduction commitments under the EU's National Emission Reduction Commitments Directive.[297] The Directive sets 2020-2029 emission reduction commitments for each of the five pollutants and even stricter emission reduction commitments from 2030 onwards. The key procedural obligation under Article 6 of the Directive is that Member States must draw up, adopt and implement a National Air Pollution Control Programme to achieve these emission reduction targets. Regulation 9 of the National Emissions Ceiling Regulations includes various requirements relating to the National Air Pollution Control Programme, including an obligation for the Government to prepare and implement the National Air Pollution Control Programme and the obligation to course correct through a review of the National Air Pollution Control Programme if emissions are projected to exceed targets. Regulation 10 requires public participation before making/revising the National Air Pollution Control Programme. The Commission Implementing Decision sets out a common format for the National Air Pollution Control Programmes to ensure the provision of a minimum level of information and to improve transparency/credibility of the Programmes.

The Office of Environment Protection (OEP) has repeatedly raised concerns that the removal of these laws would significantly weaken legal air quality protections in the UK. In a letter to the Secretary of State for the Environment dated 30 August 2023, the Chair of the OEP Dame Glenys Stacey stated:

> '[W]e do not consider that there are any statutory provisions that

293 Schedule 1 of the Retained EU Law Act 2023.
294 Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants (The National Emission Reduction Commitments Directive).
295 Commission Implementing Decision (EU) 2018/1522 of 11 October 2018.
296 Client Earth, 'The importance of retaining the National Emission Ceilings Regulations'. *REUL Act Briefing,* 2023. Available at: https://www.clientearth.org/media/q0jnwqbx/reul-act-impact-on-clean-air-clientearth-briefing-september-2023.pdf. They were revoked by Retained EU Law Act 2023, Schedule 1.
297 Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants. The National Emission Ceiling Regulations also codify the UK's broader international obligations under the Gothenburg Protocol to the UNECE Convention on Long-range Transboundary Air Pollution.

> duplicate the requirements of regulations 9 and 10 of the NECR [National Emissions Ceiling Regulations]. We remain of the view that removal of these regulations without alternative statutory requirements constitutes a weakening of the legal framework supporting delivery of improved air quality. By way of example, removal of the course corrective measures of the NECR [National Emissions Ceiling Regulations] could have a real-time impact on the ability of government to stay on course to achieving targets for five of the most harmful air pollutants'. [298]

The issues with the revocation of Regulations 9 and 10 of the National Emissions Ceiling Regulations have been highlighted in the Chair of the OEP's letter[299] and in a briefing paper prepared by Client Earth.[300] The fact that the UK Government is currently making insufficient progress to meet its targets under the National Emissions Ceiling Regulations[301] brings into sharp relief the importance of having a National Air Pollution Control Programme, as the projections triggered the UK Government's course correction obligation to review the Programme within 18 months.[302] Both the Chair of the OEP and Client Earth emphasise that the level of detail required in the National Air Pollution Control Programme is vital for providing transparency and accountability on how emission reduction commitments are being achieved. They highlight how Environmental Improvement Plans, provided for under the Environment Act 2021, do not cover air quality in a comparable way to the National Air Pollution Control Programme.

The Chair of the OEP raised particular concerns about Northern Ireland, noting that 'there is a significant risk that an important tool for supporting achievement of emissions reductions in NI… will be lost, with no statutory duplicative arrangements in place'.[303] Until recently there was no Environmental Improvement Plan in effect in Northern Ireland. In September 2024, the Executive approved Northern Ireland's first Environmental Improvement Plan (which will also act as Northern Ireland's Environment Strategy).[304] It is worth noting that 'strategic environmental outcome 1: excellent air, water & land quality' appears to only make reference to ambient air quality limit values[305] and does not make any reference to an absolute cap on the amount of major air pollutants that can be emitted into the air like ammonia and particulate matter (which the National Emissions Reduction Commitment Directive sets out for EU Member States). Whilst there are some commendable and time-bound actions and targets to tackle air pollution under this strategic environmental outcome (e.g., a new operational protocol to assess the impacts of air pollution

298 Dame Glenys Stacey, Chair of the OEP, Letter of reply to Secretary of State for the Environment, 30 August 2023. Available at: https://www.theoep.org.uk/report/oep-correspondence-secretary-state-reul-bill-gained-royal-assent
299 Ibid.
300 Client Earth, n296.
301 D. Ingledew et al., 'UK Informative Inventory Report (1990 to 2021). Ricardo Energy & Environment, 2023. Available at: https://uk-air.defra.gov.uk/assets/documents/reports/cat09/2303151609_UK_IIR_2023_Submission.pdf
302 Client Earth, n296.
303 Dame Glenys Stacey, n298, p. 7.
304 Northern Ireland Executive, Environmental Improvement Plan for Northern Ireland, September 2024.
305 Limit values (i.e. requirements that the ambient level of certain air pollutants do not exceed prescribed concentrations) are set by Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L152/1 (the Ambient Air Quality Directive), which is a different (albeit complementary) air quality directive.

on the natural environment and the development of an Ammonia Strategy by March 2025),[306] there are no numeric targets in the Environmental Improvement Plan for either reducing the concentration of air pollutants or reducing overall national emissions for key air pollutants. The Environmental Improvement Plan acknowledges that it is a 'high level plan… setting the Executive's direction of travel for the environment… [and that] greater detail on actions, targets and desired future outcomes will be provided during the development and implementation of the various Strategies, Action Plans and Programmes'.[307] However, the lack of numeric targets in the 'future visions/outcome' section[308] stands in sharp contrast to the EU's recently strengthened approach to air quality governance as evidenced by its final adoption of the revised Ambient Air Quality Directive in October 2024.[309]

The key question is whether this paring back of air quality protections within the UK can be understood as a diminution for the purpose Article 2(1) of the Windsor Framework through applying the Northern Ireland Court of Appeal's six-step test as set out in *SPUC*.

5.3 An Application of the *SPUC* Six-Step Test

Rights Engaged

In considering whether a diminution has occurred as a result of Brexit in this context, it is useful to think about what options a person living in Northern Ireland would have had to challenge the removal of key transparency rules under EU air quality laws on or before 31 December 2020. There were two (inter-related) routes by which an individual in Northern Ireland might have challenged the revocation of these regulations before 'Brexit day'. First, they might have relied directly on the right to life and to respect for private and family life as they were protected under UK human rights law on or before this date. We could call this an environmental rights claim. Second, an individual might have relied on broader environmental protections (e.g., secondary EU laws) in conjunction with general EU laws and governance structures (e.g. principles of supremacy, direct effect, sincere cooperation and the role of the CJEU, as well as the potential to complain to the European Commission regarding non-compliance) that could be understood to give effect to, or to promote and bolster, their environmental and human rights.

306 Northern Ireland Executive, n304, p. 23.
307 Ibid, p. 7.
308 This section refers to future visions/outcomes such as 'Cleaner air for Northern Ireland', 'fewer pollutants released by home heating systems,' 'increased public awareness of health effects of poor air quality and sources of pollution', improved monitoring networks' and 'Ammonia emissions reduced to a point where critical loads of nitrogen deposition and critical levels of ammonia are not being exceeded at any designated sites'.
309 Directive (EU) 2024/2881 of the European Parliament and of the Council of 23 October 2024 on ambient air quality and cleaner air for Europe (recast). The recently revised Ambient Air Quality Directive brings the EU's ambient air quality limit values for 2030 closer, although still not fully in line with, the thresholds recommended by the World Health Organisation. See: World Health Organisation, World Health Organisation global air quality guidelines 2021. It also introduces new provisions on access to justice and a right to compensation where there are breaches of air quality standards.

Regardless of whether we frame the issue as an environmental rights claim or environmental protections claim, as a starting point we should consider the *SPUC* six-step test. We should therefore first ask whether environmental human rights under the ECHR or 'greened' ECHR rights – which we know are included in the relevant section of the 1998 Agreement - are engaged at all, taking into account that the RSE section encompasses a 'broad suite of rights'. In other words, can we frame the UK Government's downgrading of air quality protections in the National Emissions Ceiling Regulations as an environmental human *rights* issue?

It is not difficult to answer this question in the affirmative. There is a strong argument that both procedural and substantive aspects of the right to life and respect for private and family life as enshrined in Articles 2 and 8 of the ECHR and interpreted by the ECtHR to apply to environmental matters, are engaged here. For example, the UK Government has a substantive obligation to put in place legislative and administrative frameworks designed to provide an *effective* deterrence against threats to the right to life. [310] It also has a substantive obligation to take reasonable and sufficient measures *capable of protecting* the right to private and family life and more generally, a healthy protected environment.[311] There are also procedural obligations on the UK Government to ensure that interested parties are sufficiently involved in environmental decision-making processes[312] and have access to effective review procedures to challenge environmental decisions.[313] The importance of these rights is highlighted when viewed in light of the severity of air pollution in the UK. For example, a recent study estimated that in the UK three-quarters of the population live in areas where exposure to particulate matter ($PM_{2.5}$) is between 'one and two times [above] the World Health Organisation guidance, with almost a quarter more than two times over that limit'.[314] It is estimated that air pollution causes the equivalent of 40,000 premature deaths each year in the UK and the cost of health problems resulting from exposure to air pollution in the UK adds up to more than £20 billion every year.[315]

In light of the serious harm air pollution causes to human life and health in the UK, it is difficult to see how the removal of core parts of the National Emissions Ceiling Regulations, without an alternative statutory framework could be compatible with the UK's positive obligations under the Convention. The requirement to make (and where necessary revise) a National Air Pollution Control Programme and to consult the public on it are key procedural safeguards for ensuring that air pollutant emission reduction targets are actually met. As it

310 *Öneryıldız v Turkey*, Application no. 48939/99, Judgment of the Grand Chamber of 30 November 2004, para 89.
311 *Tătar v Romania*, Application no. 67021/01, Chamber judgment of 27 January 2009, para 107.
312 *Hatton and Others v the United Kingdom,* Application no. 36022/97, Judgment of the Grand Chamber of 8 July 2003.
313 *Taşkin et al. v Turkey*, Application no. 46117/99, Judgment of the Third Section of10 November 2004. Articles 6 and 13 are usually relevant to the right of access to justice also.
314 M. Taylor and P. Duncan, 'Revealed: almost everyone in Europe is breathing toxic air'. The Guardian, September 2023. Available at: https://www.theguardian.com/environment/2023/sep/20/revealed-almost-everyone-in-europe-breathing-toxic-air.
315 See Royal College of Physicians. Available at: https://www.rcplondon.ac.uk/projects/outputs/every-breath-we-take-lifelong-impact-air-pollution.

stands, the National Emission Reduction Commitments Directive and National Emissions Ceiling Regulations provide a comprehensive legal and administrative framework (one that could still be improved upon with more ambitious and stringent targets) to deter threats to the right to life and renders it capable of protecting the right to respect for private and family life. The level of detail required in the National Air Pollution Control Programme is an important transparency tool for tracking the Government's progress towards its targets whilst the course correction requirement and its amenability to judicial review are crucial for providing an *effective* accountability mechanism.

Rights Given Effect in Northern Ireland

As discussed below, National Emission Ceiling Regulations give effect to EU Directive in Northern Ireland law.

Underpinned by EU Law

In the context of Northern Ireland, it is not simply the fact that the removal of these obligations may be a breach of environmental human rights under the ECHR that needs to be considered, but that the EU law dimension must also be tracked. As previously stated in Chapter 3, the requirement for an EU law underpinning should not be construed narrowly here.

Before or on 31 December 2020, a person living in Northern Ireland could have relied directly on rights guaranteed in the EU Charter like Article 2 (right to life) and Article 7 (right to respect for private and family life) to challenge the downgrading of air quality laws. The following sub-sections will necessarily make reference to the EU Charter and its ostensible 'extinction'[316] from Northern Ireland law to the extent it is relevant to the present example. The interaction between the Charter and the Windsor Framework are examined in detail in a recent NIHRC report produced by Lock *et al.* in 2023.[317] These sub-sections will not therefore rehearse the previous analysis therein, but instead draw on some of that report's key findings to consider whether the recent weakening of air quality protections can be understood as a diminution of 'greened' ECHR rights for the purposes of Article 2(1) of the Windsor Framework.

The second and third step of the *SPUC* test requires reflection on whether the relevant rights (the 'greened' rights to life and respect for private and family life) had been given effect to in Northern Ireland and had an EU law underpinning. Both of these elements of the test can be satisfied when it comes to the Charter. The argument here is that the right to life and to private and family life were also given effect to in Northern Ireland through the Charter before or on 30 December 2020 and the Charter evidently has an EU law underpinning.

316 B. McCloskey, 'The Charter of Fundamental Rights' in C. McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP, 2022), p.159.

317 Lock, Frantziou and Deb, n21. See also, for instance, *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 127.

Before or on Brexit day, the right to life and respect for private and family life were not just protected (and given effect to) in Northern Ireland by the ECHR/ Human Rights Act 1998 but also by the Charter. The Charter became legally binding with the Lisbon Treaty and has the same status as the EU treaties.[318] The Charter mirrors all the ECHR rights currently guaranteed by the Human Rights Act 1998. The Charter and the ECHR are, of course, two discrete bills of human rights belonging to two distinct legal orders. However, there is a degree of 'cross-pollination' between the two systems in light of the EU's planned accession to the ECHR, the 'discernible judicial dialogue between the [ECtHR and the CJEU]', and the 'strong association links between the ECHR, [the Charter] and general principles of EU law'.[319]

Under Article 52(3) of the Charter, corresponding ECHR and Charter rights are to be given the same meaning and scope. In other words, the ECHR may be used to interpret the corresponding Charter right. Relevant overlapping rights for present purposes are therefore Article 2 of the ECHR and Article 2 of the Charter (on the right to life) and Article 8 of the ECHR and Article 7 of the Charter (on the right to respect for private and family life). There is therefore a strong argument that the ECtHR's interpretation of Articles 2 and 8 in environmental matters can be read into the corresponding Charter rights of Articles 2 and 7. Article 53 of the Charter relates to the level of protection guaranteed by the Charter, which is not to be interpreted as 'restricting or adversely affecting human rights and fundamental freedoms' like those found within the ECHR and Member State constitutions. According to Suzanne Kingston *et al*., Article 52(3) read in conjunction with Article 53 of the Charter confirm, in principle, that the ECHR represents a floor for EU human rights protection and does not prevent EU law from providing more extensive human rights protection.[320] Based on this logic, Kingston *et al*. argue that the CJEU would be obliged when, for example, applying Article 7 of the Charter, to grant at least the same level of protection in cases of environmental degradation as the ECtHR has done in its Article 8 case law.[321] Indeed, the CJEU could go further than the ECtHR (based on Article 52(3)), although none of its judgments to date point towards an inclination to do so.[322] It is also worth mentioning that Article 7 of the Charter has been recognised as having direct effect[323] and the list of Charter rights that enjoy direct effect continues to grow as the CJEU's case law on the Charter develops.[324]

The Charter would have been applicable to this situation since the UK would have been implementing or acting 'within the scope of EU law'[325] since the National Emissions Ceiling Regulations are transposing the National Emission

318 Article 6(1) Treaty on the European Union.
319 McCloskey, n316, p.163.
320 S. Kingston, V. Heyvaert, and A. Cavoski, *European Environmental Law* (CUP, 2017), p.166.
321 Ibid.
322 Ibid.
323 E.g., *Schrems v Data Protection Commissioner*, Case C-362/14, cited in Lock, Frantziou and Deb, n21.
324 Lock, Frantziou and Deb, n21.
325 *Fransson*, Case C-617/10, ECLI:EU:C:2013:105, para 19.

Reduction Commitment Directive into domestic law. The 'added value' of reliance on the Charter would have been that it would have come with the full gamut of EU law remedies including disapplication of the offending national law and state liability.[326] It follows that an individual living in Northern Ireland would have been able to seek an order from the Court to disapply or quash the offending provisions of national law on the basis of incompatibility with Charter rights. Before 'Brexit day', a person living in Northern Ireland would have had the benefit of the extensive oversight and accountability mechanisms the European Commission and CJEU provide.[327] For example, an individual could go before any domestic court and seek to have the offending domestic law disapplied, or seek a preliminary reference to the CJEU under Article 267 TFEU to obtain an interpretation of the protection provided under the Charter *vis-à-vis* air quality protection. An individual could have also made a formal complaint to the Commission against the UK alleging a violation of its human rights obligations with a further option of public enforcement by the Commission before the CJEU (via Articles 258/260 TFEU).

In some respects, it is somewhat artificial to attempt to separate environmental rights and environmental protections because if an individual were to challenge the revocation of key provisions of the National Emissions Ceiling Regulations before or on 31 December 2020, they would have likely emphasised the interconnectedness of both the Charter and environmental protections and raised both arguments.[328] The argument is that 'greened' rights to life and respect for private and family life up until Brexit day were supported, protected, and ultimately given effect to, through an array of environmental standards, measures, procedures, governance structures - many of which came from EU law. Before or on 30 December 2020, it can therefore be said that the 'greened' right to life and to respect for private and family life were not just given effect to in Northern Ireland law through the ECHR/Human Rights Act 1998 and Charter but also through secondary EU environmental laws – which put 'flesh on the bones' of these rights.

For example, the 'greened' right to life and respect for private and family life are given expression to through the existence of the whole body of EU environmental laws, including the National Emissions Reduction Commitments Directive. Whilst the CJEU has yet to explicitly make the link, AG Kokott noted in a recent case that EU air quality laws (in that case the Ambient Air Quality Directive, which relates ambient air quality concentrations so therefore more to local air quality conditions) put into concrete terms the EU's obligations concerning environmental protection and the protection of

326 T. Lock, 'Human Rights Law in the UK after Brexit' (2017) *Public Law*, Nov Supp (Brexit Special Extra Issue) 117; J. Grogan, 'Right and remedies at risk: implications of the Brexit process on the future of rights in the UK' (2019) *Public Law* 683, p. 689; C. Barnard, 'So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights' (2019) *Modern Law Review* 82 350, p. 365; Lock, Frantziou and Deb, n21.

327 See generally J. Grogan, 'Right and remedies at risk: implications of the Brexit process on the future of rights in the UK' (2019) *Public Law* 683, p. 688.

328 It is worth highlighting that the Court of Appeal has noted that a reduction in available remedies could in itself be a diminution for Article 2: *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 149.

public health.[329] AG Kokott expressed the view that the obligation to protect the environment and public health in the context of air quality stem not just from Article 3(3) TEU and Article 191(1) and (2) TFEU, but also Articles 2 (right to life), 3 (right to integrity of the person) and 37 (principle of a high level of environmental protection) under the Charter.[330] This observation helps us see the interconnectedness between environmental rights and environmental protections like the National Emissions Reduction Commitments Directive and its domestic transposition in the National Emissions Ceiling Regulations.

Underpinnings Removed

The answer to this element of the *SPUC* test is fairly straightforward. By excising the key provision of the National Emission Ceiling Regulations, the UK's air quality protections will be significantly weakened compared to what they would have been had the UK remained in the EU.

Resulting Diminution?

It is possible to construe a (potential) diminution in the enjoyment of the 'greened' rights to life and respect for private and family life in terms of both a loss of substantive and procedural protection.

In terms of the loss of substantive protection, the determining factor is likely to be whether the removal of the National Air Pollution Control Programme requirements will result in a deterioration in air quality standards to such an extent as to increase the level of morbidity and mortality associated with air pollution in the UK. At this point in time, it is unclear whether the revocation of these transparency rules under the National Emission Ceiling Regulations will have this effect. However, in her letter to the Secretary of State for the Environment, the Chair of the OEP Dame Glenys Stacey expressed 'concerns' that the without a programme, like the National Air Pollution Control Programme, in place to realise the emission reduction targets means the 'likelihood of meeting [the targets] may be reduced'.[331] It follows that to the extent we understand the National Emission Reduction Commitments Directive and the National Emission Ceiling Regulations as giving effect to these rights, their downgrading may be understood as giving rise to a potential diminution for the purposes of Article 2(1) of the Windsor Framework. A closely connected argument – which was also raised by the Chair of the OEP[332] - is that increased legal uncertainty in this area arising from the removal of these procedural rules may adversely affect the ability to meet the emission reduction targets. This protracted period of uncertainty could itself therefore

329 *JP v Ministre de la Transition écologique and Premier ministre*, Case C-61/21, Opinion of AG Kokott, EU:C:2022:359, at para 73.
330 Ibid.
331 Dame Glenys Stacey, n298, p.9.
332 Ibid.

give rise to a diminution as it arguably results in a situation where rights are not being vindicated and creates additional hurdles for individuals seeking to enforce their environmental rights.

In terms of the loss of procedural protection, this requires us to briefly discuss the status of the Charter and the question of remedies post-Brexit in the context of Article 2(1) of the Windsor Framework – although, as previously stated, this is covered in more extensive detail in Lock et al.'s 2023 NIHRC report on the subject.[333]

Scholars and practitioners have identified various routes through which the Charter will continue to be applicable in Northern Ireland post-Brexit.[334] The first route is where the Charter continues to have effect in Northern Ireland via Article 4 of the Withdrawal Agreement, which stipulates that provisions of this Agreement and Union law made applicable by the Withdrawal Agreement includes the Windsor Framework – and 'shall be interpreted and applied in accordance with the methods and general principles of Union law'.[335] Article 2 of the Withdrawal Agreement defines 'Union law' as including the Charter, the Charter therefore continues to have effects both in terms of Withdrawal Agreement provisions and where it makes EU law applicable, including under the Windsor Framework.[336] This route is not the focus for present purposes. Instead, we are concerned with the second and 'more complex'[337] route through which the Charter and EU law remedies continue to apply in Northern Ireland *via* the non-diminution commitment in Article 2(1) of the Windsor Framework.[338] Article 13(2) of the Windsor Framework, read together with Article 4(4) Withdrawal Agreement, suggests that the case law of the CJEU (and through this, the Charter as it feeds into these decisions) continues to be relevant to the interpretation of Union law.[339] This has been argued to generate a 'non-strict' element of dynamic alignment obligation relevant to the rights protected under Article 2(1) of the Windsor Framework. This is discussed in more detail in Appendix 1. The hook for the application of the Charter via the non-diminution guarantee, as described by Lock *et al*., is an iteration of EU law underlying a part of the 1998 Agreement before the end of the implementation period.[340] For example, if the CJEU case law had interpreted (or if it were in future to interpret) such an EU law iteration in light of the Charter, then the Charter would apply through that iteration by this route.[341]

333 Lock, Frantziou and Deb, n21.
334 Ibid, n21, and McCloskey, n316, pp.164-166.
335 Ibid.
336 Ibid.
337 Lock, Frantziou and Deb, n21
338 As per *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 126, when the Court of Appeal stated that Northern Ireland legislation – the Victim Charter (Justice Act (Northern Ireland) 2015) Order (Northern Ireland) 2015 – was 'clearly underpinned by the [EU Victims] Directive which is to be interpreted in accordance with the EU Charter of Fundamental Rights and general principles of EU law'.
339 Article 13(2) Windsor Framework: 'Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union.'
340 Lock, Frantziou and Deb, n21.
341 Ibid.

The argument here is that rights guaranteed in the RSE part of the 1998 Agreement had been given effect to in Northern Ireland, at least in part, through the Charter/EU human rights law (like the general principles of EU law) and therefore indirectly benefited from the remedies available for breaches of EU law like disapplication and state liability. If the commitment to non-diminution is to be taken seriously, the prospective removal of the Charter and EU law remedies - which up until now have provided support for, and helped to vindicate, RSE rights - could therefore be construed as a potential diminution. As highlighted by Lock *et al*., up until Article 2(1) of the Windsor Framework was created, the RSE part of the 1998 Agreement was not *per se* actionable.[342] The 1998 Agreement was not drafted as a legal text and as such did not *by itself* attract remedies comparable to those provided by EU law.[343] However, by drawing a link between the 1998 Agreement, EU law and Article 2(1) of the Windsor Framework, there is an argument to be made that Article 2(1) allows EU remedies to be borrowed to vindicate the range of rights guaranteed under the RSE part of the 1998 Agreement, including environmental rights.[344] In other words, there is a strong argument to be made that the loss of directly actionable EU human rights, EU remedies and strong oversight and accountability mechanisms could amount to a diminution of these rights.

On the issue of the removal of EU environmental protections as a potential diminution, up until Brexit day, an individual living in Northern Ireland would have been able to rely directly on the National Emissions Ceiling Directive – potentially strengthened by reading it in conjunction with the Charter – to challenge the legality of the revocation of key provisions of the National Emissions Ceiling Regulations. An individual would have been able to challenge the legality of the domestic law before any national court, seek a preliminary reference, a range of EU law remedies (e.g., disapplication of the offending domestic law or state liability), and/or make a complaint to the Commission with further potential recourse to the CJEU.

Diminution Caused by Brexit

This diminution would not have been possible before Brexit because the UK Government would not have been permitted to water down its transposition of the National Emission Reduction Commitments Directive and remove key procedural safeguards for delivering its targets.

342 Ibid.
343 Ibid.
344 Ibid.

5.4 Conclusion

This chapter started by acknowledging the challenge of identifying a concrete diminution in a rapidly evolving landscape. Following this cautionary note, the chapter proceeded to consider how the downgrading of EU air quality protections, like the National Emission Ceiling Regulation, could potentially be understood as a diminution using the *SPUC* test – given the tight connection between greened established human rights, environmental protections and the EU's legal remedies regime.

On the basis of this analysis, the following conclusions can be drawn:

- There is a strong argument that both procedural and substantive aspects of the right to life and respect for private and family life as enshrined in Articles 2 and 8 of the ECHR and interpreted by the ECtHR to apply to environmental matters, are engaged here.
- The right to life and to private and family life were also given effect to in Northern Ireland before or on 30 December 2020 and had an EU law underpinning.
- By excising the key provision of the National Emission Ceiling Regulation, the UK's air quality protections will be significantly weakened compared to what they would have been had the UK remained in the EU.
- It is possible to construe a (potential) diminution in the enjoyment of the 'greened' rights to life and respect for private and family life in terms of both a loss of substantive and procedural protection.
- This diminution would not have been possible before Brexit because the UK Government would not have been permitted to water down its transposition of the National Emission Reduction Commitments Directive and remove key procedural safeguards for delivering its targets.

Chapter 6:

Protection of Aarhus Convention Rights through Article 2(1) of the Windsor Framework

6.1 Introduction

This chapter examines the extent to which rights guaranteed by the Aarhus Convention UNECE 1998[345] may fall within the ambit of the non-diminution guarantee in Article 2(1) of the Windsor Framework. This will necessitate an examination of the ways in which these obligations have made their way into Northern Ireland law. However, due to the broad and far-reaching nature of the rights that are guaranteed by the Convention, it is not possible within the scope of this chapter to comprehensively identify all rights originating from the Aarhus Convention in Northern Ireland law. Detailed consideration of this is available in other reports.[346] Instead, key areas are highlighted. The fact that an area is not highlighted here should not be taken as implying that it is not within the ambit of Article 2(1) or not potentially subject to diminution.

In this Chapter the approach followed elsewhere in the report of using the six-step test laid down by the Northern Ireland Court of Appeal in the *SPUC* case[347] is followed. The discussion in Chapter 3 signposted the unsuitability of the requirements of the six-step test in this area of law, and that while it was a useful tool for ruling in rights captured by the scope of Article 2(1) of the Windsor Framework, it was not necessarily as useful for ruling out rights and safeguards from the ambit of that mechanism, particularly in areas where the impacts of EU law are harder to delineate clearly from the domestic legal landscape. The test is applied here in order to fully demonstrate these shortcomings, and the dangers of rigid or rote application of its elements, as confirmed in the Court of Appeal's decision in the *Legacy* case. In particular, it is noted that the 'underpinning' requirement when construed narrowly may not capture the full extent to which the Aarhus rights were guaranteed in UK/Northern Ireland law. This is because many Aarhus rights (e.g. access to justice, fair procedures in administrative and judicial decision-making) were already features of the legal system and were refined and improved by the normative context of EU and UK membership of the Convention and diminution may well result from the UK leaving the EU even though these measures were not directly or primarily supported by specific

345 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice In Environmental Matters (the Aarhus Convention) UNECE 1998, p. 447.

346 E.g. see A. Hough & C. Brennan, 'Report on Aarhus Implementation in Northern Ireland'. Finding Common Ground, 2022. Available at: www.findingcommonground.ie; UK Government, 'National Implementation Report of the United Kingdom (UK) under the Aarhus Convention', April 2021. Available at: https://aarhusclearinghouse.unece.org/national-reports/reports?field_nr_report_language_aux_2_value=en&field_nr_report_language_aux_value=en&field_nr_q_year_target_id_verf%5B%5D=18900&field_nr_party_target_id_verf%5B%5D=17514&combine=&field_nr_answer_file_file_target_id%5B1%5D=1

347 *In the Matter of SPUC Pro Life Limited* [2022] NIQB 9.

EU legislative measures. It is also the case that not all EU implementation of Aarhus rights followed the traditional route of implementing legislation. A good example of this is the innovative use of the Doctrine of Consistent Interpretation (discussed below), the impact of the synergy of the Aarhus Convention's rights with the rights in the EU Charter of Fundamental Rights, in particular Article 47, and the extent to which the Aarhus Convention's procedural rights may have acquired a normative status in international law, in part as a result of the adoption by the entirety of the EU Member States and the EU itself.[348]

Other elements of the test potentially cause issues in this area also, for example the requirement that the right 'be given effect to in Northern Ireland law at the date of Brexit'. This is especially relevant in the area of environmental rights which are often poorly implemented and which have led to a number of EU infringement actions against the UK for failure to implement EU directives. These are discussed further under 'Rights given effect to in Northern Ireland', below. Enforcing this requirement strictly would effectively reward the Northern Ireland administration for failing to implement EU law rights during membership of the EU, so if this criterion is to be retained, it must also be given a broad interpretation.

6.2 Background

The Aarhus Convention is an international Treaty which has 47 State Parties largely in the Europe/Eastern European region, as well as more recently from Guinea Bissau. The Convention has the objective of facilitating the right to an environment adequate to health and well-being. It does this by empowering individuals and NGOs to protect their right to a healthy environment through a range of procedural environmental rights, the right of access to environmental information, the right to participate in environmental decision-making and the right to access justice in the case of failure to vindicate the two previous rights, in addition to breaches of domestic environmental law. It also contains guarantees of the rights of environmental defenders, guarantees of exercise of the rights in the Convention without discrimination as to citizenship or domicile, provision for environmental impact assessment for certain types of projects, and obligations on State Parties to implement the Convention through their legal frameworks. Finally, the Kyiv Protocol[349] to the Convention (2009) creates legally binding obligations in relation to recording and disseminating information about pollution emissions through centralised registers (the Pollutant Release and Transfer Registers Protocol). The UK and all the EU Member States are Parties to the Convention, as is the EU itself. The Convention's obligations have mostly made their way into UK/Northern Ireland law via EU implementation of the Convention's provisions. However, the EU implementation has been incomplete, with some significant gaps in the framework of rights.

348 Hough, n33.

349 Protocol On Pollutant Release And Transfer Registers (Kyiv Protocol) 2009. Available at: https://unece.org/DAM/env/pp/prtr/Protocol%20texts/PRTR_Protocol_e.pdf

As examined in Chapter 2, the RSE section of the 1998 Agreement encompasses a broad range of environmental human rights guarantees, in particular those embodied in the Charter and the ECHR (which includes access to information, the right to participation in decision-making, the right to fair procedures in decision-making (aspects of Articles 6 and 8 of the ECHR), rights to remedies where environmental damage and pollution affect the right to home and family life under Article 8 and the right to effective remedies under Article 13 of the ECHR),[350] as well as a range of civil and political rights, such as those contained in the International Convention on Civil and Political Rights (which includes public participation and access to justice), and those which are grounded in the domestic constitutional law of the UK/NI.

International environmental law frameworks are commonly expressed in human rights terms, with the link being made between an environment necessary for human health and wellbeing, for example, as seen in Article 1 of the Aarhus Convention. As a result of the growing understanding of the indivisible link between human health and wellbeing and environmental protection, environmental rights have increasingly been accepted as human rights,[351] particularly in the area of procedural rights. This is paralleled with the emergence and recognition of new international customary rules of law, such as environmental impact assessment[352] and public participation in environmental decision-making [353] which have become increasingly common in international law instruments, influencing court judgments even where no treaty provisions impose specific obligations.[354] Although procedural rights have only recently come into focus in environmental rights discourses, they do have a long track record of recognition as fundamental rights.

6.3 An Application of the *SPUC* Six-Step Test

Rights Engaged

The Aarhus Convention was an expression of Principle 10 of the Rio Declaration 1992, which states that environmental decisions are best handled with the participation of those concerned and contains strong procedural guarantees for the right of the 'public concerned' (those affected) to participate in decisions that affect them. This is set out in Article 6 of the Convention. Environmental NGOs must be included in the 'public concerned' (Article 2(5) & Article 6). The right of public participation is supported by a right to information about the

350 See Chapter 2, Section 2.5 above for more detailed explanation of these rights in the context of the ECHR.
351 J. Knox, 'Human Rights' in L. Rajamani & J. Peel (eds.), *The Oxford Handbook of International Environmental Law* (OUP, 2021), p. 784.
352 N. Bremner, 'Post-environmental Impact Assessment Monitoring of Measures or Activities with Significant Transboundary Impact: An Assessment of Customary International Law'. (2017) *Review of European, Comparative and International Law* 6(1), 280 - 290.
353 Hough, n33, p. 128.
354 E.g. in Pulp Mills on the River Uruguay (*Argentina v Uruguay*). Available at https://www.icj-cij.org/en/case/135

environmental impacts of the project where the project is one listed in Annex 1 to the Convention or where there will be a significant impact on the environment. There is an entitlement to reasoned written decisions. The Convention mandates a right to access information about the environment (so that the public would be well informed enough to participate in environmental decision-making), and a duty on public authorities to actively gather and disseminate environmental information (Articles 4 & 5). Article 9 sets out the right to a remedy in the courts when rights of public participation and information were not fully protected, or environmental law was breached. More specifically:

- Article 9(2) requires judicial procedures offer both substantive and procedural review of the impugned decision. The UK threshold for substantive review in environmental judicial reviews is currently under consideration by the Aarhus Convention Compliance Committee as to whether it complies with this requirement.[355]
- Article 9(3) contains a broader provision for access to justice to challenge acts/omissions of public or private parties where they contravene national law relating to the environment.

> '3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.'

- Article 9(4) sets out procedural requirements for access to justice under Articles 9(1) – (3), including that review procedures will be quick, provide effective remedies, with written, publicly accessible decisions. The provision that was the crux of the Heather Hill case was the requirement that proceedings not be prohibitively expensive (the 'NPE' requirement).

> '4. In addition, and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.'

The Convention also provides for environmental impact assessments of projects that have a significant effect on the environment, and high-level plans and programs affecting the environment (Strategic Environmental Assessments), such as Government Policies and Strategies, or County or Local Development Plans. It provides for public participation as an integral part of

355 Communication ACCC/C/2017/156 (UK) to the Aarhus Convention Compliance Committee, made on 13 February 2015, see full ACCC file here https://unece.org/node/15319 .

the environmental impact assessment process of these types of projects, plans, programs and policies. The Parties to the Convention are required to make the necessary provisions (at national, regional or local level) to enable these rights to become effective.

The Aarhus Convention also guarantees the right of environmental defenders to be protected against persecution for their activities (Article 3(8)).

The procedural rights set out in the Aarhus Convention have largely been recognised by the ECtHR as falling within Article 8 of the ECHR[356] (see Section 2.5 above for a more detailed explanation of this), and have been recognised in the case law of the CJEU as being supported by the EU Charter of Fundamental Rights.[357] The *Legacy* case makes it clear that the rights encompassed by the RSE section are given effect by their relationship with the corresponding ECHR rights.[358]

As can be seen from the above discussion, and in light of the Court of Appeal's approach to the RSE section in the *Legacy* judgment,[359] the full range of procedural guarantees provided by the Aarhus Convention can be said to be fundamental environmental human rights, and therefore are encompassed within the guarantees in the RSE section of the 1998 Agreement.

Rights Given Effect in Northern Ireland

The UK, including Northern Ireland, ratified the Aarhus Convention in 2005. As set out below, the UK implemented its Aarhus obligations mainly through EU law implementing measures, carrying into UK law the Aarhus obligations through a range of both UK-wide and devolved legislation and legislative amendments. However, the UK also relies on domestic measures of common law, constitutional law and legislation to fulfil its compliance with the Aarhus Conventions provisions both before the Convention's mechanisms[360] and before the CJEU. This is also permissible under EU law. A directive does not have to be explicitly transposed as long as the aim of the directive is achieved.[361] Therefore, the idea of 'implemented' in domestic law needs to be construed broadly to capture all of the rights that are supported by EU membership.

356 E.g. *Taşkin et al. v Turkey*, Application no. 46117/99, Judgment of the Third Section of 10 November 2004.

357 E.g. '*LZ No. 1*', *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky,* Case C-240/09, 8 March 2011, para 51-52; '*LZ No.2*', *Lesoochranárske zoskupenie vlk v Obvodný úrad Trenčín*, C-243/15, 8 November 2016 paras 93-96; *Societatea Civilă Profesională de Avocaţi AB & CD v Consiliul Judeţean Suceava and Others*, Case C-252/22, 11 January 2024, para 79.

358 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, 115-117. See also the discussion on Article 47 of the EU Charter of Fundamental Rights and the ECHR in *In the Matter of Martina Dillon and others* [2024] NIKB 11, para 541.

359 E.g. *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, paras 115 and 117 reflecting the expansive, flexible approach to identifying rights and how they are given effect.

360 UNECE Aarhus Convention National Implementation Reports, 'UK National Implementation Report 2021'. April 2021. Available at: https://aarhusclearinghouse.unece.org/national-reports/reports?field_nr_report_language_aux_2_value=en&field_nr_report_language_aux_valu%20e=en&field_nr_q_year_target_id_verf%5B%5D=18900&field_nr_party_target_id_verf%5B%5D=17514&combine=&field_nr_answer_file_file_target_id%5B1%5D=1.

361 Article 288 Treaty on the Functioning of the European Union.

It is also important to be aware that the implementation of the Aarhus Convention in the UK and Northern Ireland (and its EU law manifestations) has been incomplete and fragmented.[362] While a member of the EU, the UK was the subject of infringement actions relating to Aarhus obligations brought by the Commission and Article 267 TFEU references, including a number of instances of breaches of the Convention's obligations in Northern Ireland[363]. The UK has been the subject of adverse findings on compliance by the Aarhus Convention Compliance Committee, which has found multiple instances of failure in relation to access to justice and public participation provisions in Northern Ireland.[364] These decisions are legally binding on the UK Government once approved by the Meeting of the Parties to the Convention.[365]

The Convention remains binding on the UK, Northern Ireland and Ireland and this is not affected by changes in the status of UK membership of the EU. However, the EU implementing measures no longer bind the UK as a whole and may be revoked, now that the REUL Act 2023 is passed. While these measures are part of REUL via the EU (Withdrawal) Act 2018, and the TCA environmental provisions arguably apply to protect them, there is considerable potential for erosion and backtrack of already flawed implementation. It is essential that the three strands of the Convention be fully implemented in both Northern Ireland and Ireland to help facilitate cross-border and all-island cooperation and engagement – flawed and differentiated implementation of these important procedural rights substantially undermines the potential for individuals and NGOs to engage in environmental governance and creates different levels of environmental protection either side of the border.[366]

The extent to which the Convention's obligations are encompassed within the Article 2(1) of the Windsor Framework arrangements is to a large extent (but not completely) determined by whether the EU had taken action to ensure that they were implemented at a national level across the Member States.

Underpinned by EU Law

As mentioned, the most common way for Aarhus rights to be implemented in UK/ Northern Ireland law is through implementation of EU directives, such as the Access to Environmental Information Directive 2003/4/EC, and the Public Participation Directive 2003/35/EC, which amended a number of other directives including the Environmental Impact Assessment Directive (now 2011/92/EU as

362 E.g. see A. Hough & C. Brennan, 'Finding Common Ground: Report on the implementation of the Aarhus Convention in Northern Ireland'. Finding Common Grounds, 2022. Available at: www.findingcommonground.ie.

363 *European Commission v UK*, Case C-530/11, 13 February 2014; *Edwards v Environment Agency,* Case C-260/11, 11 April 2013.

364 E.g. see A. Hough & C. Brennan, n362; See also case ACCC/C/2013/90 (UK) in which the River Faughan Anglers made complaints regarding the public participation in environmental impact assessment development and judicial review process in the context of an unauthorised expansion of concrete factory tailings ponds on the banks of the River Faughan Special Area of Conservation, or the ACCC/C/2008/27 (UK) in which the Cultra Residents complained about the lack of public participation in relation to the expansion of Belfast Airport.

365 E.Fasoli and A. McGlone, 'The Non-Compliance Mechanism Under the Aarhus Convention as "Soft" Enforcement of International Environmental Law: Not So Soft After All!' (2018) 65 *Netherlands International Law Review* 27.

366 A. Hough, 'Finding Comon Ground: Synthesis Report'. Finding Common Grounds, 2022. Availbale at:. www.findingcommonground.ie.

amended by 2014/52/EU) and the Industrial Emissions Directive (2010/75/EU). These are also complemented by a range of sectoral directives with specific access to information, public participation and access to justice provisions.

The Access to Environmental Information Directive finds expression in Northern Ireland law in the Environmental Information Regulations 2004, but prior to this explicit implementation of access to environmental information rights these were underpinned by the Freedom of Information Act 2000 in a general sense. Directive 2003/35 on Public Participation in Environmental Decision Making was implemented in spatial planning through the Planning Act (NI) 2011, and through The Planning (General Development Procedure) Order (Northern Ireland) 2015.[367] Public participation rights are supported in EU law through (in relation to habitats) the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 (as amended, including in 2015 to transfer functions to the new local councils) and Wildlife and Natural Environment Act (Northern Ireland) 2011 and requires assessment of impacts with public participation rights finding expression through these.

Pollution prevention and control is governed by the Pollution Prevention and Control Regulations (Northern Ireland) 2013 which set out a similar regime to that of the spatial consent outlined above, implementing aspects of Article 5 (information), Article 6 (public participation).

Access to justice provisions can be found in directives like the Environmental Impact Assessment Directive and Industrial Emissions Directive as a result of the amendments from the Public Participation Directive, which closely follows the wording and requirements of the Aarhus Convention in providing for access to substantive and procedural review in a fair, equitable timely fashion, and not prohibitively expensive. These obligations are vindicated in Northern Ireland law through the Planning Acts and associated regulations' provision for judicial review of environmental decisions. However, access to justice was a pre-existing right, and is strongly grounded in the pre-existing common law concepts such as natural and constitutional justice, as well as making its way into domestic law by its strong establishment as a principle[368] of customary international law.[369]

Judicial review is the process whereby the courts review a decision of an administrative decision maker. There are broadly three grounds of review: irrationality, illegality and procedural impropriety (although there is a lot of cross-over between these grounds in practice). The courts will usually not engage in substantive review until the criteria in the Wednesbury principles are met.[370] In *Newry Chamber of Commerce and Trade's Application* [2015]

367 The Planning (General Development Procedure) Order (Northern Ireland) 2015.

368 F. Francioni, *'The Rights of Access to Justice under Customary Law'*, in F. Francioni (ed.), *Access to Justice as a Human Right, Collected Courses of the Academy of European Law* (Oxford Academic, 2012). https://doi.org/10.1093/acprof:oso/9780199233083.003.0001.

369 S.C. Neff, 'United Kingdom', in D. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford, 2011; online edn, Oxford Academic, 19 Jan. 2012), https://doi.org/10.1093/acprof:oso/9780199694907.003.0026.

370 E.g., The GCHQ case - *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.

NIQB 65 Treacy J. stated: 'The Court will not interfere with the exercise of the planners' discretion on the weighting of the factors, provided it is rational in the Wednesbury sense'. This high threshold for substantive review may be problematic and is under consideration by the Aarhus Convention Compliance Committee.[371]

The provisions of Article 9(2) and (4) require access to a review which is fair, equitable, timely and not prohibitively expensive. The CJEU[372] and the Aarhus Convention Compliance Committee,[373] have previously commented on the prohibitively expensive nature of UK costs. This led to the development of costs protection measures.[374]

Looking at the status of implementation of Aarhus Convention obligations in Northern Ireland law, it is clear that rights available to support the guarantees in the RSE section of the 1998 agreement are not all directly underpinned by EU legislative measures, but many rights are supported by EU membership such that their removal would not have been envisaged during UK membership of the EU, and would have given rise to legal difficulties around the EU Treaty requirements for international mixed agreements in the EU legal system.[375]

The case of Article 9(3) is interesting, as it is not yet implemented by the EU in many contexts, and has been held not to be directly effective.[376] However, the CJEU, developing a variation of the customary international law principle, the doctrine of consistency, gave effect to Article 9(3) by combining it with the Charter rights under Article 47. This can be seen across a range of EU level case law. The EU Commission have also issued guidance on its implementation to Member States.[377]

The rights in Article 9(3) are definitely captured within the RSE Section of the 1998 Agreement. Whether an individual could successfully sue for diminution of this right would, based on the reading of the *SPUC* case above, be dependent on whether the right was underpinned by EU law.

371 ACCC/2017/156 (EU). Available at https://unece.org/env/pp/cc/accc.c.2017.156_united-kingdom.

372 E.g., *European Commission v UK*, Case C-530/11, 13 February 2014; *Edwards v Environment Agency,* Case C-260/11, 11 April 2013.

373 ACCC/C/2008/33. Available at https://unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece_mp.pp_c.1_2010_6_add.3_eng.pdf. See also Report to the 6th Meeting of the Parties on Compliance of UK 2nd August 2017 available at https://unece.org/DAM/env/pp/mop6/English/ECE_MP.PP_2017_46_E.pdf

374 The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 https://www.legislation.gov.uk/nisr/2013/81/contents/made as amended by The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017.

375 While in theory possible, a Member State leaving a human rights convention that formed part of the EU legal framework (like the ECHR or the Aarhus Convention) would pose political and legal problems during EU membership. In this sense the maintenance of such rights is supported by EU Membership which would discourage deviation from human rights norms and standards, even where they were not explicitly enforced through directly applicable EU legislation. This can be seen in the extensive framework in the EU Treaties that seeks to support human rights standards in Member States. E.g. Article 49 Treaty on European Union requires members to uphold the values of Article 2. Article 2 of the Treaty on European Union commits to upholding human rights values. Article 6 of the Treaty on European Union provides that the EU will accede to the system of human rights protection of the ECHR. Article 52 of the EU Charter of Fundamental Rights provides for aligned meaning of the EU Charter and the ECHR.

376 Case C-240/09 *'LZ No.1 - Brown Bears'*. Judgment of the Grand Chamber, 8 March 2011, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, ECLI:EU:C:2011:125,https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62009CJ0240

377 E.g. see 'Commission Notice on Access to Justice in environmental matters', C/2017/261.

EU law (binding legal instruments) is listed in Article 288 TEU which makes it clear that it does not encompass any measures like non-legal instrument guidance documents. The EU law encompassed by the Windsor Framework is defined in Article 2 Withdrawal Agreement, and again only includes the traditional hard law boundaries. Guidance documents are not referred to.

Therefore, based on the *SPUC* test, the right under Article 9(3) might not be protected under the Article 2(1) of the Windsor Framework mechanism because they inhabit an area of law that remains uncertain, vague and controversial, whereby the EU gives effect to 'mixed agreement' international law treaties signed by both the EU & Member States. The CJEU found they had jurisdiction even though this is an area of shared competence (environment) where the EU has not yet acted (and therefore competence remains in theory with the Member States).[378] Nonetheless the CJEU felt able to give effect to these international law provisions in particular national level contexts based on their reading of the Charter and the rights in question, and the doctrine of consistent interpretation. These 'judicially declared rights' remain legally invisible until they are recognised by the Court in their particular context, posing problems for making arguments related to their diminution in the context of the very stratified approach to the 'given effect in Northern Ireland' and 'underpinning' requirements in the *SPUC* case. It would be difficult to show a right which is subsequently recognised by the CJEU was given effect to in Northern Ireland prior to Brexit, even if the court is merely recognising an already existing right (especially in light of the Northern Ireland Court of Appeal's subsequent approach to CJEU developments in the *Legacy* judgment). This raises questions about the interpretation of the Court in *SPUC* and its focus on EU competence. It is also relevant to note that Lock et al. argue for a more expansive interpretation of the rights covered by the non-diminution guarantee.[379] A more expansive interpretation of the underpinned requirement is evident in the *Legac*y case but does not entirely alleviate this issue because the context did not require a detailed examination of these issues from this perspective, there being a directive in place in the relevant area. The *SPUC* case revolved around abortion, which the Court found was not within Article 2(1) because law regulating access to abortion in Northern Ireland was not 'underpinned' by EU law, and the EU did not have competence regarding this issue.[380] The Court does not appear to have recognised the potential of shared, but limited, competence in this area. Similar arguments could be made in relation to Article 9(3) of the Aarhus Convention, which still lacks implementing measures in EU law in certain contexts, and did not meet the criteria for direct

378 '*LZ No.1 - Brown Bears*'. Judgment of the Grand Chamber, 8 March 2011, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, Case C-420/09, 8 March 2011.

379 See Lock, Frantziou and Deb, n21, p. 65.

380 The Northern Ireland Court of Appeal in the *SPUC* case did not enter into a detailed discussion on this point, disposing of the idea of EU competence in abortion in one line in para 52 'The answer is beside the point because disability discrimination and the provision of abortion is not a matter within EU competence'. (*SPUC Pro Life Limited v Secretary of State for Northern Ireland (and others)* [2023] NICA 35) The Court of Appeal left undisturbed the findings of Colton J. on the issue in the High Court in the *SPUC* case where he did not interrogate the principles of EU law governing the exercise of shared competence (like subsidiarity) and relied on an EU Commission response to an EU Parliamentary question on the issue of competence for abortion (para 112) and the lack of legislative action (para 119), although it is not entirely clear from the discussion as to whether this point is in relation to EU competence for discrimination or abortion, as the discussion deals with both of these at the same time.

effect according to the CJEU.[381] Therefore, the existence of the right to access to justice in cases covered by Article 9(3) of the Aarhus Convention (the right to challenge in court breaches of domestic environmental law) was not 'recognised' by Member State courts until the CJEU had done so in the ruling in the 'LZ No. 1 – Brown Bears' case in 2011. This same issue could arise in relation to any of the other provisions of this or other Conventions, where the EU has not acted to implement their provisions in specific contexts.

The more expansive approach in the Northern Ireland High Court in the *Legacy* case[382] offers hope for a more flexible application of the *SPUC* test. This judgment shows a much stronger awareness of the role of international law principles and the ECHR in the 1998 Agreement/Article 2 of the Windsor Framework arrangements. The Court used the VCLOT principles to justify a strong purposive reading that encompassed the ECHR rights into Article 2(1) of the Windsor Framework. Interestingly, while implicitly supporting this approach, the Court of Appeal in the *Legacy* case subsequently deemed that Article 2(1) and the corresponding RSE Section were sufficiently flexible without need for recourse to the VCLOT principles.[383] Further and of note, the High Court recognised the need for 'interpretation in conformity' where poor implementation of EU law leaves the public effectively without access to the rights they were supposed to have.[384] However, again because the judgment is in the context of a directive, it does not shed light on how the Court might approach less clearly supported rights. Nonetheless, the more flexible approach provides a basis for making arguments for the recognition of these rights as existing in Northern Ireland at Brexit date and being underpinned by EU law.

A clearer example is the Article 7 obligation to assess plans, programs and policies for potential environmental harm (strategic environmental assessment). This provision of the Convention is incompletely implemented in the EU legal order, through the Strategic Environmental Assessment Directive which covers plans and programs but not policies. This is implemented in Northern Ireland through the Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004 legislation[385] which also covers plans and programs and not policies. A broad approach to the right to access justice in relation to failures around plans had developed in UK jurisprudence but recent case law tends to show evidence that the UK Supreme Court is taking a more restrictive approach to when it will examine policies.[386]

381 '*LZ No.1 – Brown Bears*', n378, para 45.
382 *In the Matter of Martina Dillon and others* [2024] NIKB 11, paras 530-535.
383 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, paras 79, 81 and 89.
384 *In the Matter of Martina Dillon and others* [2024] NIKB 11, e.g. see para 567: '*Marks & Spencer Plc v Commissioners of Customs and Excise* [2002] ECR I06325, ECLI; EU; C2002 in which the CJEU held that "However, my attention having been drawn to the case of where the national measures correctly implementing the Directive were not being applied in such a way as to achieve the results sought by it" individuals could continue to directly rely on the provisions of the Directive.'
385 Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004. Available at: http://www.legislation.gov.uk/nisr/2004/280/contents/made
386 *R (A) v Secretary of State for the Home Department* [2021] UKSC 37 and *R (BF (Eritrea) v Secretary of State for the Home Department* [2021] UKSC 38.

The impact of not covering policies is that the public will not be guaranteed the right to participate in and do consultations about the project, and when they try to access justice in relation to Government policies that breach their rights or domestic environmental law, they will encounter difficulty getting the Courts to examine such policies due to the recent moves towards greater judicial deference.

This test required that the measure be underpinned by EU law at Brexit date in order to come within the scope of Article 2(1) of the Windsor Framework. If this was to be interpreted narrowly this could exclude the right to participate in policy making which is currently available to the public in Northern Ireland (in theory), or the right of access to justice in cases of breach of environmental legislation under Article 9(3).

There are a range of other rights like constitutional guarantees related to fair procedures and constitutional justice that are not directly underpinned by EU law but would be captured within the RSE section of the 1998 Agreement and which were relied on by the UK to fulfil their obligations under EU law regarding access to justice.

Any requirements should be construed broadly, consistent with the far-reaching impact that these rights have in guaranteeing people's fundamental rights, civil and political activities, and their centrality to the rule of law.[387] Any diminution of these rights may be difficult to track and will damage the fabric of the rule of law in Northern Ireland. There have been no direct legislative attacks on these rights in the Northern Ireland context as yet. However, given the growing conservatism of the UK Supreme Court on human rights,[388] the growing sense of deference being displayed by the Court to Government policy,[389] and the discussions around restrictions on judicial review,[390] this cannot be ruled out.

Underpinnings Removed and Resulting Diminution

So far this has not arisen. However, if attempts are made to change the procedural rights arrangements in Northern Ireland e.g. standing rights with regard to judicial review, this could fulfil this requirement. Examples from the UK (not applicable in Northern Ireland) include the Policing Bill, and the proposals to restrict judicial review.

Questions arise over areas of law that ought to have been implemented by virtue of EU membership, but were not, such as the requirement for Strategic Environmental Assessment of Policy.

387 D. Feldman, 'Democracy, the Rule of Law and Judicial Review' (1990) 19(1) *Federal Law Review*, 1-30. https://doi.org/10.1177/0067205X9001900101.

388 L. Graham, 'The Reed Court by Numbers: How Shallow is the 'Shallow End'?', U.K. Const. L. Blog 4th April 2022. Available at https://ukconstitutionallaw.org/.

389 *R (A) v Secretary of State for the Home Department* [2021] UKSC 37 and *R (BF (Eritrea) v Secretary of State for the Home Department* [2021] UKSC 38.

390 H. Siddique, 'Plans to restrict judicial review weaken the rule of law, MPs war'. *The Guaridan*, June 2021. Available at: https://www.theguardian.com/law/2021/jun/02/plans-to-restrict-judicial-review-weaken-the-rule-of-law-mps-warn.

Any removal of the existing EU law that resulted in a lower level of procedural rights protection for individuals and NGOs would represent a diminution in rights and give rise to a right of complaint under Article 2(1) mechanisms.

Diminution Caused by Brexit

This is currently a theoretical risk.

6.4 Conclusion

As can be seen from the above, there is a strong basis for reading environmental procedural rights into the RSE section of the 1998 Agreement and thereby into the protections provided by Article 2(1) of the Windsor Framework. This is because of their strong grounding in both domestic and international customary law, as well as in the Aarhus Convention and its implementation under EU law. This has been further reinforced by the strong purposive reading given to both the RSE section in the 1998 Agreement and Article 2 of the Windsor Framework.

However, because Aarhus rights generally have been so badly implemented at both EU and domestic level, this right set exposes weaknesses in the requirements set out in the *SPUC* case. In particular, the requirement of EU law underpinning has the potential to be interpreted restrictively to exclude rights available prior to Brexit which were supported by EU law but not underpinned by specific legal instruments. Also, the requirement of domestic implementation of the relevant underpinning EU law measures could lead to exclusion of certain rights available under EU law because of the failure of the state to take steps up vindicate or implement these rights. Another issue arises due to the fact that neither of these requirements seem expressly or impliedly evident in the wording of Article 2 of the Windsor Framework and appear to be judicial additions. Therefore, the interpretation of the *SPUC* test as set out by the Northern Ireland Court of Appeal in the *Legacy* judgment, which presents it as a guide rather than a binding test, is welcomed as the preferred approach in this area in order to ensure the safeguarding of these rights.[391]

Therefore, although the *SPUC* test clearly proves useful as a factor for ruling in measures captured within Article 2(1) of the Windsor Framework via the RSE section of the 1998 Agreement, it also has the potential to rule out EU law rules where these do in fact fall within the terms of Article 2. There are two potential routes the Courts could take to solve the problem posed by the underpinning requirement.

It seems that while the *SPUC* test clearly functions to identify or confirm breaches of Article 2 of the Windsor Framework where there is a clear EU legislative basis and good quality domestic implementation, such as the

391 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 96.

example of air quality discussed in the preceding chapter, this test does not function as well to identify diminutions of EU law based human rights contained in the RSE section of the 1998 Agreement where there is a less clear basis at EU level, for example Article 9(3) Aarhus Convention access to justice rights, or rights to participate in policy making available under Article 7 of the Convention, or rights with poor/no domestic implementation, or rights that were not necessary to specifically implement as they were already vindicated by the domestic legal system. It can therefore be said when the *SPUC* test is fulfilled a matter is captured within Article 2, but when it is not, it cannot conclusively be said it does not fall within Article 2. This aligns with the application of the test in the *Legacy* judgment by the NI Court of Appeal, where the court made clear it should not be treated as a strict binding legal test, but a guide to interpreting whether a diminution of rights fell under the Article 2 of the Windsor Framework mechanism.

Chapter 7:
Nature Conservation

7.1 Introduction

There are two key avenues to consider when examining the issue of nature conservation in the context of Article 2 of the Windsor Framework: human rights and, in particular, safeguards. As mentioned above, while the *SPUC* test does not address safeguards, these are encompassed expressly by both the RSE section and Article 2(1). This is acknowledged and addressed by the Northern Ireland Court of Appeal in the subsequent *Legacy* judgment.[392] While the focus of this report is primarily on rights, safeguards are relevant independently and also as a mechanism to help inform and further rights.

This is essential to note as nature conservation is probably the element of environmental law that appears most distant from human rights, especially if there is no express right to a clean and healthy environment. However, even taking an anthropocentric, or human-centred perspective,[393] nature conservation remains essential to core environmental human rights and also to other human rights given consideration of natural resources, ecosystems, ecosystem services and biodiversity.[394] One key utilitarian reason for nature conservation is that we need a healthy, resilient environment, with biodiversity across and within species. We need it to produce clean air, help combat and mitigate against climate change, produce nutritious food, produce clean and safe water, provide shelter, produce and develop new and existing medicines, etc.[395] For instance, one of the core pieces of EU nature legislation examined below notes the significance of nature conservation in protecting natural resources and promoting sustainable development.[396] An unhealthy environment where nature is not protected will undermine ecosystem services, but also potentially pose new problems, e.g. the spread of zoonotic diseases.[397] Consequently, for both current and future generations, nature conservation is something of considerable benefit to human

392 E.g. *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, paras 63, 87, 115 and 149.

393 As opposed to ecocentric, or emerging 'rights of nature' based approaches, e.g. R. Killean, J. Gilbert, P. Doran, 'Rights of Nature on the Island of Ireland: Origins, Drivers, and Implications for Future Rights of Nature Movements' (2024) *Transnational Environmental Law*. Published online 2024:1-26.

394 E.g. see Millennium Ecosystem Assessment, *Ecosystems and Human well being: Synthesis Repor*t, (Island Press, 2005). This is also reflected in the EU's Biodiversity Strategies, including the pre-Brexit Biodiversity Strategy for 2020. Available at: https://eur-lex.europa.eu/EN/legal-content/summary/biodiversity-strategy-for-2020.html.

395 E.g. M. Pieraccini, 'The EU, Brexit and nature conservation', University of Bristol Law School Blog, 16 May 2016. Available at: https://legalresearch.blogs.bris.ac.uk/2016/05/eu-brexit-and-conservation-law/. D. Taylor 'UK's Rwanda bill 'incompatible with human rights obligations' The Guardian, February 2024. Available at: https://www.theguardian.com/uk-news/2024/feb/12/uk-rwanda-bill-incompatible-with-human-rights-obligations#:~:text=Following%20line%20by%20line%20scrutiny,of%20the%20European%20convention%20on .

396 Recital 5 of the Council Directive 2009/147 on the Conservation of Wild Birds, [2009] OJ L20/7 (2009 Wild Birds Directive) discussed below states: 'The conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain the Community's objectives regarding the improvement of living conditions and sustainable development.'

397 E.g. B.A. Jones et al., 'Zoonosis emergence linked to agricultural intensification and environmental change', (2013) 110:21 *Proceedings of the National Academy of Sciences* 8399-8404. The authors at p. 8404 expressly state, for instance, that: 'Loss of biodiversity can exacerbate the risk of pathogen spillover.'

rights – including the right to life as provided for under both the ECHR and the EU Charter of Fundamental Rights.

Furthermore, in the context of Article 2(1) of the Windsor Framework, it is worth noting that nature conservation is clearly relevant to 'developing the advantages and resources of rural areas' as outlined in the 1998 Agreement RSE sub-section on economic, cultural and social issues. This is also reflected in various Northern Ireland policy documents, for example, the draft Environment Strategy identifies a 'thriving, resilient and connected nature and wildlife' as one of the six strategic environmental objectives it proposes, and in so doing recognises that we 'are an integral part of nature, and reliant on nature to sustain life'.[398] The Northern Ireland 'Green Growth' strategy document (although criticised by environmental NGOs)[399] states that the 'natural environment is one of our most important assets and contributes to our prosperity and well-being'.[400] There is also a range of procedural environmental rights within nature conservation legislation (as discussed in Chapter 6) which could fall within the scope of Article 2(1). Therefore, although nature conservation is not an obvious area where rights may be relevant, there appears to be potential to apply Article 2(1). In light of this, and the significance of the EU's contribution to environmental regimes such as nature conservation, there is good merit to examine the application in more detail – in line with the *SPUC* test and also through taking a more purposive approach.

7.2 Background

EU nature conservation[401] is furthered by a wide range of EU environmental law, e.g. laws relating to the TFEU environmental provisions, water, marine, air quality, waste etc., in addition to the procedural rules related to the implementation of the Aarhus Convention. However, the main focus is the Natura2000 network, created by the Wild Birds Directive[402] and the Habitats Directive.[403] There are also laws regarding aspects such as invasive species[404] and trade in endangered species,[405] as well as a new EU Nature Restoration Law.[406] As with the other areas of environmental law, the EU governance mechanisms discussed above are central.

398 Northern Ireland Executive 'Draft Environment Strategy for Northern Ireland' (2021). Available at https://www.daera-ni.gov.uk/sites/default/files/consultations/daera/Draft%20Environment%20Strategy.PDF, pg.45.

399 S. Corr 'Environment charity calls for 5 key improvements to 'fatally flawed' Green Growth Strategy for Northern Ireland. Belfast Live, January 2022. Available at: *https://www.belfastlive.co.uk/news/northern-ireland/environment-charity-calls-5-key-22630648*

400 Northern Ireland Executive 'Draft Green Growth Strategy for Northern Ireland: Today we act. Tomorrow we thrive' (2021) Available at https://www.daera-ni.gov.uk/sites/default/files/consultations/daera/Green%20Growth_Brochure%20V8.pdf pg 25.

401 For general discussion of EU nature law, see e.g., S. Kingston et al., *European Environmental Law* (CUP, 2017), Chapter 12 on 'Nature and Biodiversity Protection'. ; and A. Jackson (ed.). *Nature Law and Policy in Europe* (Routledge, 2023).

402 Council Directive 2009/147 on the Conservation of Wild Birds, [2009] OJ L20/7.

403 Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, [1992] OJ L206/7.

404 Regulation (EU) 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species, [2014] OJ L317/35.

405 Council Regulation (EC) 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, [1997] OJ L61/1.

406 Proposal for a Regulation of the European Parliament and of the Council on nature restoration COM/2022/304. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0304. Available at: https://www.europarl.europa.eu/news/en/press-room/20240223IPR18078/nature-restoration-parliament-adopts-law-to-restore-20-of-eu-s-land-and-sea

The Natura2000 Network is a network of protected sites across the EU. This is undertaken for numerous reasons, including the state of the environment, that individual habitats cross borders, to provide for redundancy (rather than just having one habitat for a protected species), the existence of migratory species and the potential for transboundary environmental harms. The Habitats Directive notes the aim of contributing 'towards achieving biodiversity'.[407] Consequently, there is a need to designate and protect a multitude of relevant sites in and across Member States. NI, as part of the UK and home to numerous important species and habitats, was also governed by the EU nature conservation framework – alongside its own domestic regime in parallel.[408] All obligations on the Member States bound the UK and Northern Ireland at the time of Brexit, even if only partially or imperfectly transposed, implemented and enforced.

Alongside the designated sites and the elements encompassed therein, the directives also provide for some general elements of protection. Thus, the Wild Birds Directive encompasses 'all species of naturally occurring birds in the wild state' in the EU, including their habitats and eggs',[409] with wild birds in general receiving some minimal protections, e.g. regarding population baselines,[410] and an obligation on Member States to establish 'a general system of protection for all species of birds' within the scope of the Directive.[411] This includes prohibition of various forms of interference with the birds, eggs and nests, including especially during breeding and rearing periods, which underpins an important and contentious limitation on cutting of hedgerows from spring to autumn. Limited derogations are possible,[412] but only in accordance with the Directive and as interpreted by the CJEU – which has taken a very purposive approach to the Directives in favour of the environment. The Habitats Directive also provides for protection of specific species, e.g. from their 'deliberate disturbance' or the 'deterioration or destruction of breeding sites or resting places,'[413] again with limited potential derogations.[414]

The main focus of the EU nature conservation regime, however, is on those species and habitats that are deemed to require extra protections through the process of site designation and management. This is primarily undertaken nowadays in the EU via the Habitats Directive, but the Wild Birds Directive still retains relevance. Thus, the Wild Birds Directive provides for special conservation measures (to ensure survival and reproduction), including the designation of protected sites (Special Protection Areas) to protect particularly vulnerable and rare species listed in Annex I of that Directive and all regularly occurring species

407 Article 2(1).
408 E.g. under the Nature Conservation and Amenity Lands (NI) Order (1985) and the Environment (NI) Order (2002). It also complements obligations under international agreements such as the Ramsar Convention.
409 Article 1.
410 E.g., Articles 2 and 3, in conjunction with Article 1.
411 Article 5.
412 Article 9.
413 E.g. Article 12 of the Habitats Directive and similarly in Article 13 of the Habitats Directive. These provisions focus on Annex IV species, with Articles 14 and 15 focussing on Annex V species.
414 E.g. Article 16 of the Habitats Directive.

of migratory birds.[415] The Habitats Directive is both broader and narrower in scope than the Wild Birds Directive, as it covers habitats for a broad range of flora and fauna (not just birds), but it is not all 'wild' flora and fauna or all migratory species – it is limited to a combination of specific habitat types listed in Annex I of the Habitats Directive and habitats of species listed in Annex II of the Habitats Directive.[416] The Habitats Directive provides for site designation to ensure the protection of these habitats (and thereby species), leading to Special Areas of Conservation.[417]

Designation is an essential step, as it also then leads to new understandings of and legal relationships with the sites[418] – which may be under private ownership. Site management plans and site-specific conservation objectives are to be established,[419] enabling tailored management and protection of the relevant habitats and species – there is little point in taking the same approaches to forestry, marshes and meadows, or where key species include snails, curlews, and bears. It also leads to a general obligation on Member States, for both Special Protection Areas and Special Areas of Conservation,[420] to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the area has been designated, in so far as such disturbance would be significant in relation to the objectives of the Directive. However, the key component following site designation relates to the need for appropriate assessments and prior authorisation for plans or projects on or near Special Areas of Conservation and Special Protection Areas.[421] These are laid out under Article 6(3) and 6(4) of the Habitat Directive. Crucially, these provisions, to the extent that they have gone before the CJEU, have been interpreted purposively in light of the environmental objectives of the directives and the precautionary principle.[422]

415 Article 4 in conjunction with Annex I.

416 Again, within these, further distinction is made between the general lists and 'priority' species or habitats. Further, these Annexes are updated periodically, with over 200 habitats types and over a thousand species currently listed and subject to protections.

417 E.g. Articles 4 and 5 of the Habitats Directive. See, for instance, the judgment in June 2023 of the CJEU *Commission v Ireland*, Case 444/21. The CJEU continues to pronounce on, clarify and develop its interpretation of the provisions in its judgments.

418 E.g. Article 6 of the Habitats Directive. It should be noted that Article 7 states: 'Obligations arising under Article 6 (2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4 (4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4 (1) or similarly recognized under Article 4 (2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.' Thereby, while some obligations are created under the Wild Birds Directive for Special Protection Areas, most obligations actually fall under the Habitats Directive for both Special Protection Areas and Special Areas of Conservation.

419 E.g. under Article 4(1) and 4(2) of the Wild Birds Directive and Article 6(1) of the Habitats Directive.

420 Article 6(2) of the Habitats Directive, in conjunction with Article 7.

421 See Article 6(3) and 6(4) of the Habitats Directive, in conjunction with Article 7 – and, crucially, as interpreted by the CJEU.

422 E.g., C-127/02 *Landelijke Vereniging tot Behound van de Waddenzee, Nederlandse Vereniging tot Bescerming van Vogels v Statsecretaris van Landbouw, Natuurbeheer en Vizzeri*j [2004] ECR I-7405; and Case C-226/08 *Stadt Papenburg v Germany* [2010] Env LR 19; and Case C-411/17, Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen, EU:C:2019:622, paragraphs 120 and 134.

Article 6(4) of the Directive remains largely undeveloped by the CJEU, simply due to the lack of sufficient cases raising the provision. While on paper it is quite limited in its flexibility for Member States (and one would expect the CJEU to take a purposive approach, limiting it further), the Commission has taken quite a flexible, conciliatory approach in its role and granted the Member States considerable leeway. The Commission's approach here has been the subject of considerable criticism, in particular regarding transparency, accountability and coherency with the CJEU's purposive approach.[423] Nonetheless, despite the apparent flaws in the Commission's oversight of this provision, it still plays an important gatekeeper role. If the Commission does think that the Member States are going too far, there remains the potential to resort to the general enforcement mechanisms, thereby bringing in the CJEU once more.

The CJEU has taken a very pro-environmental, purposive approach to interpreting the Directives,[424] leading to a situation where the regime is developing on a gradual basis over the decades and where one might continue to expect further developments. Despite being based on two Directives, the EU legal regime is not stagnant and arguably, where any provision might be considered slightly ambiguous, previous CJEU judgments would support a similarly purposive interpretation of those provisions, even if yet unstated.[425]

7.3 An Application of the *SPUC* Six-Step Test

Rights Engaged

The *SPUC* test's first step focusses on the question of whether a right or equality of opportunity protection within the relevant section of the 1998 Agreement is engaged. In contrast with the previous two areas considered of air and procedural rights, the link between nature and human rights is less obvious or direct – but those links do exist and are essential. The core purpose of EU nature conservation is largely focussed on the environment and wildlife (broadly understood) itself, rather than on human health or similar. Yet, for instance, healthy habitats and biodiversity contribute to the right to life and respect for private and family life (Articles 2 and 8 of the ECHR), e.g. through promoting healthy water, air and food, etc. via ecosystem services.

Further, and in the alternative, it should be highlighted again that both of the Windsor Framework Article 2(1) and the RSE section include safeguards – and therefore it is necessary to either interpret the *SPUC* test in light of the safeguards therein or to note that the *SPUC* test is insufficient and must be

423 L. Kramer, 'The European Commission's Opinions Under Article 6(4) of the Habitats Directive', (2009) 21:1 *Journal of Environmental Law* 59-85.

424 E.g. Case C57/89 *European Commission v Germany* (the Leybucht Dykes Case) [1991] ECR I 883 regarding the Wild Birds Directive.

425 As flagged by Lock, Frantziou and Deb, n21, at p. 63-65, the CJEU is influenced by the civil law tradition and 'clarifies' what the EU law has always been rather than developing new precedents. Since the CJEU is merely stating or clarifying what the law is, the implication is that the law was similarly that way prior to the judgment, but merely unstated.

adapted when considering areas that do not so easily fall within step 1. Thus, if the engagement of human rights is considered too indirect to apply to nature conservation, then it is possible to identify relevant safeguards within the RSE section instead that are applicable and are engaged. For instance, the RSE section refers to 'protecting and enhancing the environment' and 'developing the advantages and resources of rural resources', both of which could be considered to encompass safeguards relating to nature conservation.

Rights Given Effect in Northern Ireland

Rights to life, and private and family life, are well-documented as applying in Northern Ireland via means such as the Human Rights Act 1998 – including as noted above. It should be flagged that the applicability of such rights in Northern Ireland did not provide a panacea regarding environmental matters (including nature conservation) – to raise these rights in litigation regarding environmental harms was and remains very challenging, e.g. through needing to demonstrate a real and immediate risk to life for Article 2 of the ECHR. However, the purpose here is to simply note that such rights were given effect to in Northern Ireland at the relevant point in time.

Further, again going beyond a narrow reading of the *SPUC* test, the relevant safeguards noted above were given effect to in Northern Ireland by a wide range of environmental measures – including nature conservation measures. For instance, the two nature conservation directives[426] were transposed and implemented primarily by the Conservation (Natural Habitats etc.) (Northern Ireland) Regulations (1995).[427] Under these regulations, numerous protected sites were designated, on land and in the marine.[428] To support these sites, the Northern Ireland Environment Agency commenced a 4-year work programme in 2017 to develop conservation management plans for the 58 Special Areas of Conservation (further supported by EU funding),[429] as required under EU law. A wide and varied landscape of other measures completes the implementation of EU law, for example the prohibition on hedge-cutting (subject to exceptions) between 1st March and 31st August is based in both EU nature law and cross-compliance for the EU's Common Agricultural Policy funding.[430] This is implemented in Northern Ireland law via Article 4 of the Wildlife (Northern Ireland) Order 1985 through a 'closed season' to protect birds and their nests.

Even if EU nature laws were not transposed, implemented or enforced fully and effectively at the time of Brexit, a general obligation applied to do so – especially as the transposition date for the Directives had long since passed.

426 As an aside, this also raises the application of Article 47 of the EU Charter of Fundamental Rights.
427 There is a wide range of other relevant legislation, e.g. the Wildlife (Northern Ireland) Order 1985 (as amended) and the Wildlife and Natural Environment Act (Northern Ireland) 2011.
428 E.g. https://www.daera-ni.gov.uk/articles/special-protection-areas, https://www.daera-ni.gov.uk/articles/special-areas-conservation, and https://www.daera-ni.gov.uk/articles/european-marine-sites-marine-special-areas-conservation-and-special-protection-areas.
429 https://www.daera-ni.gov.uk/articles/management-special-areas-conservation-sac.
430 E.g. https://www.daera-ni.gov.uk/news/reminder-when-hedge-cutting-permitted.

This general obligation is complemented and supported by elements such as the environmental provisions in the TFEU, other environmental laws, general EU obligations, the EU governance mechanisms, incentives under funding schemes,[431] etc. The High Court in the *Legacy* judgment notes the significance of direct effect and that individuals could have used this to rely on relevant directive provisions where directives were not implemented, were not implemented correctly or were implemented but not applied correctly.[432] Not discussed by the High Court and going beyond direct effect, through the possibility for complaints to, and enforcement actions by, the Commission before the CJEU, any potential infringements by Northern Ireland of the EU nature regime had the potential to be rectified.[433] Consequently, it is not simply the Northern Ireland law as it was in paper or in practice on a day-to-day basis that needs to be borne in mind, but how it ought to have been in light of the full extent of EU law and interpretation.

Further, the interpretation of EU nature law is one that is regularly clarified and developed by the CJEU – but the legal principle is that they are merely stating the correct interpretation of the law, which is the same law as existed and applied in Northern Ireland pre-Brexit. Therefore, there is a strong argument that Northern Ireland EU-derived nature law should continue to be interpreted in light of evolving CJEU jurisprudence,[434] provided that this does not itself lead to a diminution in protection and thereby rights.

Underpinned by EU Law

The EU underpinnings of general Northern Ireland environmental safeguards and governance mechanisms have been outlined in some considerable detail in Chapter 4. These apply generally and complement any individual regime, e.g. the EU's water regime and corresponding governance mechanisms will help advance other environmental areas, including nature conservation. However, the Northern Ireland nature conservation regime outlined above (e.g. Conservation (Natural Habitats etc.) (Northern Ireland) Regulations (1995)) also has its own specific underpinnings in EU law (the Habitats and Wild Birds Directives).

Thus, while Northern Ireland does have parallel and even overlapping nature regimes – including ones focused on conservation and also human enjoyment of beauty spots – the crucial issue is that at the time of Brexit there was a Northern Ireland nature conservation regime (giving effect to a wide range of rights and safeguards) derived from and underpinned by EU law (the nature conservation directives in particular), governance mechanisms and funding.

431 E.g. see the role of the INTERREG Va and NI's Regional Development Programme in seeking to design management plans for protected sites: https://www.daera-ni.gov.uk/articles/management-special-areas-conservation-sac.
432 *In the Matter of Martina Dillon and others* [2024] NIKB 11, para 567.
433 *Commission v UK*, Case C-6/04.. And more generally, Jack, n189.
434 Craig and Frantziou, n21,. However, it should be noted that the Northern Ireland Court of Appeal in *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59 was reticent to take into account the evolution of EU jurisprudence.

Underpinnings Removed

When Brexit occurred, those underpinnings were removed to a great extent.[435] Thus, the relevant EU laws do not apply in Northern Ireland (despite the existence of the EU-derived laws); the environmental principles central to interpreting EU nature law have different foundations, meanings and functions; EU access to justice and enforcement mechanisms no longer apply; and the European Commission does not play its watchdog role, nor the CJEU its enforcement role. Further, the general obligation on the UK and thereby Northern Ireland to uphold EU law, including through transposing, implementing and enforcing nature conservation laws, no longer applies. While the UK introduced some stop-gap measures via the EU (Withdrawal) Act 2018, the role of the EU's nature directives and CJEU jurisprudence has shifted considerably. Thus, the EU's broader governance mechanisms and funding no longer underpin the NI's EU-derived regime, despite having provided its original foundations and much of the law being currently identical. This remains the case despite the Windsor Framework and TCA.

Resulting Diminution?

Again, the difference between the *SPUC* test and Article 2(1) of the Windsor Framework merits highlighting. The test focusses on a diminution in the enjoyment of a right, whereas Article 2(1) encompasses also safeguards and equality of opportunity. The test is insufficiently inclusive, having been adopted in a specific litigious context. In the context of nature conservation, it might in principle be feasible to identify a diminution of a relevant right, e.g. if a designated site is harmed due to pollution of a water body that also provides drinking water for the local human population.[436] Nonetheless, it will likely prove challenging to establish this in practice and especially in the context of litigation where significant environmental degradation might be required before it was considered to impinge on, for instance, a right to life. This would be exacerbated where for instance the issue relates to the destruction of hedgerows or a protected bird's nest – while nature conservation does promote human rights through ecosystem services, it would likely prove challenging to have this accepted as the causal link before the courts.

However, Article 2(1) of the Windsor Framework also encompasses safeguards found within the RSE section and this can encompass environmental law and governance mechanisms more generally, as well as nature conservation more

435 The main exception is that of the alien and invasive species regime, as well as to a more limited extent areas such as industrial emissions and greenhouse gas emissions (see Chapter 2, discussing Articles 5 and 9 of the Protocol). But, even there, the argument can be made that the changes to trade, political instability, changes to availability of ring-fenced funding etc, all place pressure on the practical governance of this regime, even if in paper it itself remains the same.

436 It is worth noting that, in such a situation, an additional, possibly simpler, option would be to rely on the environmental law regarding drinking water, with direct links to human rights and also where specific standards are required to be complied with. It may be possible to argue that a relevant diminution has occurred due, for instance, to the inability to enforce either EU-derived water or nature conservation laws before the CJEU.

specifically. Bearing this in mind, there is considerable scope to identify both diminutions that have already occurred and ones that might occur in future.

In considering whether a potential diminution has occurred or might occur in this field and as a result of Brexit, the starting point is not that the regime must be perfect. Indeed, EU environmental law is clearly not perfect on multiple fronts. Instead, as noted, Article 2(1) of the Windsor Framework examines the status quo at the time of Brexit (on paper and in practice, including as it legally should have been) and seeing whether any potential diminution has occurred or might occur. The EU nature regime provides a complex and detailed legal framework that has been subject of purposive interpretation and occasional weighty enforcement at the EU level. It establishes a baseline, with some evidence of positive impacts on the environment to-date,[437] that Article 2 seeks to preserve. However, with the EU underpinnings largely removed, there is a clear potential for diminution that must be guarded against and, some changes already indicate diminutions in the regime's governance that further open the door to diminutions in the substantive protections.

As argued by Hervey,[438] it is important to consider not just the impacts of a hypothetical Brexit, but the impacts of the specific type of Brexit that has arisen, including in light of the agreements between the EU and the UK. The general impacts of Brexit on both environmental law and governance measures in Northern Ireland have been noted above. These apply broadly in a similar vein in nature conservation. Thus, beyond elements such as the level playing field provisions, nature conservation is not covered by the Withdrawal Agreement, the Windsor Framework (for the main part) or the TCA. The main key exception is that of alien and invasive species, where the EU law continues to apply in Northern Ireland courtesy of Annex 2 of the Windsor Framework.[439] However, NI, for instance, is no longer part of the Natura 2000 network; does not have access to the European Environment Agency; and loses out on the outcomes of the key implementation, oversight and accountability roles played by the Commission and the CJEU (e.g. interpretations, updating lists/habitats and enforcement), etc.

Each of these changes is arguably in itself part of a diminution (of environmental safeguards and/or, for instance, the right to life), through undermining the potential effectiveness of the nature regime and the external accountability mechanisms. They can be minimised (without being fully negated) in practice, e.g. through maintaining the REUL, seeking to minimise cross-border

437 M. Pieraccini, 'The EU, Brexit and nature conservation'. University of Bristol Law School Blog, May 2016. Available at: https://legalresearch.blogs.bris.ac.uk/2016/05/eu-brexit-and-conservation-law/. Also, the 2016 Commission's fitness check. Available at https://commission.europa.eu/system/files/2017-01/swd-2016-472-final_en.pdf.
It generally notes the added benefits of the regime, but issues remaining regarding, in particular, full and proper implementation and enforcement.

438 Hervey, n21.

439 Annex 2 of the Protocol includes: Regulation (EU) 1143/2014 on the prevention and management of the introduction and spread of invasive alien species; and Council Regulation (EC) 708/2007 concerning the use of alien and locally absent species in aquaculture. It also includes Council Regulation (EC) 338/97 on the protection of species of wild fauna and flora by regulating trade, but not the Habitats Directive or Wild Birds Directive.

divergence,[440] abiding by the CJEU's interpretations as they evolve,[441] by providing for alternative strong external accountability measures/mechanisms and more generally ensuring appropriate internal governance mechanisms. However, (i) this has not been done to-date and (ii) there have been counter-indications in steps that have been taken. For instance, the UK used the Levelling-Up and Regeneration Act 2023[442] to amend existing provisions on nutrient neutrality (that implemented parts of the Habitats Directive) in order to facilitate housing developments.[443] While the Act primarily affects England only, such a development is nonetheless significant in so much as it highlighted the deregulatory trajectory of UK policy in respect of environmental protection and the potential for such approaches post-Brexit.

While in Northern Ireland the majority of EU nature conservation law has been retained for the time-being, it still relies on implementation and enforcement by the Northern Ireland Environment Agency, which is an Executive Agency within the Department of Agriculture, Environment and Rural Affairs (DAERA). The Northern Ireland Environment Agency's status as an agency not independent of the Government department has been the source of significant controversy, not least due to the potential conflict of interest inherent in the role of DAERA as simultaneously supporting and regulating agricultural industry.[444] Although an independent environmental protection agency for Northern Ireland was committed to as part of the 'New Decade, New Approach' political settlement, the lengthy collapse of the devolved government has prevented this political commitment from being actioned.[445] In addition, the newly established OEP replaces some functions of the Commission but is largely toothless,[446] there is no real commitment (in Northern Ireland or on UK level) to minimise divergence (or diminution) and the UK clearly does not wish to sign up to external accountability mechanisms or abide by future CJEU judgments.[447] Some of these issues are for the UK Government and others fall within NI's remit, or both. Neither can fully disclaim responsibility.

440 This is primarily with Ireland, but also with Great Britain and nearby States. E.g. Brennan *et al.*, n23.

441 See Craig and Frantziou, n21; and V. Gravey and L. Whitten, 'The NI Protocol and the Environment: the implications for Northern Ireland, Ireland and the UK', Environmental Governance Island of Ireland Network Policy Briefs 1/2021, March 2021, https://www.brexitenvironment.co.uk/research-projects/egii/. Although, an interesting question arises here if the CJEU breaks from tradition and interprets the area in a manner that is less favourable to the environment.

442 Section 168 and 169.

443 The UK Government recently tried to 'sunset' or scrap all EU laws that were not specifically selected for retention, but the bill that ultimately became the REUL Act 2023 adopted a more conservative approach, providing instead for extensive powers to repeal or amend REUL but maintaining the status quo of retention by default. For more on the original bill see The Wildlife Trust 'UK Government's deregulation agenda is dangerous: for the good of future generations, we must retain existing laws and enhance nature protection instead' (2022) https://www.wildlifetrusts.org/blog/joan-edwards/uk-governments-deregulation-agenda-dangerous-good-future-generations-we-must; S. Laville, 'UK environment laws under threat in 'deregulatory free-for-all' Environment' The Guardian (23 September 2022) https://www.theguardian.com/environment/2022/sep/23/uk-environment-laws-under-threat-in-deregulatory-free-for-all; C.A. Caine, 'Brexit and environmental law in England: where are we now?', (2023) Journal of Energy & Natural Resources Law, DOI: 10.1080/02646811.2023.2246281

444 Brennan, Purdy and Hjerp, n4.

445 NI Office, 'New Decade, New Approach'. NIO, 2020. Availble at: https://assets.publishing.service.gov.uk/media/5e178b56ed915d3b06f2b795/2020-01-08_a_new_decade__a_new_approach.pdf p. 45.

446 H. Horton, 'UK government 'ignoring green watchdog' over air quality rules'. The Guardian, August 2023. Available at:, https://www.theguardian.com/environment/2023/aug/04/uk-government-ignoring-green-watchdog-over-air-quality-rules.

447 E.g. Brennan, Dobbs and Gravey, n18.

Further, even in retaining the EU nature regime, small but important changes were introduced that lead to diminutions. For instance, in addressing the loss of the role of the European Commission in the process for updating/amending protected sites[448] and also in evaluating whether there is an imperative reason of overriding public interest (justifying a potentially harmful activity on a protected site),[449] an external, independent third-party body was replaced with DAERA.[450] This creates even more potential for conflicts of interests in decision-making, where one arm of the government seeks to undertake an activity and another arm of the government (DAERA) then provides an opinion saying that it is justified due to imperative reasons of overriding public interest.[451]

An additional complex issue, but one worth flagging briefly, is that the loss of the majority of relevant EU funding (e.g. the various iterations of INTERREG and PEACE funding, or Common Agricultural Policy funding ringfenced for environmental purposes)[452] and the ability to reform Northern Ireland agricultural policy and the cross-compliance regime could significantly undermine the nature regime and thereby lead to a diminution in it and the rights it furthers. For example, changes introduced to Northern Ireland agricultural policy post-Brexit include limitations on penalties for repeated *negligent* breaches of cross-compliance requirements[453] and a narrowing of the requirements that must be complied with.[454]

This is not to say that all changes since Brexit have been negative. For instance, the OEP and the policy statement on principles (see discussion of Environment Act 2021 above) play roles beyond REUL and Northern Ireland has since created various environmental and environmentally related strategies and policies (although several important strategies remain in stasis as drafts in the absence of a devolved government).[455] Indeed, some elements of the Northern Ireland agricultural policies have the potential to help bolster nature protection, depending on how they are developed, supported and enforced in the future.[456]

448 The Conservation (Natural Habitats, etc.) (Amendment) (Northern Ireland) (EU Exit) Regulations 2019, Regulation 9.
449 Ibid, Regulation 23.
450 DAERA, Guidance on The Conservation (Natural Habitats, etc.) (Amendment) (Northern Ireland) (EU Exit) Regulations 2019.
451 C. Brennan and M. Dobbs 'Reality bites: The implications of scrutiny-free environmental law reform in Northern Ireland after Brexit', 12 March 2019, *Brexit and Environment*, https://www.brexitenvironment.co.uk/2019/03/12/scrutiny-free-environmental-law-northern-ireland/
452 As part of the Protocol, the UK and EU agreed to establish a successor funding initiative to follow the end of the existing PEACE IV and INTERREG VA programme – after some time, the UK, Ireland and EU concluded a Financing Agreement for the new 'PEACE Plus' funding which will run from 2021-2027. The environment is addressed under theme five of the PEACE Plus programme 'Supporting a Sustainable and Better Connected Future' which is due to fund initiatives in pursuit of land, coastline and wildlife conservation in Northern Ireland and the Border Counties, as well as cross-border transport initiatives. SEUPB 'PEACEPLUS PROGRAMME 2021-2027: Programme Overview' *seupb.eu* https://www.seupb.eu/sites/default/files/2023-05/PEACEPLUS_Overview_24052023.pdf
453 Cross-compliance in the EU's Common Agricultural Policy linked receipt of financial support by farmers with compliance with 'statutory mandatory requirements' and 'good agricultural and environmental conditions' – for instance, farmers could lose some of the final support if they breached EU environmental law (even on a strict liability basis).
454 DAERA. 'Minister announces changes to the Cross-Compliance penalty regime', 6 October 2022, https://www.daera-ni.gov.uk/news/minister-announces-changes-cross-compliance-penalty-regime.
455 E.g. L. Cullen, 'Environment plan delayed by Stormont stalemate'. BBC News, October 2023. Available at: https://www.bbc.com/news/uk-northern-ireland-66985286. The environmental strategy was also intended as the initial environmental improvement plan required under the Environment Act 2021, thereby indicating the missing of a statutory deadline.
456 E.g. the 'Farming for Nature' package within Northern Ireland's agricultural policy, https://www.daera-ni.gov.uk/news/future-agricultural-policy-northern-ireland.

Identifying changes can be useful for the purposes of Article 2(1) of the Windsor Framework in two ways. First, where changes have occurred, the changes themselves may simply provide evidence of potential diminutions. Second, some of these developments will lead to divergences across the island, which makes cross-border cooperation more challenging[457] (as well as a need to provide further support for the bodies referred to under Article 2(2)) and could lead to further diminutions in practice, e.g. where cooperation is necessary to manage a cross-border site. However, this adds further steps, by requiring evidence that the specific divergence was only possible due to Brexit and that the divergence then leads to a relevant diminution.

A final point to consider is the issue of on-going developments in the EU, in particular regarding the new Nature Restoration Law.[458] Although it clearly did not bind the UK/Northern Ireland at the time of Brexit and nor was it guaranteed to be adopted, it was under development. A review of the EU nature regime had been undertaken, and further needs were identified.[459] The Nature Restoration Law is not simply tweaking existing EU laws, but it is updating, enhancing and complementing them. An argument could be made that not adopting/being bound by this is a diminution relative to what would have been, had the UK remained in the EU. This goes beyond the *SPUC* test to reflect the spirit of Article 2 of the Windsor Framework and the idea of equivalence of rights across the island of Ireland more broadly. It is clearly a difficult argument to make, especially since the law is also highly contentious, but nonetheless it remains arguable and is one for policy-makers to bear in mind in seeking to uphold Article 2.

Diminution Caused by Brexit

As should be apparent from the discussion above, there have been both positive and negative changes in the regime since Brexit. In the case of those diminutions that have already occurred, those focussed upon could not have occurred but for Brexit, e.g. the loss of EU governance mechanisms and the changes to site designation and imperative reasons of overriding public interest. For the former, this is directly due to not being an EU Member State. For the latter, this contradicts the obligations and procedures found within the nature conservation Directive - if NI/the UK had legislated or acted accordingly to change the process for site designation and approvals in the case of imperative reasons of overriding public interest, they would have been in breach of their obligations under EU law and open to enforcement actions, thereby presumably ensuring compliance in the long-term.

457 E.g. S. Clerkin, 'Working cross-border in nature conservation with regard to different designations, structures and management', (2020) 15 *Journal of Cross Border Studies in Ireland,* 111-122, Hough, n18; and Brennan *et al.*, n23.

458 Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869, [2024] OJ L2024/1991.

459 EU Commission 'Inception impact assessment - Ares(2020)6342791' (2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12596-Protecting-biodiversity-nature-restoration-targets-under-EU-biodiversity-strategy_en>

Further, as noted, there is a range of potential diminutions that might occur in future. Again, some would be as a direct result of Brexit (e.g. through the lack of the role of the European Commission) and some would be not possible 'but for' Brexit, e.g. if the law is amended, standards changed etc.

If the lack of applicability of the EU Nature Restoration Law is deemed a 'diminution', then it is arguable this is resulting from Brexit – since, 'but for' Brexit, evolving EU nature conservation law would bind NI.

7.4 Conclusion

Nature conservation can clearly fall within the scope of Article 2(1) of the Windsor Framework – through impacting on an array of rights and also in the context of nature being considered a natural resource for Northern Ireland (as reflected in, and safeguarded by, the RSE's sub-section on on economic, cultural and social issues). There is a wide range of measures in Northern Ireland regarding nature conservation, many of which derive from and were underpinned by EU law prior to Brexit – although Northern Ireland had and continues to have its own separate, 'homegrown' regime. With Brexit, despite some positive elements such as the establishment of the OEP, there nonetheless is a general diminution in environmental governance mechanisms (and thereby environmental protections) –as discussed above. Nature conservation is not immune to this and will continue to be impacted. Some elements have been insulated against negative impacts via the Windsor Framework, as in the case of alien and invasive species – although the impact of the 'Stormont Brake' remains to be seen here.[460] Other changes are also external from Brexit, e.g. through climate change, and are not relevant to Article 2(1).

The specific substantive changes in the area of nature conservation are limited to date, with most relating to issues of independence and accountability, e.g. regarding site designations/revisions and imperative reasons of overriding public interest – which are more likely to have impacts further down the line rather than in the immediate future. There are indications from England in particular of what could be done post-Brexit, e.g. proposals regarding lessening protections,[461] effectively ignoring the competent authority's concerns,[462] etc., but these have yet to arise in NI. If they were to occur, it would be a clear decrease in environmental protections and thereby arguably a diminution in both safeguards and, via the ecosystem approach, human rights. Further, as mentioned, regulatory divergence itself may also lead to some diminutions, as well as imposing extra burdens on 1998 Agreement bodies – thereby raising issues under both Article 2(1) and 2(2) of the Windsor Framework. More generally, the

460 See Appendix 1.

461 H. Horton, 'Gove's housing plans are latest divergence from promised 'green Brexit'. *The Guardian*, September 2023. https://www.theguardian.com/politics/2023/sep/01/michael-gove-housing-plans-latest-divergence-promised-green-brexit.

462 H. Horton, 'Ministers ignored Natural England's advice on plans to rip up pollution laws'. *The Guardian*, September 2023. Available at:, *https://www.theguardian.com/environment/2023/sep/12/ministers-ignored-natural-england-advice-plans- rip-up-pollution-laws.*

loss of the applicability of EU governance mechanisms, e.g. the potential for the European Commission to take enforcement actions, could have a significant impact on the effectiveness of the regime and thereby a diminution in relevant safeguards or rights. Consequently, it remains essential to monitor this field and developments therein.

Chapter 8:

Conclusions

8.1 Introduction

The primary aim of this project was to investigate whether and to what extent Article 2 of the Windsor Framework could play a significant role in an environmental context, despite the lack of an express focus on environmental human rights, standards, or measures within the provision. In particular, it aimed to examine (i) to what extent Article 2 provides meaningful protections of environmental human rights and/or whether Article 2 could be used to protect the environment via other human rights and (ii) whether evidence exists to indicate that Article 2 is triggered or could be triggered in the near future in this context through an exploration of general impacts as well as three case studies (air quality, Aarhus rights and nature conservation). In undertaking this research, the analysis extended beyond the initial focus point of human rights to recognise that the relevant section of the 1998 Agreement also encompassed safeguards and equality of opportunity – linked to, but distinct from human rights.

8.2 Key Findings

- The RSE section of the 1998 Agreement protects a broad suite of rights, going beyond those expressly mentioned.[463] This includes the civil and political rights mentioned and the substantive and procedural human rights contained in the European Convention on Human Rights, but goes further. Human rights are indivisible, interdependent and interrelated. This means that all human rights have an environmental aspect, including those expressly contained in the 1998 Agreement. Clean air, a stable climate, water, soil, etc. are a precondition for the enjoyment of all human rights. This is further supported by the RSE section addressing environmental matters in the provision on regional development, alongside the 1998 Agreement's support more generally for all-island cooperation on the environment. Together, this means that **there is significant scope for arguing that the 1998 Agreement establishes a wide range of procedural and substantive environmental rights and other human rights that can protect the environment**.

- Alongside these human rights, the **RSE section also provides for environmental safeguards** that can similarly fall within Article 2 of the Windsor Framework (and would further environmental and other human rights).

463 *Dillon and others v Secretary of State for Northern Ireland* [2024] NICA 59, para 115.

- The Northern Ireland Court of Appeal has considered the implications of Article 2 of the Windsor Framework in the *SPUC* case and has established a 'test' to help determine its applicability. **The Northern Ireland Court of Appeal in the *Legacy* judgment[464] provided an essential gloss, where it noted that the *SPUC* test is an interpretative aid, not a binding code.** This is the preferred approach as an overly rigid application of the six-step test could artificially limit the application of Article 2 of the Windsor Framework.

- A key purpose of the Windsor Framework, is to prevent damage to the 1998 Agreement – in 'all its dimensions'.[465] This includes an express provision (Article 2) which is designed to prevent the rights established by the 1998 Agreement from being eroded post-Brexit. **Because the 1998 Agreement establishes an extensive range of rights and safeguards (subject to a purposive interpretation), including in the context of environmental protection, this also means that Article 2 of the Windsor Framework applies to a potentially extensive range of rights and safeguards**.

- Brexit has had a significant impact on the structures and laws designed to deliver environmental protection in Northern Ireland – mainly because the environment is an area of law which has been heavily influenced by the need to comply with EU environmental rules and standards. **Environmental rights are a category of rights particularly vulnerable to potential reduction, or 'diminution' as post-Brexit governing arrangements replace those that followed from EU membership. The same is true for environmental safeguards.**

- This analysis indicates that **post-Brexit diminution of environmental rights and safeguards across a range of areas are likely to fall within the scope of Article 2 of the Windsor Framework and that these diminutions should be challenged in order to uphold the environmental rights of individuals in Northern Ireland** and, in some instances, on the island of Ireland.

8.3 Environmental Measures Falling Within the Scope of Article 2 of the Windsor Framework

The table below highlights environmental measures falling within the scope of Article 2 of the Windsor Framework based on the analysis in this report.

464 Ibid, para 96.
465 Article 1(3) of the Windsor Framework.

Environmental measures falling within the scope of Article 2 of the Windsor Framework	Comments
EU air quality laws (e.g., the Ambient Air Quality Directive and the National Emissions Ceilings Directive)	The links between air pollution and adverse health impacts and pre-mature death are well established. Air pollution is increasingly understood as an issue affecting the rights to life and respect for private, family life and the home. It is therefore increasingly possible to argue that EU air quality laws are an expression of fundamental rights.
Environmental objectives and principles (e.g. those in Article 191 TFEU)	These include that EU environmental policy should be aimed at a high level of protection and expressly refer to human health (and use of natural resources). Principles include prevention and precaution. They are binding provisions that are applied in interpreting EU law. They reflect the links between the environment and health/life, and thereby relevant rights. Interpreting EU-derived law in a manner inconsistent with these objectives and principles could not occur but for Brexit and could lead to a diminution of relevant rights.

Environmental procedural human rights: • Access to environmental information • Public participation in environmental decision-making • Access to environmental justice	Clearly encompassed by the of the Windsor Framework Article 2 guarantee on the basis of: • Their status as customary international law principles. • Their status as aspects of the ECHR Rights (based on the green interpretations given these rights by the ECtHR). • The EU Charter of Fundamental Rights, Article 37 & 47. • Their explicit implementation in some circumstances via EU legislative measures (Public Participation Directive 2003/35/EC, Access to Environmental Information Directive 2003/4/EC, access to justice provisions in the Environmental Impact Assessment Directive, Industrial Emissions Directive, Water Framework Directive and other directives), and the CJEU interpretation of the general application of these rights in decisions such as *LZ No.1* and *NEPPC.* • Their implicit implementation in other areas via the case law innovations of the CJEU. The status of the Aarhus Convention as an environmental human rights treaty that was ratified by all Member States and the EU prior to Brexit, and therefore declared by the CJEU to form part of the corpus of EU law, and to have various forms of direct and indirect effect based on the case law of the CJEU, which gives rise to a duty to disapply conflicting measures of national law prior to Brexit.

EU environmental legislation governing project-permitting/emissions to the environment including but not limited to:

- Environmental Impact Assessment Directive 2011/92/EU
- Habitats Directive 92/43/EEC
- Birds Directive 2009/147/EC
- Industrial Emissions Directive/ Integrated Pollution Prevention and Control Directive 2010/75/EU
- Urban Waste Water Treatment Directive
- Water Framework Directive 2000/60/EC
- Nitrates Directive 91/676/EEC
- Bathing Water Directive 2006/7/EC
- Groundwater Directive 2006/118/EC
- Environmental Quality Standards Directive 2008/105/EC
- The Marine Strategy Framework Directive 2008/56/EC
- Sewage Sludge Directive 86/278/ EEC
- The Strategic Environmental Assessment Directive 2001/42/EC

This framework of interlocking EU environmental controls safeguarded biodiversity, air, soil and water quality against pollution, and thereby protected human health and the environment. These laws vindicate the right to health, and the right to environment if such is accepted by the Courts.

They also in many cases vindicate the environmental procedural human rights discussed above, in the specific context of their subject area.

This is supported by the EU treaties, e.g. Articles 3 (sustainable development, environmental improvement) TEU, Article 21 TEU (Sustainable development in external policy), Article 11 TFEU (Environmental Policy Integration). Article 192 – 194 TFEU mandate a high level of environmental protection. The EU Charter of Fundamental Rights also supports this. Article 37 guarantees a high level of environmental protection, and Article 47 gives procedural guarantees. The judgments of the CJEU clearly outline the synergy of these provisions and the Aarhus Convention.

Transboundary Consultation:

- The Environmental Impact Assessment Directive 2011/92/EU implements the international law obligations surrounding transboundary public consultation on project permitting.
- The Strategic Environmental Assessment Directive 2011/42/EC implements the transboundary public consultation obligations in relation to strategic level plans and programs.

The obligations arise under the Aarhus Convention and the Espoo Convention (Convention on Environmental Impact Assessment in a Transboundary Context), as well rights implied by other transboundary conventions e.g. Conventions on Long Range Transboundary Pollution

The obligation to consult with affected publics on environmental decisions does not stop at a political border. This obligation arises

- Under the Aarhus Convention which doesn't permit discrimination as to domicile or citizenship.
- Under the Espoo Convention and is implied a number of other transboundary Conventions.
- As a result of the case law of the ECtHR on the right to participate in decision-making processes affecting legal rights.
- Public participation in environmental decision-making is considered a right under Customary International Law making it binding on the UK, Ireland and Northern Ireland when making environmental decisions with transboundary context.
- Under a range of EU legislative measures including the Environmental Impact Assessment Directive 2011/92/EU, the Strategic Environmental Assessment Directive in a plan/program context, and the Governance Regulation 2018/1999/EU in a climate context to give a few examples. Due to the fact that the Aarhus Convention and ECHR form part of EU law, arguably any obligation subject to public participation obligations is subject to transboundary participation obligations where there is reason to believe there will be transboundary effects of the decision. A good example of this is National Climate Plans.

Appendix 1:

Article 2's Relationship with Other Windsor Framework Provisions

This appendix considers Article 2 of the Windsor Framework in its immediate legal context by accounting for the relationship between its provisions and other specific provisions in the Windsor Framework and the EU/UK Withdrawal Agreement. This is necessary to fully understand the implications of Article 2 for at least three reasons: (i) in line with the VCLOT, the terms of any treaty are to be interpreted in their context and in light of their object and purpose;[466] (ii) provisions regarding enforcement mechanisms are found elsewhere in the Windsor Framework text; and (iii) the legal relationship established between EU law and 'the UK in respect of Northern Ireland' by the Windsor Framework is not static but instead includes novel provisions for its evolution which do or may impact on the scope of Article 2.

Article 2 and Enforcement: Article 4 Withdrawal Agreement, Articles 12 and 13 Windsor Framework[467]

Provisions of the UK-EU Withdrawal Agreement and any EU laws 'made applicable' by it, including the Windsor Framework (and its Article 2), are required, according to Article 4(1) of the Withdrawal Agreement to produce 'the same legal effects as those which they produce' in the EU and its Member States.[468] Moreover, any references, in the Withdrawal Agreement and/or its Windsor Framework(s), to 'Union law or to concepts or provisions thereof' are, according to Article 4 Withdrawal Agreement, to be: interpreted and applied in accordance with the methods and general principles of EU law (4(3));[469] to be interpreted in conformity with pre-2021 CJEU case law (4(4)); and thereafter to be interpreted and applied by UK authorities with 'due regard' to relevant CJEU case law as it develops. While the Windsor Framework sets up even closer links between Northern Ireland and the CJEU/its case law, these overarching provisions of the Withdrawal Agreement are the essential backdrop against which its provisions generally and Article 2 in particular must be understood. Before considering the specific Windsor Framework provisions, a word

466 The Vienna Convention on the Law of Treaties 1969, s3 Article 31.

467 See generally Melo Araujo, B. and Whitten, L. C. (2022) 'Judicial Review And The Protocol on Ireland / Northern Ireland' *Post-Brexit Governance NI.* Available at: https://www.qub.ac.uk/sites/post-brexit-governance-ni/ProjectPublications/Explainers/JudicialReviewandtheProtocolonIrelandNorthernIreland/

468 See also similar provision in Article 127(3) Withdrawal Agreement regarding EU laws adopted during Transition Period.

469 Notably in *SPUC* para 79 the Court noted that the combined effect of section 7A of EU (Withdrawal) Act 2018 and Article 4 Withdrawal Agreement is to limit the post-Brexit restriction of the use of the EU Charter of Fundamental Rights and/or EU General Principles that otherwise applies in UK jurisprudence after Brexit.

on the language used in Article 4(1) regarding provisions 'made applicable', and its implications when it comes to Article 2 of the Windsor Framework.

Article 4(1) Withdrawal Agreement read against Article 2(1) of the Windsor Framework begs a question about the relationship between EU acts 'made applicable' under the Withdrawal Agreement/Windsor Framework and the 'no diminution' obligation of rights 'enshrined' in provisions of EU law listed in Annex 1 and/or the relevant 1998 Agreement RSE section. Are EU acts that 'enshrine' Article 2(1) Windsor Framework rights, for the purpose of Article 4(1) Withdrawal Agreement 'made applicable'?[470] The answer is somewhat unclear.[471] A case for the affirmative can be made by looking at several aspects of legal context. The second sentence of Article 4(1) Withdrawal Agreement elaborates: '*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'.[472] Both the 'accordingly' link to the first sentence and the expanded 'contained or referred to' conceptualisation of relevant EU laws suggests that, at least, those laws *referred to* in Article 2(1) and *contained in* Annex 1 meet the conditions for the Article 4(1) Withdrawal Agreement obligation. Additionally, in providing that any Withdrawal Agreement provisions '*referring to* Union law or to concepts or provisions thereof *shall'* (as stated) be interpreted and applied according to EU general principles and interpreted in conformity with pre-2021 CJEU case law, subparagraphs 4(3) and 4(4) further suggest that any reference to EU laws or concepts in the Withdrawal Agreement or its Protocols are in scope of Article 4 Withdrawal Agreement. On the face of it this also includes, at least, Article 2 and Annex 1 of the Windsor Framework EU law on the basis that these are sufficiently clearly in scope of the 'no diminution' obligation to a degree that other rights enshrined in EU law which underpin 1998 Agreement RSE rights are not. By implication, there may be a technical distinction arising from Article 4 Withdrawal Agreement between the obligations of the UK as regards Annex 1 of the Windsor Framework laws where implementation is to conform to EU general principles and direct effect as well as the 'no diminution' threshold; and 1998 Agreement RSE relevant

470 Worth noting, of the 22 uses of 'made applicable' in the Withdrawal Agreement and its Protocols, 14 are in the Windsor Framework. This underlines the importance of the concept for Northern Ireland and flows from the comparative breadth of EU laws that continue to apply there under its terms.

471 Worth noting UK/EU mixed messaging on this issue: in January 2020, Northern Ireland Office Minister Lord Duncan of Springbank stated in a Written Answer (HL404): 'the Government also considers that Article 2(1) of the Protocol is capable of direct effect and that individuals will therefore be able to rely directly on this article before the domestic courts. By contrast, the Northern Ireland Office 'Explainer' on Article 2 published in August 2020 states: 'there will not be any direct application in Northern Ireland of the EU law in Annex 1' 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?'. NI Office, 2020. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907682/Explainer__UK_Government_commitment_to_no_diminution_of_rights__safeguards_and_equality_of_opportunity_in_Northern_Ireland.pdf, para 7. Article 2 is a UK commitment and the EU have not published official documents on it; however, in *The UK-EU Withdrawal Agreement: A Commentary* edited by EU negotiators states that 'it seems likely that this [Article 2(1)] provision is sufficiently clear and precise to have direct effect' which might suggest the EU would take such a view [2021: OUP, 8.14].

472 Namely that, as per *Van Gend & Loos v Netherlands Inland Revenue Administration* [ECLI:EU:C:1963:1] the relevant provisions are precise, clear, unconditional, do not call for additional (national or European) measures; and, as per *Becker* [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:619ECLI:EU:C:1982:71CJ0008], do not allow Member States discretion regarding implementation.

laws in scope of Article 2 of the Windsor Framework, where implementation is only required to conform to the 'no diminution' threshold.[473] Notwithstanding this potential distinction, provisions in the Windsor Framework itself regarding enforcement, read together with domestic legislation, suggest any such differentiation may be mostly academic.

While to be read in the context of the Withdrawal Agreement, the Windsor Framework also contains specific and bespoke provisions for its own application and enforcement. Notably, the full jurisdiction of the CJEU (as according to Article 267 TFEU) continues for the purposes of implementing (only) Articles 5, 7 to 10 and 12(2) of the Windsor Framework. Along with Articles 1, 3 and 4, 6, 11 and 12(1); (3) to (7) and 13 to 19 of the Windsor Framework, Article 2 is excluded from this provision for continued CJEU jurisdiction. Importantly, of the excluded articles, only Article 2 contains explicit reference to specific Union law. Arrangements for the implementation and enforcement of Article 2 and laws within its scope are therefore novel even when read in the (also novel) arrangements for the implementation of other Windsor Framework-applicable EU laws.

By contrast to the constrained nature of CJEU jurisdiction, Article 13(2) of the Windsor Framework provides that any references to EU law, concepts, or provisions in the Windsor Framework 'shall in their implementation and application be interpreted in conformity with CJEU case law'. In view of the aforementioned specific (by implication) exclusion of Article 2 applicable EU laws from CJEU jurisdiction, this obligation for continued alignment with relevant case law is particularly notable. When read in light of Article 2(1) of the Windsor Framework in particular, the comparatively narrow terminology used in 13(2) is notable in respect to its reference to 'the provisions *of this Protocol* referring to Union law…*'* rather than, as is used at other points in the text, the broader language regarding 'provisions of Union law *made applicable by* this Protocol' (e.g., Article 6(1); 7(2); 13(3) of the Windsor Framework); by implication, while the provisions of EU law listed in Annex 1 are, unquestionably, to be applied in conformity with CJEU case law, the obligation as regards those EU laws not explicitly included in the Windsor Framework text but potentially (see above) 'made applicable by' it including via the relationship established by Article 2(1) with EU laws underpinning 1998 Agreement (RSE) rights is, at the very least, less clear if not expressly excluded. This is however where the Article 4 Withdrawal Agreement provision *may* come into play in the event that EU laws in scope of Article 2 of the Windsor Framework by dint of their underpinning of 1998 Agreement RSE rights (including any environmental rights) are not in scope of

473 An additional point to make for the case in favour arises from the Article 4(2) Withdrawal Agreement requirement for the UK to 'ensure compliance' with 4(1) as regards empowering its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions – from an Article 2 perspective such action on the part of the UK was taken. The related powers/obligations are laid down in section 7A of the EU (Withdrawal) Act 2018, which gives the Withdrawal Agreement/Protocol legal force in the UK, together with sections 6 and 24 of the 1998 Northern Ireland Act which (respectively) prohibit the Northern Ireland Assembly from making incompatible laws and disempowers Northern Ireland Ministers/Departments from making incompatible subordinate legislation. Again, this suggests EU laws in scope of Article 2 and Annex 1 of the Windsor Framework have, for the purposes of Article 4(1) Withdrawal Agreement, been 'made applicable' in Northern Ireland.

the Article 13(2) obligation for alignment with CJEU case law *as it evolves*, under Withdrawal Agreement Article 4(4) and 4(5) they would still be required to conform with it *as it stood* in January 2021 and, thereafter, to be interpreted with 'due regard' to any evolutions (see also section 3.4).[474]

Article 2 and Alignment: Articles 13(3) and 13(4) Windsor Framework

The relationship between post-Brexit Northern Ireland and the EU established under the Windsor Framework is dynamic in several respects – some relate to arrangements for (obligated and/or elective) alignment and others (detailed in the next subsection) relate to the potential for divergence and/or alignment-reversal.

For the purposes of Article 2 of the Windsor Framework the most pertinent dimensions of this newfound dynamism as regards alignment are set out in Article 13(3) and 13(4). Under Article 13(3) of the Windsor Framework, where it makes reference to an EU act it is to be read 'as referring to that act as amended or replaced'. Here the language is even more explicitly narrowed to occasions 'where this Protocol makes reference to *a Union act'* that act is to apply in accordance with its evolution in/through the ordinary processes of EU law-making; this contrasts to the somewhat wider phrasing of Article 13(2) of the Windsor Framework as regards CJEU case law and the even more expansive terminology regarding Union laws 'made applicable' used elsewhere. On the face of it then the requirement for *automatic* dynamic alignment in respect of Article 2 appears limited only to those EU acts which now or in future are listed in its corresponding Annex 1.

At the same time, there is, at least potentially, a link between Article 2(1) of the Windsor Framework on the basis that some aspects of EU law *both* underpin rights in scope of 1998 Agreement RSE *and* are included as Windsor Framework-applicable EU law outside of those Directives listed in its Annex 1. What this means is that, in effect, updates or revisions to these acts could add to the automaticity of alignment that arises by consequence of Article 13(3) in ways that are of relevance to Article 2. Examples of Windsor Framework-applicable EU laws in this category can be found in Article 5 and Annex 2.[475]

Additional to the requirement for Windsor Framework-applicable EU acts to apply 'as amended or replaced' under Article 13(4) the EU and UK can *by agreement* adopt any new EU act that 'falls within the scope' of the Windsor Framework but which neither amends nor replaces one already listed. This (still hypothetical) process would be initiated by the EU in the first instance informing

474 Notably, this appears to be the view taken by the UK Government in their 'Explainer' para 16. See also Lock, Frantziou and Deb, n21, p. 63-65.

475 For example: Regulation (EU) 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products; Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83/EC on the Community Code relating to medicinal products for human use; Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC (Recast).

the UK of 'the adoption [not proposal] of that act' which would be followed by an 'exchange of views' on its implications between the two sides in the EU/UK Joint Committee within six weeks. Thereafter as soon as 'reasonably practical' the Joint Committee would either (a) adopt a decision to add the act or (b) examine all further possibilities to maintain the Windsor Framework's good functioning, alternatively if no Joint Committee decision was forthcoming the EU would 'be entitled' to take 'appropriate remedial measures' provided the UK was notified in advance. These Article 13(4) procedures could be used to add to the number of EU laws listed in Annex 1 and thereby in effect expand the scope of Article 2(1) laws. Such a hypothetical does however raise interesting questions as regards the interaction between 'no diminution' arising from UK withdrawal as a legal threshold (as per 2(1)) and the possibility of *new* EU acts being deemed within the scope of Article 2 commitments.

Article 2, Stormont Brakes and Democratic Consent: Article 13(3)(a) and 18 Windsor Framework

In addition to providing for Northern Ireland alignment to EU law, the Windsor Framework also provides for its reverse and/or divergence. While this was the case when the legal text was agreed in October 2019 under the premiership of UK Prime Minister Boris Johnson, among the effects of the amendments and new arrangements for its implementation agreed in February 2023 under the premiership of UK Prime Minister Rishi Sunak is a newly diverse legal means of doing so.

The possibility for alignment-reversal and/or divergence arise from two provisions in the Windsor Framework: Article 13(3)(a) – the 'Stormont Brake' – and Article 18 – the 'Democratic Consent Mechanism' – taking each in turn.

The Stormont Brake(s)

One of the more prominent aspects of the Windsor Framework agreement between the UK and EU is the so-called Stormont Brake it introduces. Rooted in concerns about the (at least perceived) lack of democratic credentials of the requirement (under Article 13(3) of the Windsor Framework) for Northern Ireland to stay dynamically aligned to areas of EU law in which it had no role in shaping and limited foresight regarding, the UK Government and European Commission agreed to amend the text of Article 13 to introduce a 'brake' procedure. In substance the Stormont Brake agreed between the UK and EU is manifest in the addition of a subparagraph – Article 13(3)(a) – to the legal text of the original Protocol read alongside a UK unilateral declaration which is annexed to a Joint Committee Decision – 1/2023 – which lays down arrangements related to the Windsor Framework.[476]

476 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

Under new Article 13(3)(a) of the Windsor Framework the UK is enabled to deviate from the otherwise automatic regulatory alignment of 'the UK in respect of NI' with EU rules on goods on the instruction of Members of the Legislative Assembly (MLAs) in NI, subject to stated conditions. In legislating for the implementation of the Stormont Brake procedure in domestic law, the UK Government introduced an additional new process which is linked to Article 13(4) of the Windsor Framework which allows for the addition of new EU instruments to those that already apply under the Windsor Framework if the new act is agreed to be within the scope of its objectives and the Joint Committee agree as much. What this means is that, in effect, the Stormont Brake comes in two forms – the associated procedures of both aspects are complex.

Article 13(3)(a) Stormont Brake

With regard to automatic alignment under Article 13(3) of the Windsor Framework and borrowing from the Northern Ireland 'petition of concern' constitutional procedure for its threshold, under new Article 13(3)(a), 30 MLAs from two or more political affiliations can 'notify' the UK Government of their desire for the 'brake' to be applied to a specific amendment or replacement of an EU act which would otherwise apply in Northern Ireland under Article 5 and Annex 2 of the Windsor Framework (which concerns customs and trade in goods). Notification on the part of MLAs is subject to several conditions. Firstly, the case must be convincingly made by notifying MLAs that the relevant change would have a 'significant impact specific to everyday life of communities in Northern Ireland' and one that is 'liable to persist'.[477] Secondly, notifying MLAs must be able to demonstrate compliance with restrictions on the Petition of Concern procedure that flow from the New Decade New Approach agreement, meaning principally that any notification is 'only being made in the most exceptional circumstances and as a last resort'.[478] Thirdly, notifying MLAs will need to be able to demonstrate that: they have sought 'prior substantive discussion' with the UK Government and with (or within) the Northern Ireland Executive to 'examine all possibilities in relation to the [relevant specific] Union act'; they have 'taken steps to consult' businesses, traders or civic society representatives affected by the relevant EU act; and they have made 'all reasonable use of applicable consultation processes' provided by the EU for new acts of relevance to Northern Ireland.[479] Fourthly, any notification must be given within two months of the relevant change of an EU act being published in the Official Journal of the EU.

Community of 24 March 2023 laying down arrangements relating to the Windsor Framework. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1145694/Decision_of_the_Withdrawal_Agreement_Joint_Committee_on_laying_down_arrangements_relating_to_the_Windsor_Framework.pdf

477 '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' OJ L 102, 17.4.2023 p. 61-83. Available: https://eur-lex.europa.eu/eli/dec/2023/819/oj/eng: Article 2.

478 *Ibid*: Annex 1(c)(i).

479 *Ibid*: Annex 1(c)(iii).

The scope of this Article 13(3)(a) aspect of the Stormont Brake is limited to that EU law made applicable by Article 5(2) of the Windsor Framework and which is listed in Annex 2 excluding those laws listed under subheadings 2 to 6 (representing 32 instruments) which relate, primarily, to trade defence measures and bilateral safeguards.[480] Based on the original agreed text, this leaves 256 instruments listed under subheadings 1 and 7 to 47 of Annex 2 in scope of the Stormont Brake procedure which is subject to notification on the part of 30 MLAs from two or more political affiliations. This Stormont Brake procedure is only available when Northern Ireland institutions are operational; should the institutions collapse (again), only those MLAs seeking 'individually and collectively' to operate the institutions 'in good faith' would be able to avail of the procedure.[481] The specific mechanisms by which the brake would operate in this scenario, particularly as regards the process for possible Assembly recall and/or the criteria by which the 'good faith' test would be determined remains unclear.

From an Article 2 of the Windsor Framework perspective, this first dimension of the Stormont Brake procedures is (at least potentially) relevant in two respects: (i) the possibility of updates to EU laws in scope of Article 2 by nature of their underpinning of 1998 Agreement RSE rights *and* falling in the relevant parts of Article 5 and Annex 2 being subject to successful Stormont Brake procedure that results in a diminution (ii) the possibility of any exercise of the Stormont Brake procedure resulting in a 'diminution' of rights that are (now or in future) in scope of Article 2.

Article 13(4) Stormont Brake

In regard to any new acts adopted by the EU considered to be in the scope of the Windsor Framework, the Article 13(4) requirement for consensus in the Joint Committee for any additions, in effect, gives the UK 'a veto' on any expansion (in EU law terms) of the agreed existing scope of the Windsor Framework. The legal texts of the Framework did not propose any change to Article 13(4) but, the UK Command Paper indicated that new domestic procedures would be introduced such that Northern Ireland would be more involved;[482] these came in the form of a statutory instrument. When it came before parliament the UK Government framed the Windsor Framework (Democratic Scrutiny) Regulations 2024[483] as representative of the Windsor Framework in its entirety which was approved in the House of Commons by a decisive majority of 515 for and 29 against.[484]

480 Subheadings 2 to 6 of Annex 2 cover: protection of the Union's financial interests; trade statistics; general trade related aspects (such as generalised tariff preferences, common rules for exports etc.); trade defence instruments; and regulations on bilateral safeguards.
481 Decision No 1/2023 of the Joint Committee: Annex 1(a).
482 HM Government, 'The Windsor Framework: A New Way Forward' CP 806 (2023), para 68.
483 SI 2024/118. Available at: https://www.legislation.gov.uk/uksi/2024/118/contents/made.
484 Hansard Vol. 730: 22 March 2023. Available at: https://hansard.parliament.uk/commons/2023-03-22/debates/B72DF24C-EE1B-4BDC-AAD6-C4961342424C/NorthernIreland.

According to the Windsor Framework Regulations a UK Minister will be unable to agree to the addition of a new EU act in the Joint Committee unless the Northern Ireland Assembly pass a motion in favour of doing so *or* 'exceptional circumstances' apply.[485] Importantly, any 'applicability motion' tabled to this end can only pass if cross-community consent is achieved.[486] While the determination of the presence of 'exceptional circumstances' is left to the discretion of the UK Minister, it is stated that if the application of the new EU act would not create a new regulatory Great Britain-Northern Ireland border, the condition of exceptionality is reached; there is no reference to NI/Ireland regulatory implications.

Similar to the Article 13(3)(a)-related process, the Article 13(4)-related process is conditional on the devolved institutions being operational, and an Executive being in place. Notwithstanding the similarity, in contrast to the brake for amendments or replacements, the brake for new EU acts would *not* be available for use in the event of a subsequent collapse of devolved government in Northern Ireland; the draft statutory instrument is explicit in this regard. One of the possible 'exceptional circumstances' that could lead a Secretary of State to ignore the absence of cross-community consent for the application of a new EU act, is lack of a sitting Executive.[487]

While the scope of the Article 13(3)(a)-related brake is limited to changes or updates made to (the majority of) those EU laws that apply under Article 5 and Annex 2 of the Framework, the Article 13(4)-related brake is not limited. Any proposal for a new EU act to be added to the Framework under any of its provisions could, potentially be subject to the Article 13(4)-related 'applicability motion' procedure in the Assembly, *if* devolved government in Northern Ireland is up and running. By implication, this second dimension of the Stormont Brake procedures has (at least potential) direct relevance to Article 2 of the Windsor Framework: if a new EU act deemed in scope of the Windsor Framework due to its underpinning of Annex 1 or 1998 Agreement RSE rights does not pass an applicability motion and 'exceptional circumstances' do not apply, this can be expected to result in diminution.

The Democratic Consent Mechanism

Article 18 of the Windsor Framework obliges the UK Government to 'provide the opportunity for democratic consent in Northern Ireland to the continued application of Articles 5 to 10' (Article 18(1) of the Windsor Framework) periodically. A first vote was due before the end of 2024 and, thereafter, votes are to be held at four- or eight-year intervals according to whether or not, respectively, a simple or cross-community majority are in favour of continued application; if/when there is no majority in favour, Article 5 to 10 of the Windsor

485 Windsor Framework (Democratic Scrutiny) Regulations 2024, Regulation 18(1) and 18(2).
486 Ibid, Regulation 19(6).
487 Ibid, Regulation 18(5).

Framework will be disapplied after a period of two years during which the Withdrawal Agreement Joint Committee will 'address recommendations' to the EU and UK regarding 'necessary measures' which take 'into account the obligations of the parties to the 1998 Agreement (Article 18(4)).

While on a *prima facie* reading this Article 18 'democratic consent mechanism' has only limited Article 2 relevance given its exclusion from the scope of the mechanism it nonetheless has the potential to have both direct and indirect effects.

In the event that a majority of MLAs in future vote against the continued application of Articles 5 to 10 of the Windsor Framework, due to the overlap between 1998 Agreement RSE rights and aspects of law that apply under Articles 5 to 10 (particularly 5 and 9), a diminution by default *could* result. However, Article 2 obligations would stand, meaning that any EU laws that currently apply under Articles 5 to 10 and which are also in scope of the 'non-diminution' commitment would need to be upheld to the extent of their Article 2 relevance. Safeguarding Article 2 rights could therefore conceivably be among the 'necessary measures' adopted by the UK and EU acting jointly in the two interim years between a vote against continuation and disapplication of Articles 5 to 10. Less directly, the requirement under Article 18 for recurring votes to be held in the Northern Ireland Assembly on the continuation/discontinuation of aspects of the Windsor Framework increases the likelihood that its unique post-Brexit arrangements remain a prominent and contested political issue in Northern Ireland. While an indirect and contextual point, it is nonetheless important to note given the probability that political contestation over the Windsor Framework generally will make effective and efficient implementation of Article 2 more difficult.

NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Northern Ireland Human Rights Commission
4th Floor Alfred House
19-21 Alfred Street
Belfast
BT2 8ED

T: +44 (0)28 9024 3987
E: info@nihrc.org
W: www.nihrc.org