

Human Rights and Equality in Northern Ireland Under the Protocol

A Practical Guide

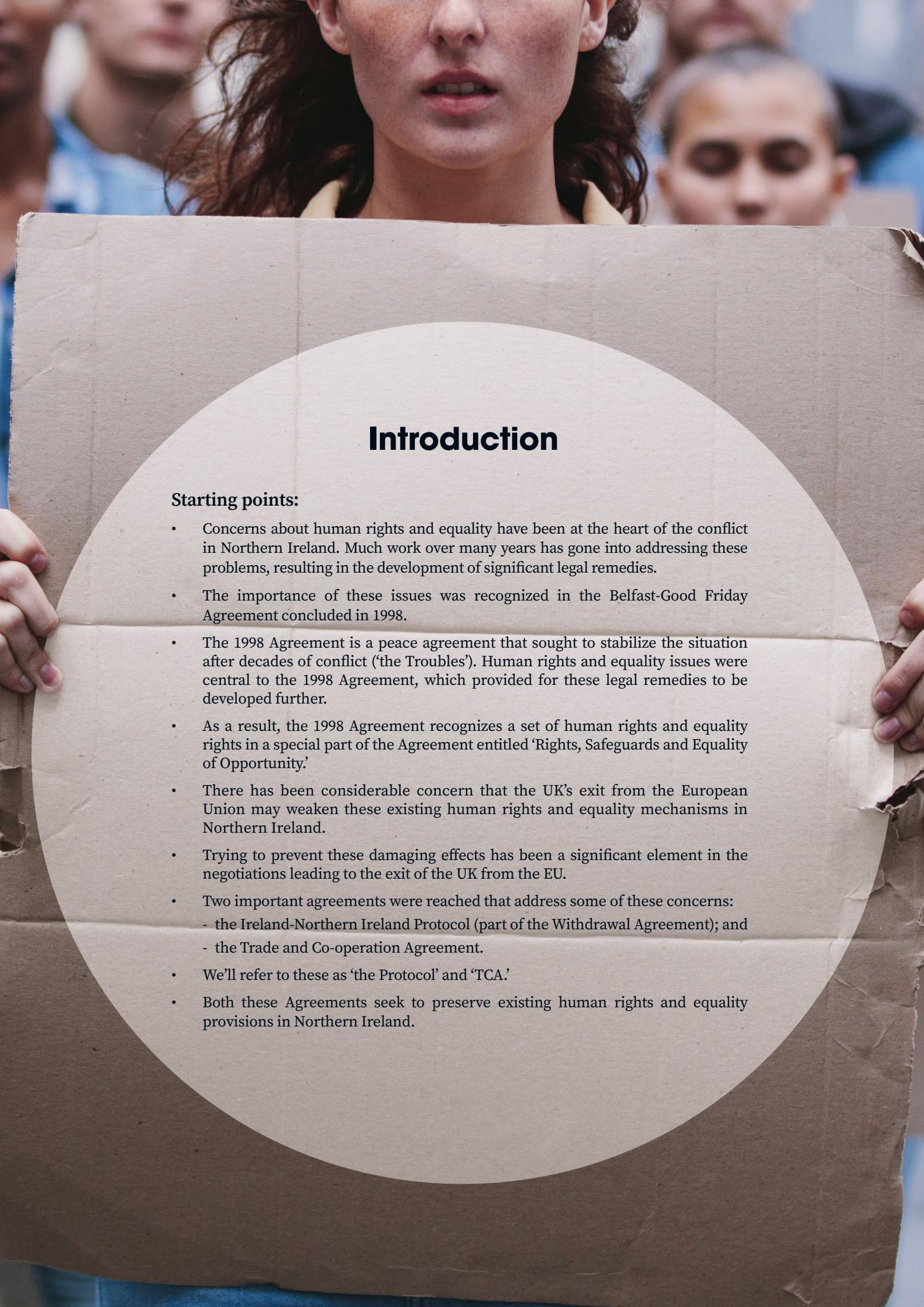
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HUMAN RIGHTS CENTRE



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Introduction

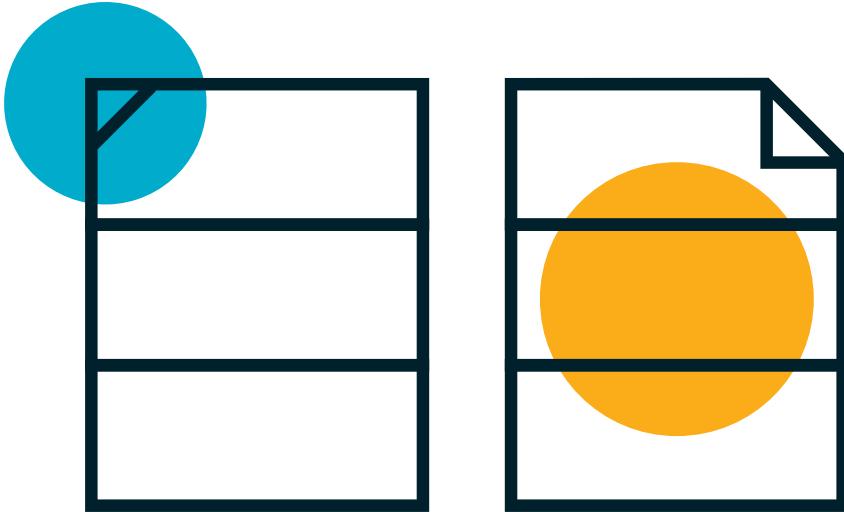
Starting points:

- Concerns about human rights and equality have been at the heart of the conflict in Northern Ireland. Much work over many years has gone into addressing these problems, resulting in the development of significant legal remedies.
- The importance of these issues was recognized in the Belfast-Good Friday Agreement concluded in 1998.
- The 1998 Agreement is a peace agreement that sought to stabilize the situation after decades of conflict ('the Troubles'). Human rights and equality issues were central to the 1998 Agreement, which provided for these legal remedies to be developed further.
- As a result, the 1998 Agreement recognizes a set of human rights and equality rights in a special part of the Agreement entitled 'Rights, Safeguards and Equality of Opportunity.'
- There has been considerable concern that the UK's exit from the European Union may weaken these existing human rights and equality mechanisms in Northern Ireland.
- Trying to prevent these damaging effects has been a significant element in the negotiations leading to the exit of the UK from the EU.
- Two important agreements were reached that address some of these concerns:
 - the Ireland-Northern Ireland Protocol (part of the Withdrawal Agreement); and
 - the Trade and Co-operation Agreement.
- We'll refer to these as 'the Protocol' and 'TCA.'
- Both these Agreements seek to preserve existing human rights and equality provisions in Northern Ireland.

Our aims:

- The purpose of this Guide is to explain the provisions of the Protocol and TCA dealing with human rights and equality in Northern Ireland as simply and clearly as possible.
- While these two Agreements have numerous important provisions dealing with trade and customs, we're primarily interested here in how the Protocol and TCA deal with issues of human rights and equality and how they can be used to protect your legal rights.
- We'll start with a basic introduction to the Protocol and the TCA. Then we'll do a deeper dive into how the most important provision of the Protocol works (its protection of human rights and equality in Article 2).
- We'll then look at the Protocol through a problem-solving lens: how it can be used to protect the human rights and equality framework that has evolved in Northern Ireland over the last few decades.
- So, following the details of how Article 2 works, we'll identify several hypothetical problems related to the protection of human rights and equality that may arise in the future, and how they could be addressed through the Protocol.
- We've initially created a set of flowcharts that outline the international and domestic legal processes relevant for enforcing the Protocol.
- Some important human rights issues that arise may not be able to be addressed adequately using the Protocol. The Withdrawal Agreement, as well as containing the Protocol, also has important provisions dealing with the rights of EU citizens who are resident in the UK after Brexit. We don't deal with these provisions here. That's not because we think these provisions aren't important. It's because they deserve a separate Guide – they are very complicated.
- But we do look at how the TCA may also be relevant when trying to address possible human rights violations in the future.
- We've set out how the relevant human rights and equality aspects of the TCA work.
- We'll provide only a basic introduction here on both the Protocol and the TCA. If you want or need further detailed advice, you'll need to consult a specialist. We've listed some sources of further help at the end.





The Basics

What does the Protocol do?

- The Protocol is the part of the EU-UK Withdrawal Agreement that attempted to deal with several specific problems that Brexit generated for relations between Ireland and the United Kingdom, between Northern Ireland and (the Republic of) Ireland, and within Northern Ireland.
- Overall, the Protocol has three main objectives:
 - to preserve the integrity of the EU's Single Market, ensuring that Ireland's relations with the rest of the UK remained significantly unaffected
 - to prevent the creation of a hard border between Ireland and Northern Ireland
 - to protect the 1998 Belfast-Good Friday Agreement in 'all its dimensions'
- As part of dealing with the protection of the 1998 Agreement, the Protocol aims to ensure that there is 'no diminution of rights, safeguards, or equality of opportunity' as set out in the part of the 1998 Agreement that deals with these issues.

Design of the Protocol:

- The Protocol is complex and often subject to interpretation. This leaves us with ample opportunities to test how it operates in practice. Don't be put off by this ambiguity. If it is ambiguous, keep pressing for greater clarity.
- The Protocol can be enforced at both the international and Northern Ireland legal levels, but in different ways.
- Broadly speaking, if you are not part of the UK government or an EU body, you won't be able to use international legal arbitration – it cannot be used by individuals. Individuals can, of course, press the UK and/or the EU to use international arbitration.
- At the international level, the Joint Committee, the decision-making body of the Protocol that is responsible for its implementation and application, can resolve disputes via consensus and mutual agreement. If this fails, cases may go to an international arbitration panel which can refer questions to the Court of Justice of the European Union.
- The legal enforcement in Northern Ireland of the Protocol, on the other hand, can be pursued by individuals.
- We'll be saying more about these issues when we consider the legal remedies available.

Enforcing the human rights and equality provisions of the Protocol:

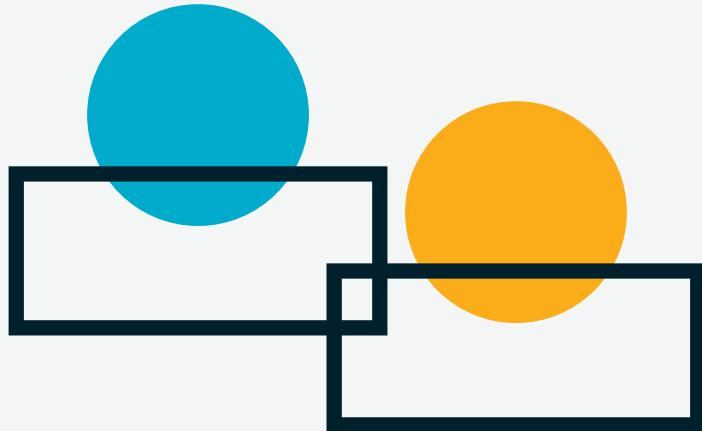
- We'll focus now on the key provision of the Protocol that deals with human rights and equality in Northern Ireland. This is Article 2 of the Protocol.
- Article 2 provides that the UK has important continuing obligations regarding human rights and equality in Northern Ireland.
- It provides that there shall be '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' resulting from the UK's withdrawal from the EU.
- It also provides that there shall be no diminution of the protections against discrimination that EU law previously provided.
- To monitor and enforce these obligations, Article 2 provides for the establishment of a 'dedicated mechanism.'
- If there has been a breach of Protocol Article 2 by the UK, legal action can be taken through either this 'dedicated mechanism' or by individuals, groups or companies.
- The 'dedicated mechanism' route refers to the work of the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission. Both bodies have various powers (which may be exercised jointly or separately):
 - to launch legal proceedings if violations of Protocol Article 2 occur or if they may occur in future
 - to assist others to take cases relating to Protocol Article 2
 - to bring violations to the attention of the international dispute procedures
- Individuals, groups or companies can also take legal action in their own names, with or without assistance from either of the two Commissions.
- These processes will be illustrated and explained in the general flowcharts that follow this introduction.

What does the TCA do?

- The TCA governs future relations between the UK and EU after the UK's full withdrawal from the European Union.
- We're primarily interested here in two sets of provisions in the TCA:
 - The first set of provisions are sometimes called the 'level playing field' provisions. These include labour and social rights.
 - The second set of provisions deal with the role of the European Convention on Human Rights (ECHR).
- The purpose of the level playing field provisions is to ensure fair competition between the UK and EU. This is achieved through commitments to maintain labour, social, environmental and climate standards. These provisions are relatively weak and may not constrain the UK much in practice.
- The human rights provisions specifically mention the ECHR. Co-operation between the UK and EU (especially in the criminal justice context) is based on the UK's continuing protection of fundamental rights and freedoms of individuals, including those set out in the ECHR.
- Unlike the Protocol, these provisions may not be enforceable in Northern Ireland courts directly by individuals, groups or businesses. The remedy lies at the international level, where the EU and the UK can invoke a similar dispute settlement process as under the Protocol.

Using the Protocol and the TCA

- Individuals can invoke their legal rights guaranteed by the Protocol in Northern Ireland courts; individuals can also try to encourage the Commissions to take action under their powers.
- Accessing the international arbitration procedures of the Protocol and using the TCA both internationally and in Northern Ireland courts may not be possible.
- However, there are significant opportunities for political mobilization at the international level. Individuals are in a position to advocate for their human rights, which can influence the UK government's or EU's policies.
- Political mobilization can be just as powerful as legal mobilization, sometimes more so.



The Protocol in More Depth

Before we get to *how* you can assert your rights through the Protocol's processes, we need to discuss *when* you can. There are several things to consider when determining if an issue is a violation of Protocol Article 2.

Here is what Article 2 says:

'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.'

There's a lot to take in here, so let's break it down into the main issues.



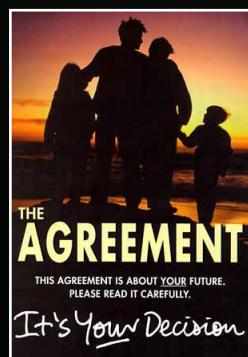
Relevant Rights in 1998 Agreement

Human rights and equality rights are central to the Belfast-Good Friday Agreement. These are the rights that the Protocol protects. Knowing which rights are protected under the 1998 Agreement is a necessary first step for considering whether the Protocol applies.

Here's when the first complication arises. It isn't all the rights in the 1998 Agreement that are protected by the Protocol. Only those in a particular part of the Agreement: the 'Rights, Safeguards and Equality of Opportunity' section of the 1998 Agreement.

The journey to understanding how to use the Protocol begins with knowing what rights the 1998 Agreement protects in that section. Don't ignore the rest of this section of the Guide – of course you know what's in the 1998 Agreement, but it's worth looking at it again in more detail.

Put simply: if the right you want to protect isn't in that section of the 1998 Agreement, the Protocol doesn't protect it. And that section covers only a limited set of issues.



The section of the 1998 Agreement titled ‘Rights, Safeguards and Equality of Opportunity’ protects

- The ‘civil rights and religious liberties of everyone in the community’

The Agreement then specifies particular rights that are included as illustrations of what is included in this broad protection:

- 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
- The right of women to full and equal political participation

Remember, these specific rights are illustrations of what is included in ‘civil rights and religious liberties’. If you think other rights are included in ‘civil rights’ then you’ll need to make a good argument that this is a reasonable interpretation.

This section of the Agreement also provides additional guarantees for what it calls ‘safeguards’. These safeguards include provisions that the UK would implement the European Convention on Human Rights in Northern Ireland law.

Keep these rights in mind as we look through the case studies and flowcharts. There are two initial questions you’ll need to be able to answer in order to proceed.

1. **Do you consider that the protection of a particular human right has been reduced in Northern Ireland or that equality of opportunity protections in specific contexts has been reduced since the UK exited the EU?**
2. **Is this right, safeguard or equality of opportunity provision or protection that you are concerned about covered by the relevant chapter of the Belfast-Good Friday Agreement?**

Substantive Questions

If you can answer ‘yes’ to both these questions, then you are on the way to being able to show that Article 2 applies. But you have four further hoops you’ll need to jump through.

To make out a case that a breach of Article 2 has occurred, it will also be necessary to be able to answer ‘yes’ to each of the following four further questions:

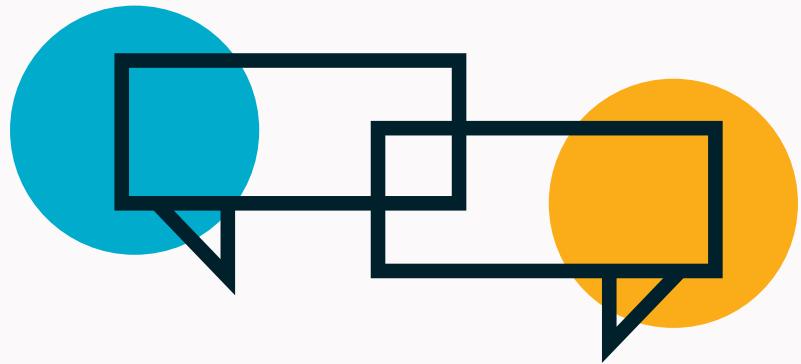
- 3. Was the right that you've identified as protected by the 1998 Agreement given effect to, in Northern Ireland law on or before 31st December 2020?**
- 4. If Northern Ireland law did give effect to this right, was this right ‘underpinned’ by EU law prior to 31st December 2020?**

Here is where the reference to ‘the provisions of Union law listed in Annex 1’ comes into play. Annex 1 lists the main anti-discrimination provisions of EU law that applied in Northern Ireland when the UK was still an EU member state. The obligations and rights they provided still hold good and can’t be changed.

But they are only a subset of EU law that underpinned rights in Northern Ireland – the only difference is that they are made explicit. You’ll need advice whether EU law provided an underpinning to other rights in Northern Ireland that aren’t listed in the Annex.

- 5. Has the UK’s exit from the EU had the effect that this EU underpinning has been removed in whole or in part, resulting in a diminution in the right, safeguard or equality of opportunity provision or protection?**
- 6. Would this ‘diminution’ not have occurred had the UK remained in the EU?**

Each of these questions may raise quite difficult legal questions, which is why you may well need legal advice, but the next section provides several examples of how these questions can be used to assess whether a breach of Article 2 may have occurred. We’ve selected issues that have come to our attention with the implementation of the Protocol. But these are simply illustrations of the type of issues that might arise. Don’t assume that these are the only issues that might arise. The case studies are mostly intended to get you to think about how other issues might also give rise to issues under Article 2.

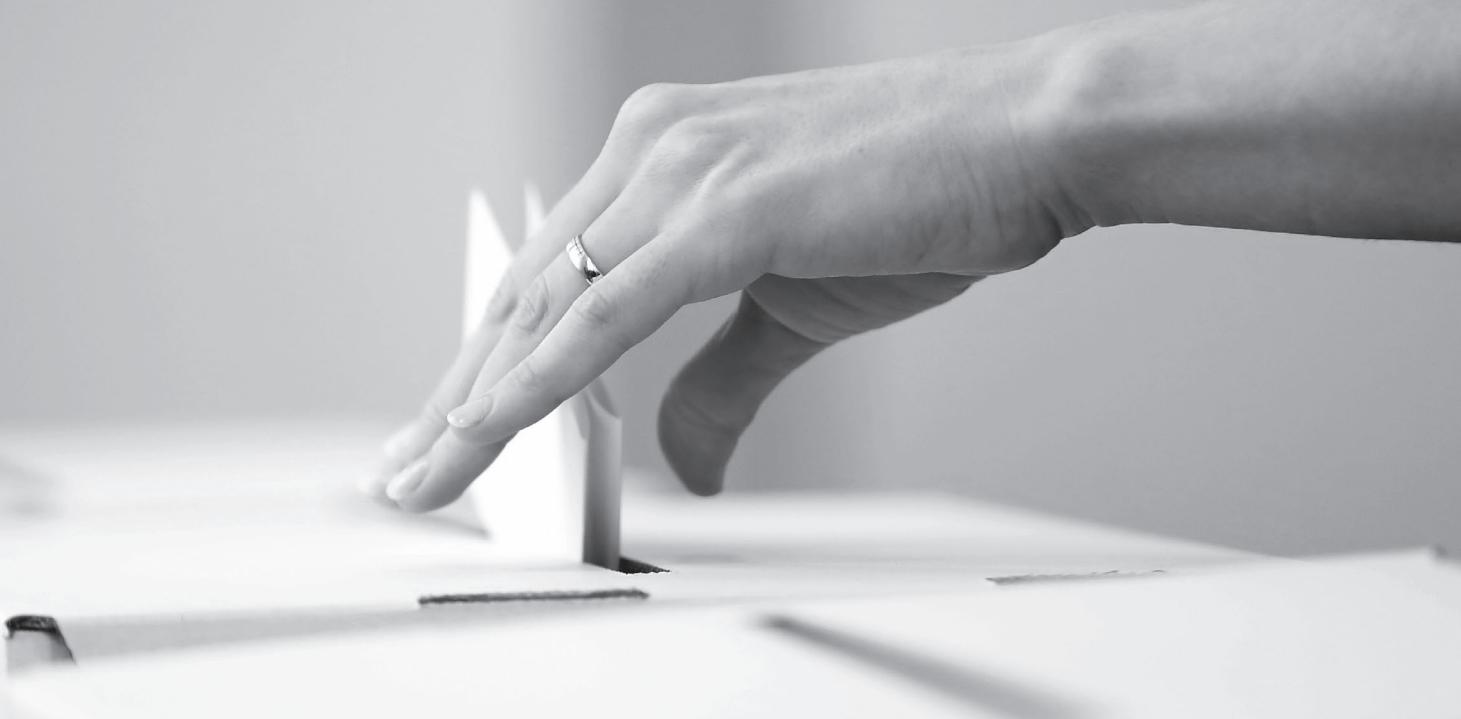


Case Studies

The purpose of the following case studies is to illustrate how to analyze whether an issue is potentially a violation of Article 2 of the Protocol. In order to illustrate the range of issues that arise, we have constructed hypothetical scenarios.

We hope these examples are helpful as you consider your own circumstances. We won't give definitive answers – we're more interested in helping you consider how you can analyze issues.

It is important to know whether your issue can be pursued in the first place before diving into the nuts and bolts of how to remedy any violation.



Case Study 1 – Voting Rights

Scenario –

Let's suppose that in 2022, the UK passes legislation that prevents EU citizens resident in Northern Ireland from voting in Northern Ireland district council elections. Is this a violation of Protocol Article 2?

Questions to ask yourself –

Do you consider that the protection of a particular human right has been reduced in Northern Ireland or that equality of opportunity protections in specific contexts has been reduced since the UK exited the EU?

- In this context, the human right in question is the right to vote. Prior to Brexit, EU citizens were able to vote in local elections in Northern Ireland, which indicates that a right is being diminished.

Is this right, safeguard or equality of opportunity provision or protection that you are concerned about covered by the relevant chapter of the Belfast-Good Friday Agreement?

- Yes. The relevant section of the Belfast-Good Friday Agreement protects the ‘right to pursue democratically national and political aspirations’. The right to vote enables individuals to participate in the democratic process of their nation. It is both a civil and political right.

Was the right, safeguard or equality of opportunity provision or protection enshrined, or given effect to, in the domestic legal order in Northern Ireland on or before 31st December 2020?

- Yes, at the relevant time, the Elected Authorities (Northern Ireland) Act 1989, section 1 provided that citizens of EU member states were eligible to vote in district council elections if resident in Northern Ireland.

In so far as Northern Ireland law did enshrine or give effect to this right, safeguard or equality of opportunity provision or protection, was this right, etc ‘underpinned’ by EU law prior to 31st December 2020?

- Yes. EU directives and treaty provisions, and the Charter of Fundamental Rights, all protected the right of EU citizens to vote in ‘municipal’ elections – in Northern Ireland this means district council elections.
- Article 8b.1 of the Treaty establishing the European Community (as amended by Title II of the Treaty on European Union) introduced a right to vote in municipal elections by EU citizens resident in another Member State.
- Two EU Directives subsequently spelled out the detailed arrangements necessary to operationalise this right (Council Directive 94/80/EC of 19 December 1994 and Council Directive 2013/19/EU of 13 May 2013).
- The EU Charter of Fundamental Rights, in Article 40, protected the right to vote and to stand as a candidate at municipal elections.

Has the UK’s exit from the EU had the effect that this EU underpinning has been removed in whole or in part, resulting in a diminution in the right, safeguard or equality of opportunity provision or protection?

- Yes. The UK’s exit from the EU means that EU treaties no longer have effect in Northern Ireland. The directive no longer has legal status in Northern Ireland domestic law either.

Would this ‘diminution’ not have occurred had the UK remained in the EU?

- Yes. If the UK remained in the EU, Northern Ireland would still be under the jurisdiction of the EU’s overarching treaties and directives (just like all other member states). The treaty and directive provisions that underpin the right to vote would still have effect.

Conclusion –

This scenario presents an instance where a violation of Article 2 of the Protocol is likely to have occurred. (Remember: fortunately, this scenario has not happened yet, but it may.)

There are several remedies through which you can address this issue. We set out these processes in the next section. Which would be the best route to take is still uncertain. The merits of each of these will only become clearer as these are tested.



Case Study 2 – European Convention on Human Rights (ECHR)

Scenario –

Let's suppose that in 2023, the UK withdraws from the European Convention on Human Rights (ECHR). Is this a violation of Protocol Article 2?

Questions to ask yourself –

Do you consider that the protection of a particular human right has been reduced in Northern Ireland or that equality of opportunity protections in specific contexts has been reduced since the UK exited the EU?

- Yes. The ECHR protects various human rights and withdrawing from it would significantly weaken the human rights framework in Northern Ireland. The UK was party to the ECHR when it was a member of the European Union. This means that the protection of human rights has diminished since the UK exited the EU.

Is this right, safeguard or equality of opportunity provision or protection that you are concerned about covered by the relevant chapter of the Belfast-Good Friday Agreement?

- Yes. The ECHR is included in the safeguard provisions of the relevant section of the Belfast-Good Friday Agreement. The ECHR was envisaged as protecting against infringement by the Assembly and public bodies in Northern Ireland.

Was the right, safeguard or equality of opportunity provision or protection enshrined, or given effect to, in the domestic legal order in Northern Ireland on or before 31st December 2020?

- Yes, it is given effect to in the Human Rights Act 1998 and in the Northern Ireland Act 1998. These Acts gave domestic effect to the provisions and protections outlined in the Belfast-Good Friday Agreement.

In so far as Northern Ireland law did enshrine or give effect to this right, safeguard or equality of opportunity provision or protection, was this right, etc ‘underpinned’ by EU law prior to 31st December 2020?

- This is the most difficult question. It depends how the courts would react.
 - (i) On the one hand, the membership by EU member states in the ECHR is only a political commitment. No EU law states that a member state is obliged to remain a party to the ECHR because it is an EU member state.
 - (ii) On the other hand, because the Charter of Fundamental Rights and the general principles of EU law overlap with the ECHR, EU law has been used indirectly to protect rights that are also included in the ECHR.

Has the UK’s exit from the EU had the effect that this EU underpinning has been removed in whole or in part, resulting in a diminution in the right, safeguard or equality of opportunity provision or protection?

- If the approach in (i) is adopted, the answer is ‘no’.
- However, if the approach adopted in (ii) is adopted, the answer is ‘possibly, yes’.

Would this ‘diminution’ not have occurred had the UK remained in the EU?

- Again, uncertain. If the approach in (i) is adopted, the answer is ‘no’. However, if the approach adopted in (ii) is adopted, the answer is ‘possibly, yes’.

Conclusion –

If this scenario were to become a reality, it would present an instance where a violation of Protocol Article 2 may or may not have occurred. This means that legal action would be needed in order to test the extent of the protection given by Protocol Article 2. Such action could be taken through individual enforcement, Commission enforcement, or Commission assistance.

But other non-legal remedies – such as political pressure on government actors – should be considered. And remember, this would be strengthened because of the provisions in the Trade and Cooperation Agreement which penalize the UK if it leaves the ECHR. We’ll be looking at the role of the TCA later.



Case Study 3 – Equal Pay

Scenario –

Let's imagine that in 2024, the UK abolishes the right to equal pay for work of equal value between men and women in Northern Ireland. Is this a violation of Protocol Article 2?

Questions to ask yourself –

Do you consider that the protection of a particular human right has been reduced in Northern Ireland or that equality of opportunity protections in specific contexts has been reduced since the UK exited the EU?

- Yes. The obligation on employers to provide equal pay between men and women who are doing work of equal value is part of the fundamental right not to be discriminated against. Abolishing this obligation would reduce protections against sex discrimination.

Is this right, safeguard or equality of opportunity provision or protection that you are concerned about covered by the relevant chapter of the Belfast-Good Friday Agreement?

- Yes. The relevant section of the Belfast-Good Friday Agreement protects the 'right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity'. Women do not have equal opportunities in social and economic sectors if they are paid less for equal work.

Was the right, safeguard or equality of opportunity provision or protection enshrined, or given effect to, in the domestic legal order in Northern Ireland on or before 31st December 2020?

- Yes, the Equal Pay Act (Northern Ireland) 1970 was amended in 1984 (by SR 1984/16) to require employers in Northern Ireland to provide equal pay between men and women who are doing work of equal value.

In so far as Northern Ireland law did enshrine or give effect to this right, safeguard or equality of opportunity provision or protection, was this right, etc ‘underpinned’ by EU law prior to 31st December 2020?

- Yes. Article 157 of the Treaty on the Functioning of the European Union requires member states to uphold the principle of equal pay between men and women doing equal work in the same field of employment. The right to equal pay for work of equal value is also underpinned by Directive 2006/54/EC on equal treatment of women and men in matters of employment and occupation (this is one of the Directives listed in Annex 1) which requires employers to ensure equal pay for work of equal value between women and men.

Has the UK’s exit from the EU had the effect that this EU underpinning has been removed in whole or in part, resulting in a diminution in the right, safeguard or equality of opportunity provision or protection?

- Yes. Because the UK left the European Union, EU law no longer has guaranteed continuing effect in Northern Ireland. The UK is free to make changes to its laws without having to conform to EU law. And in this scenario, it would have done so.

Would this ‘diminution’ not have occurred had the UK remained in the EU?

- Yes. If the UK remained in the European Union, Article 157 of the Treaty on the Functioning of the European Union and Directive 2006/54/EC would all still have effect in Northern Ireland. These ‘underpinnings’ would have prevented the abolition of the right to equal pay in Northern Ireland.

Conclusion –

There is a strong argument that this would be a violation of Article 2 of the Protocol if this scenario were to come to pass. You can address this through several remedies that we outline in the next section. As before, the relevant merits of each of these remedies will become clearer as time passes.



Case Study 4 – Civil Service Nationality Rules

Scenario –

In 2025, a French citizen moves to Northern Ireland to live with her new wife. She applies for a position at the Social Security Agency (SSANI). Before Brexit, all EU citizens could apply for such posts. However, she is denied the post. This is because the UK after Brexit legislated to reintroduce nationality restrictions into such posts – they are now not open to citizens of most EU countries who became resident after Brexit. British and Irish citizens can still apply, as can most EU citizens who arrived before Brexit. Is this a violation of Protocol Article 2?

- Note: Under the EU citizens' rights provisions of the Withdrawal Agreement, the UK cannot ban EU citizens who were in Northern Ireland before Brexit and who retain their EU rights from taking up such civil service posts. Under these provisions, the UK can, however, change these rules for those EU citizens who come to Northern Ireland after Brexit (as is the case in this scenario). The issue is whether this is possible under the Protocol.

Questions to ask yourself –

Do you consider that the protection of a particular human right has been reduced in Northern Ireland or that equality of opportunity protections in specific contexts has been reduced since the UK exited the EU?

- Yes. There are several rights in question: the right to work, the right not to be discriminated against based on nationality, the right to choose one's residence. Before the UK left the EU, EU citizens were able to occupy certain public service positions in Northern Ireland.

Is this right, safeguard or equality of opportunity provision or protection that you are concerned about covered by the relevant chapter of the Belfast-Good Friday Agreement?

- The relevant section of the Belfast-Good Friday Agreement protects ‘civil rights’, and the ‘right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity’.
- It would depend on how the courts interpret the provisions of the Agreement. ‘Civil rights’ might be interpreted as including the right to work, but it might not.
- The ‘right to equal opportunity in all social and economic activity’ would be likely to be read to encompass protection against discrimination in employment, but whether the protection against discrimination based on ‘ethnicity’ would include ‘nationality’ would need to be established.
- The right to choose one’s place of residence may apply.

Was the right, safeguard or equality of opportunity provision or protection enshrined, or given effect to, in the domestic legal order in Northern Ireland on or before 31st December 2020?

- Yes. The Aliens’ Employment Act 1955 and European Communities (Employment in the Civil Service) Order 2007 required that a ‘relevant European’ was exempt from the Aliens Restriction (Amendment) Act 1919, which prohibited the employment of ‘aliens’ in the public service. Because EU citizens like the French citizen in our scenario were ‘relevant Europeans’, they would have had a legal right to occupy certain posts in the public service in Northern Ireland.

In so far as Northern Ireland law did enshrine or give effect to this right, safeguard or equality of opportunity provision or protection, was this right, etc ‘underpinned’ by EU law prior to 31st December 2020?

- Yes. Article 45 of the Treaty on the Functioning of the European Union prohibits discrimination based on nationality between workers of member states exercising freedom of movement in member states. There were certain exceptions to this, but they would have been unlikely to have applied to the post in question here.

Has the UK’s exit from the EU had the effect that this EU underpinning has been removed in whole or in part, resulting in a diminution in the right, safeguard or equality of opportunity provision or protection?

- Yes. Because the UK left the European Union, EU treaty free movement requirements no longer have effect in Northern Ireland. The UK is free to make changes to its laws without having to conform to EU law.

Would this ‘diminution’ not have occurred had the UK remained in the EU?

- Yes. If the UK had remained in the European Union, Article 45 of the Treaty on the Functioning of the European Union would still have effect in Northern Ireland. This ‘underpinning’ would have prevented a move to repeal EU law that enables free movement.

Conclusion –

On balance, you may well have an arguable case that a violation of Article 2 of the Protocol has occurred here, but it is uncertain and would need to be litigated to get a clear answer. We outline several processes in the next section that can help you address this issue. As before, the relevant merits of each of these processes will become clearer as time passes and criteria is established by the Commissions for taking legal action.

Legal Remedies for Violation of Article 2

Flowcharts

The following flowcharts touch on several legal remedies that you can pursue when you believe there is a breach of your rights under Article 2 of the Protocol or a potential breach.

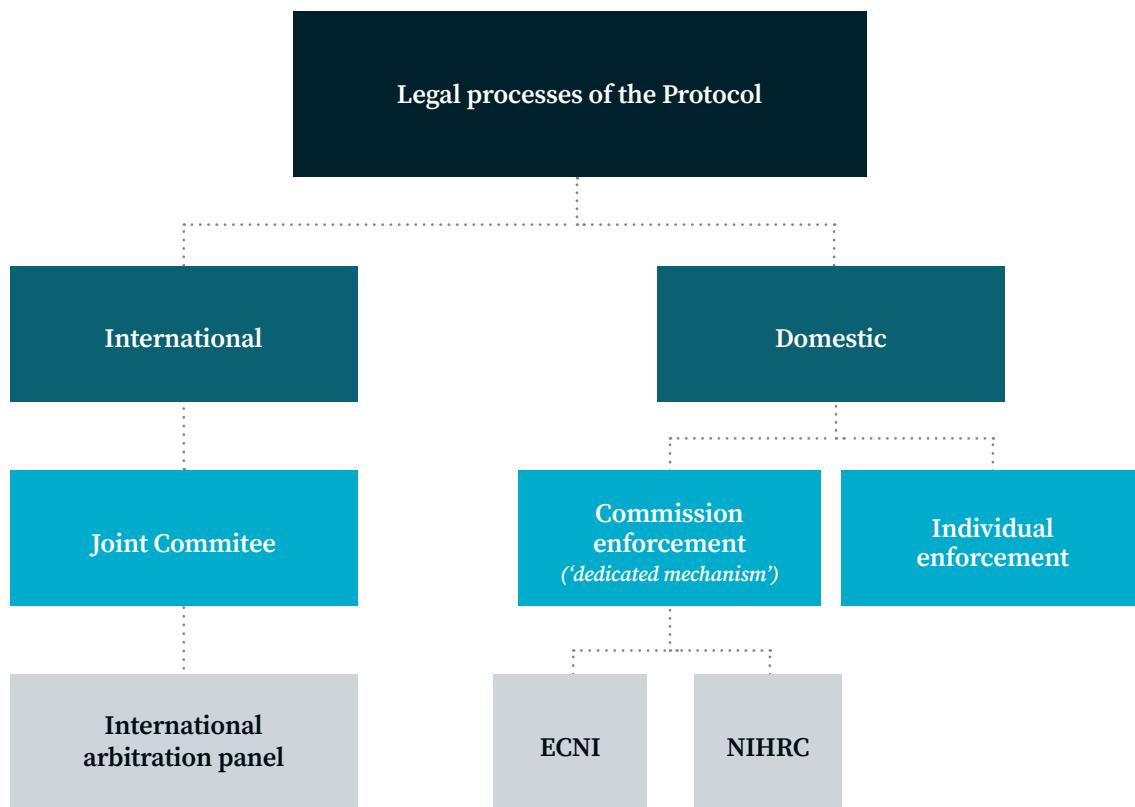
Right now, we are uncertain about how these processes will operate in practice. It is too early to determine which is the best to use, although greater clarity will evolve over time.

You should consider these, while also considering that non-legal remedies may also help address your situation. Political tools such as government pressure and lobbying are useful as well.

Let's start with an overview of the different methods of enforcing Article 2.

- We've seen that the Protocol can be enforced at both the international and Northern Ireland legal levels, but in different ways.

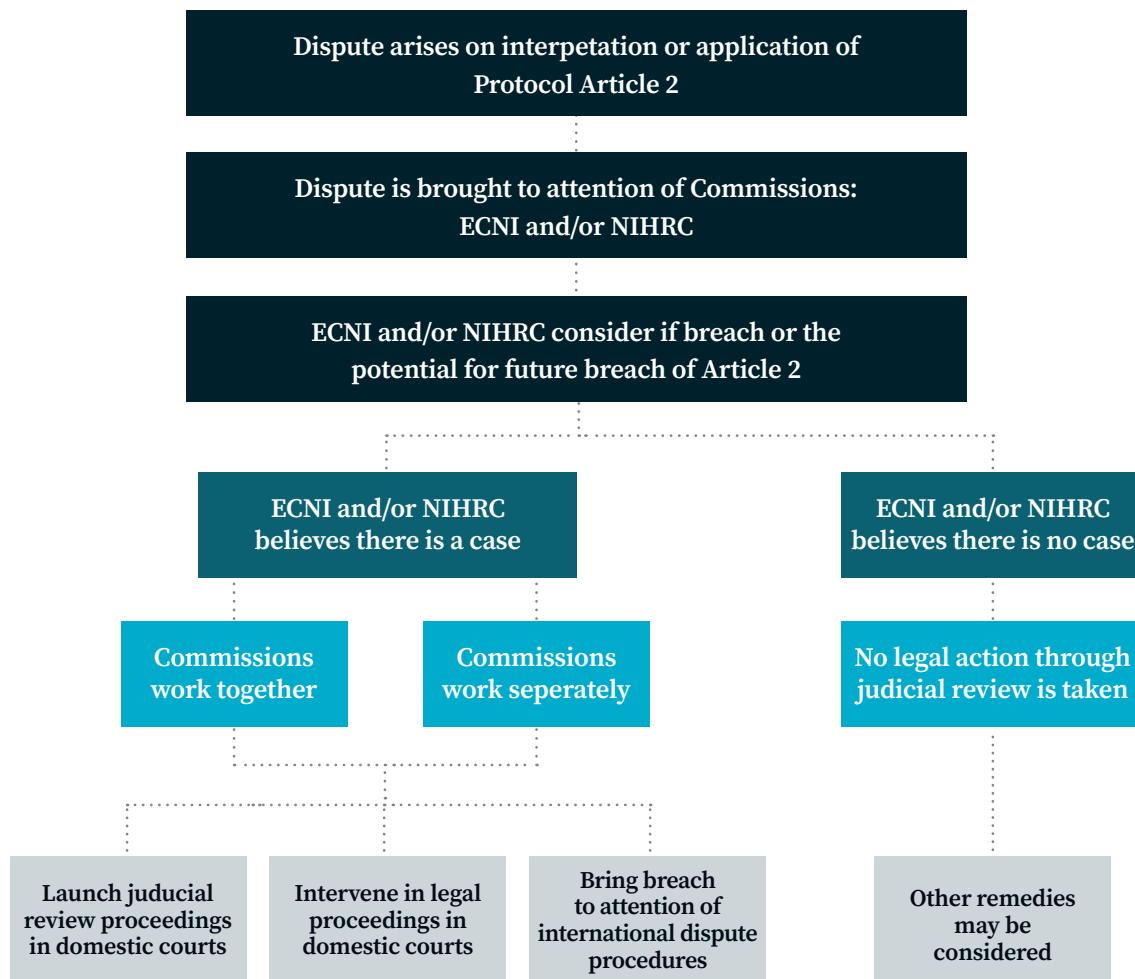
Flowchart 1 – Processes of the Protocol



- At the international level, the Joint Committee, the decision-making body of the Protocol that is responsible for its implementation and application, can resolve disputes via consensus and mutual agreement. If this fails, cases may go to an international arbitration panel which can refer questions to the Court of Justice of the European Union.

- Broadly speaking, if you are not part of the UK government or an EU body, you won't be able to use the tools provided for international legal enforcement – enforcing these will be up to the UK and EU – they cannot be used by individuals.
- The legal enforcement in Northern Ireland of the Protocol, on the other hand, can be used by individuals. In what follows, we'll focus on these methods of enforcement.
- You'll see from the first Flowchart that there are two different ways of enforcing Article 2 in Northern Ireland:
 1. One of these methods is the so-called 'dedicated mechanism' that is mentioned in Article 2. This sounds more complicated than it is.
- Basically, the 'dedicated mechanism' is the new procedure for enforcement that is operated by the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI)
 2. The other method of enforcement is through the ordinary legal processes that are available (primarily what is called 'judicial review'). This can be used by individuals with or without NIHRC or ECNI involvement.
- The ECNI and NIHRC can take 'own motion' cases as well as providing assistance to individuals. Individuals can act with or without the ECNI/NIHRC assistance. Here are the two procedures in more detail. We'll begin with the 'dedicated mechanism':

Flowchart 2 – Dedicated mechanism (Commission enforcement)



We'll turn now to the second method of enforcement, by individuals (by the way, this includes groups and companies, for example).

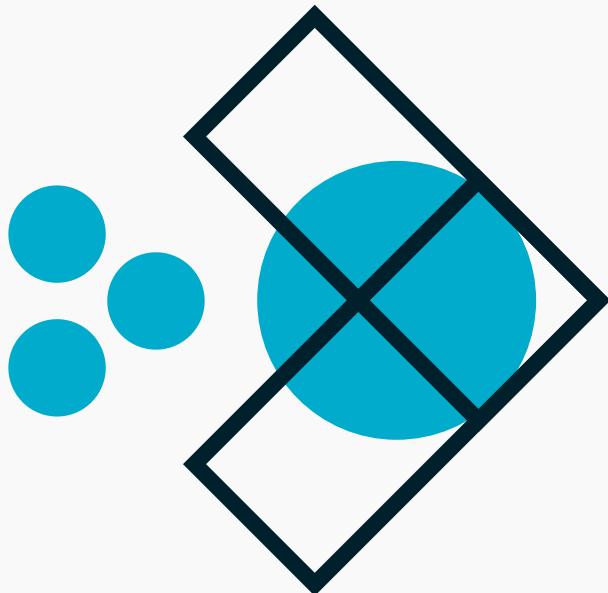
One of the (many) questions you would need to consider is how best to fund any case you might be interested in taking. There are basically three different ways of doing this:

- The first is to obtain financial assistance through applying for 'legal aid' (but you need to be below a pretty low financial threshold to qualify for legal aid).
- A second method is to seek financial assistance elsewhere (from an NGO, for example).
- The third is to apply to one of the two Commissions for assistance.

Flowchart 3 – Domestic governance of the Protocol (Individual enforcement)

Note: 'Individual' is used for simplicity. This flowchart also applies to groups or companies.





Trade And Cooperation Agreement (TCA)

- The TCA is the second major agreement that the UK negotiated with the EU. It is mostly about trade issues, but there are some important provisions that deal with human rights related issues as well.
- There are basically two different sets of provisions:
- The ‘level playing field’ provisions address the absence of explicit provisions in the Protocol addressing labour and social rights.
- The ‘human rights’ provisions, which deal with the role of the ECHR
- We’ll look at both of these, beginning with the ‘level playing field’ provisions. The major disadvantage of these provisions is that they may only be able to be used in legal disputes at the international and not at the national level.

Level-playing field provisions

- These provisions were designed to ensure fair competition between the EU and the UK, and include commitments not to lessen existing protection from labour, social, environmental and climate standards.
- Neither the EU nor the UK may weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards.
- The problem is that a reduction in protection is only contrary to the TCA if it affects trade or investment, which will be difficult to establish.

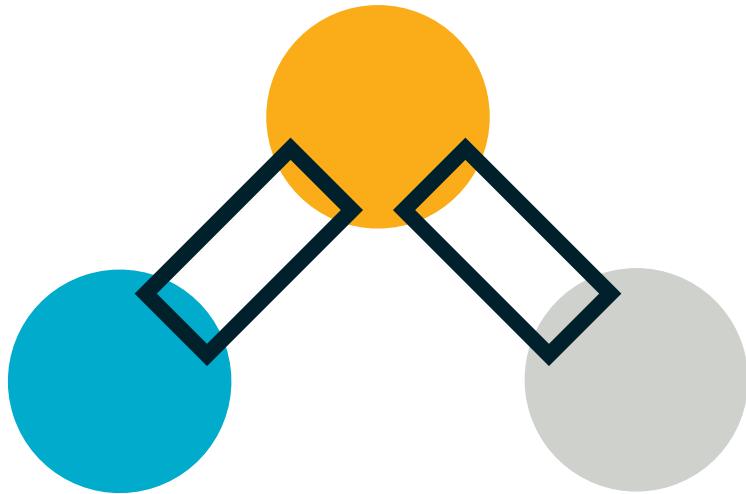
Human rights provisions

- There are two main sets of human rights provisions in the TCA; a set of general rules on human rights, and a set of special rules on human rights in the criminal justice context.
- As a result of the general rules, neither the UK nor the EU may breach obligations to uphold ‘the shared values and principles of democracy, the rule of law, and respect for human rights’.
- If the breach amounts to ‘a serious and substantial failure’, then the other party may decide to terminate or suspend the operation of the TCA in whole or in part subject to a delay to allow for negotiations between the Parties to take place, and to the measures being proportionate.
- The significant limitation is that for a situation to constitute a serious and substantial failure ‘its gravity and nature would have to be of an exceptional sort that threatens peace and security or that has international repercussions.’ That will be difficult to establish.
- The special rules on human rights in the criminal justice context are stronger. Continued cooperation in the criminal justice context is dependent on continued commitment to the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the European Convention on Human Rights.
- This includes ‘the importance of giving effect to the rights and freedoms in that Convention domestically’.
- Each Party may at any moment terminate the criminal justice co-operation measures for breach of these protections. It is clear that withdrawal from the ECHR is itself sufficient to justify termination of this part of the TCA.

Individual enforcement?

Unlike the Protocol, the TCA itself provides that these provisions are not ‘directly effective’ meaning that individuals cannot take legal action in domestic courts. The main remedy is international. Unlike the Protocol, the TCA does not have an individual direct enforcement mechanism or a dedicated mechanism at the domestic level in Northern Ireland.

However, there is a chance that individuals may still be able to use the TCA because of the way UK law deals with the TCA. Although perhaps unintentional, there is an argument that the legal provisions that Parliament passed to give effect to the TCA may have opened up a route of individual enforcement. Whether or not individuals can use the TCA under UK law is likely to be litigated in the Supreme Court. Watch this space!



Further Assistance

If you have additional questions, the following organisations should be able to provide helpful advice:

Northern Ireland Human Rights Commission

<https://nihrc.org/our-work/human-rights-after-brexit>

- The above link has important information on the NIHRC's role in protecting human rights after Brexit. It is a good place to start your research when you have questions. We suggest that you take a look through the guides they have published.

<https://nihrc.org/contact>

Equality Commission for Northern Ireland

<https://www.equalityni.org/Footer-Links/News/Delivering-Equality/Equality-and-Human-Rights-after-Brexit>

- The above link has important information on the ECNI's role in protecting equality rights and human rights after Brexit. It is a good place to start your research when you have questions. We suggest looking through the guides they have published.

<https://www.equalityni.org/contactus>

Centre for Cross Border Studies / Border People

www.crossborder.ie / www.borderpeople.info

Committee on the Administration of Justice

<https://caj.org.uk>

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Further reading:

Christopher McCrudden (ed), The Law and Practice of the Ireland-Northern Ireland Protocol
(Cambridge University Press, 2021)

<https://www.gov.uk/government/publications/the-northern-ireland-protocol>

https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement/protocol-ireland-and-northern-ireland_en

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<https://ii.umich.edu/humanrights>

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