Can Stormont Rollback the Home Office 'Hostile Environment'?

Legal Research Report

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December 2021

Promoting Justice / Protecting Rights

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Foreword by Úna Boyd, Immigration Project Solicitor & Coordinator, Committee on the Administration of Justice (CAJ)

The Committee on the Administration of Justice ('CAJ') is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues.

CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law. The present legal report was commissioned by the CAJ Strategic Immigration Project and undertaken by Mark Basset BL.

The CAJ strategic immigration project is a successor to CAJ's work through the academic led BrexitLawNI project that examined the constitutional, legal, human rights and equality aspects of Brexit in NI. CAJ led on the project reports covering Border Controls/Free Movement and Racism and Xenophobia. This work was undertaken in the context of the suite of hostile environment policies introduced by the Home Office, particularly through the Immigration Acts of 2014 and 2016. The hostile environment expressly aims to make the lives of persons in an irregular migration status unbearable, through a suite of measures whereby duties are placed on public services and private actors to police immigration status. The policies, only some of which have to date been applied in NI, have already led to shocking practices of racial discrimination most notoriously typified by the Windrush scandal, yet are largely intact, and following Brexit apply to an even broader range of persons.

In this context and the threat of NI becoming "one big border" in terms of immigration enforcement CAJ established the strategic immigration project, designed to promote a human rights compliant and welcoming immigration regime. The initial project was put together with support from the Community Foundation for NI, with additional support from New Philanthropy Capital's Transition Advice Fund. It initiated in March 2019 and continued into 2020 and beyond having secured support from the Paul Hamlyn Foundation. This included support for the present research, as well as a broader research exercise with frontline NGOs providing advice and representation, to better map evidence of migrant experiences in NI and in particular areas where abuses of rights are occurring. The project has a particular focus on strategic intervention to tackle the abuses faced by migrants in NI in the context of the evolving immigration system and the related NI context.

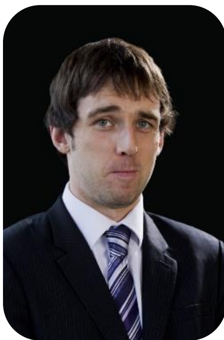
The purpose of the present report is to map out the interface between devolved and non-devolved matters in respect of immigration and associated issues and to examine where Northern Ireland Executive Departments would have the legislative competence to push back against the hostile environment and similar Home Office policies that have a detrimental impact on migrant rights. In doing this the report provides a legal mapping of the application of the Home Office's hostile environment policies in NI, scrutinises the devolved interface for such provisions and highlights areas where it would be within the competence of Stormont Departments to push back against hostile environment policies.

The context and rationale of the report are grounded in the complex and contested boundary between immigration law, an Excepted Matter to Westminster, and the areas on

which hostile environment policy can encroach, many of which would generally fall within in devolved competences in areas such as housing, employment, social security and health.

This report finds many areas where the devolved institutions can act, within their devolved competencies, to push back against the hostile environment and protect migrant rights in Northern Ireland. Where devolved competencies may be restricted, it is clear that Stormont can take a strong and proactive stance in pushing for transfer of powers or reform of legislation which impacts NI, at Westminster. Similar actions have been taken by the Scottish and Welsh legislatures on areas outside of their devolved competencies which impact their communities.

Against the backdrop of the projects interventions to counter the hostile environment, which have been met with a considerable degree of political support in NI, but also with questions as to the extent it is within the competence of the devolved institutions to act, this report seeks to break down the apparent ambiguity between the extent such provisions fall within the devolved and non-devolved sphere and assist in providing a blueprint on the way forward.



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Executive Summary

- The question of the scope of devolved competence in this jurisdiction is to be determined by reference to the provisions of the Northern Ireland Act (1998) rather than the various Immigration Acts. The intention of Parliament was to give effect to the current constitutional arrangement endorsed by the Irish electorates in the referendums of May 1998. As set out by the UKSC in the recent references from Scotland, the devolution statutes should be given consistent and predictable interpretation which allows for a coherent, stable and workable system. Alteration of the division of competences between London and Belfast should only be achieved by express and considered amendment to the Northern Ireland Act (1998) rather than by disguise or inadvertence.
- The scope of the immigration exception in paragraph 8 of schedule 2 does not extend to each and every act that a migrant may undertake whilst present in Northern Ireland. The UK Parliament may legislate for all matters but it is open to the devolved institutions to reassert their own priorities within the scope of devolution. A differentiated immigration settlement for Northern Ireland is not possible but protection from many of the intended and unintended indignities of the "hostile environment" legislation is.
- This paper attempts to, firstly, identify those aspects of the "hostile environment" legislation which have gone beyond the excepted subject matter of "*nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents."* Secondly, it proposes measures which would be within the scope of the Northern Ireland Assembly to modify in line with its legislative competence.
- Should the "right to rent" scheme be brought into effect in Northern Ireland by way of regulations by the Secretary of State for the Home Department, as envisaged by section 76 of the Immigration Act (2014), they will form part of the law of Northern Ireland. It is submitted they will form part of the housing law of Northern Ireland and will be open to modification in line with the legislative competence of the Assembly. Measures of general application which regulate the relationship between landlord and tenant, regardless of the immigration status of either party, will not fall within the scope of the immigration exception in paragraph 8 of schedule 2 to the 1998 Act. The devolved legislature cannot alter the migrant's immigration status but it can legislate to provide, or restore, a right to contract for accommodation.
- The regulation of driving licences, motor vehicle insurance and related road traffic offences are transferred matters. Provisions enacted by Westminster can be amended, repealed and/or modified by the Northern Ireland Assembly in accordance with the legislative competence provided by the Northern Ireland Act (1998). The ability of a migrant to drive a car in this jurisdiction cannot be said to fall within the scope of the exception in paragraph 8 of schedule 2 to the 1998 Act. The requirement to have a licence and minimum insurance remain issues of transferred competence. It is permissible for the Assembly and the Executive to prioritise road safety over the existing "hostile environment" measures inserted into the Road Traffic (NI) Order (1981).

- The ability of migrants to lawfully work within Northern Ireland must be considered to come within the scope of the immigration exception in paragraph 8 of schedule 2 to the 1998 Act. It is an "excepted matter" within the meaning of the devolution settlement. It is not open to the Northern Ireland Assembly to devise a differentiated immigration and employment regime which is more or less generous to migrants than that which exists in the rest of the United Kingdom. The Northern Ireland Assembly does have the option of intervention to protect those irregular migrant workers who have been exploited in the work force and are subsequently unable to enforce their rights under the current system of employment and civil litigation. These are transferred matters and would involve the devolved institutions implementing international human rights obligations already assumed by the United Kingdom. For example, the Assembly could create a separate right in tort for employees to recover compensation for labour provided to employers who engaged but subsequently did not pay. This could take the form of statutory codification of the *quantum meruit ("the amount he/she deserves")* action.
- The additions to the Marriage (NI) Order (2003) brought about by the Immigration Act (2014) and now contained in articles 3A-3E of that Order can be amended, repealed or modified by the Assembly pursuant to section 5(6) of the 1998 Act. The contents of the marriage notice, the marriage schedule and the duties on the registrar do not come within scope of paragraph 8 of schedule 2 of the 1998 Act simply because they will also apply to non-nationals.
- The imposition of No Recourse to Public Funds (NRPF) condition on the immigration status of a person in the United Kingdom and residing in Northern Ireland cannot be addressed directly by the Northern Ireland Assembly. It must be regarded as relating to the immigration status of a person. Social security, however, is a devolved matter in Northern Ireland. The devolved authorities can create new social welfare payments for persons who require support. Rules on eligibility and level of payment are matters which qualify as transferred matters.
- The provision of healthcare to persons in Northern Ireland allows for the devolved institutions to pursue the objective of ensuring the highest possible level of health of the entire population including those without regularised immigration status. The question of who is ordinarily resident in this jurisdiction, and consequently, and can be excluded from the current charging arrangements is a matter for the Assembly and the Department of Health. It is open to the devolved authorities to reimburse migrants the costs of the NHS surcharge.
- The hostile environment measures concerning banking in the Immigration Acts (2014-2016) will fall squarely within paragraph 23 of schedule 3 above rather than paragraph 8 of schedule 2 of the Northern Ireland Act (1998). These are matters concerning financial services and banking rather than immigration and nationality. They are currently beyond the legislative competence of the Northern Ireland Assembly as provided for in the Northern Ireland Act (1998).
- The Nationality and Borders Bill also contains measures which would seem to come within scope of transferred rather than excepted or reserved matters. They include age assessments by health and social care authorities as well as provisions on modern slavery. Once enacted the devolved authorities in Northern Ireland may modify such provisions as considered appropriate.

A. Introduction

1. On the 13th May 2021 the city of Glasgow was the scene of a morning raid by the Home Office's immigration enforcement officers. Two men were arrested on suspicion of immigration offences. This event was by no means unique but the response it provoked from the men's neighbourhood was significant. Around 200 people surrounded the vehicle in which they were held and prevented it from driving away. Scottish police were called to the scene and some hours later took the decision to release the men to ensure the safety of the present – detained migrants, protestors and arresting immigration officials. Detention with a view towards deportation was, it seems, abandoned at least in the immediate term.
2. The writ of Home Office immigration enforcement, presumably based here on primary legislation emanating from the sovereign Parliament, was frustrated by direct local action. The incident could be seen as a forceful pushback against the implementation of the immigration policies of central UK government. Immigration is a subject matter reserved to the UK Parliament on which the devolved authorities in Scotland, Wales and Northern Ireland have no competence. Removal is without doubt the prime example of this power. However, the creation and expansion of ever more punitive regimes directed at irregular migrants in all manner of activities not connected with immigration and residence, and impacting upon far more people than those ostensibly targeted, has the potential to give rise to similar confrontations between the UK government and the devolved administrations not in the streets but in the statute books. It is perhaps surprising there has not been a more concerted effort at pushback or mitigation.
3. The hostile environment measures impact upon far more subject areas than would traditionally be considered to be immigration and residence rules and enforcement. Housing, marriage, driving, social security benefits, health and social care, employment, banking and the administration of justice are all transferred matters within the present constitutional settlement in Northern Ireland. Nonetheless, they have all been subject to intervention from the UK Parliament reacting to relatively recent political priorities, perceived or real, of the English electorate. Immigration is simply not a vote winner in the same way in Scotland, Wales or Northern Ireland as it appears to be in parts of England. The interventions are, of course, constitutionally possible as the applicable devolution legislation does not impede the doctrine of parliamentary supremacy but those same statutes provide for considerable discretion when acting within the parameters of transferred powers.
4. Tension between central and regional powers is a feature of democratic life in many states around the globe. The form that relationship takes will depend on the particular constitutional arrangements in that state and the international law obligations voluntarily assumed. Regional immigration policies within individual nation states do exist. For example, the Australian immigration system includes both points-based routes and employer sponsored routes together with a strong regional focus. Canada has established a series of Provincial Nominee Programmes (PNP) with its provinces and territories. Quebec has a distinct system. Although immigration to the United States is a federal matter, many state and local governments have implemented a variety of policies directed at protecting unauthorized immigrants.

These “sanctuary cities” claim local democratic endorsement for actions which aim to prioritize local interests over and above the detrimental effect of federal immigration policies. These reactions can, and do, arise in the context of driving, education, employment, housing, health care and even the refusal to detain irregular migrants in local law enforcement facilities for immigration offences.

5. Hostility to migrants, regular or irregular, delivered through legislation and executive action all too often carries a political message. This could be the grotesque performative cruelty of separating children from their parents at the US-Mexican border, the infamous “go home” vans driven around London in 2018 or the announcement of ever more draconian and intrusive legislation to “crack down” on illegal immigration to the UK. These measures reflect the political priorities of those who announce and support them in the legislature. The hostile environment policies have not, to date it seems clear, been shown to achieve their stated goal of reducing overall irregular migration to the UK or encouraging those without regularised status in the United Kingdom to voluntarily leave. They have, at least in part, been politically discredited and renamed as a result of the Windrush scandal. However, for the most part they remain in place and, in some areas, are to be fortified in impending legislation. Clearly, they retain at least symbolic importance to the current UK government.

6. Those priorities may not, however, be shared by all other actors in the state who exercise legislative and executive power and who may, on occasion, be required to implement those policies. This reality in what is sometimes described as a union of nations has been accentuated by Brexit. Ending the United Kingdom’s membership of the European Union was the outcome of the 2016 referendum but it was not the desire of the electorates in Scotland or Northern Ireland. In particular, the abolition of free movement rights poses acute economic and social problems for a falling Scottish population and for Northern Ireland as a jurisdiction on the island of Ireland but no longer part of a member state. The ending of the supremacy and direct effect of free movement rights, save for those matters covered by the Withdrawal Agreement, will have the effect of placing more individuals within the reach of hostile environment measures in the near future and also has the potential to increase the variety of flashpoints between central and devolved government as the supranational decision maker disappears.

7. This report attempts to examine, firstly, the extent to which the hostile environment measures of recent years have strayed into areas which can properly be described as devolved competence and, secondly, to consider the extent to which the Northern Ireland authorities can, consistent with the restraints placed upon it by the Northern Ireland Act (1998), push back or mitigate some of those measures in the subject areas of transferred competence – housing, employment, banking, healthcare, marriage and social security. The question of whether the hostile environment measures that have arisen in the devolved context of the administration of justice, whether by way of reduced appeal rights, altered procedure or otherwise, can be addressed by the Northern Ireland Assembly is not covered however.

8. The suggestions made are based on the fundamental premise that migrants to the United Kingdom and residing in Northern Ireland, whether they hold regular or irregular immigration status, are first and foremost our family, friends, neighbours

and colleagues. They are entitled to expect governmental action which is conscious that the first keystone building block of the international human rights regime is observed. Article 1 of the Universal Declaration of Human Rights states that "*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*"

9. This premise should be, and it is submitted that as a dry matter of statutory construction it actually is, reflected in the relationship between the central and local authorities in Northern Ireland in the devolution legislation. It is not the case that each and every interaction a migrant has with public authorities or private individuals, no matter its location, its purpose or its effect, is by the very nature that a migrant is involved a matter of immigration and so beyond the legislative competence of the Assembly.

10. Migrants are human beings free and equal in dignity and rights and can expect equal status in law in most things not related to immigration status and nationality. While the UK Parliament may legislate in all conceivable subject areas it is equally permissible to see a local reaction within the parameters of devolved power. This will not have the drama of what occurred in the streets of Glasgow earlier this year but should be more effective in promoting the interests of all the people of Northern Ireland.

B. Legislation – Reserved, Excepted and Transferred Matters

11. In broad terms, the Government of Ireland Act (1920) adopted a "reserved powers" model for devolution. After partition, the local Parliament had the right to create law for the "peace, order and good governance" of the jurisdiction. This could be described as general legislative competence.

12. The Parliament of Northern Ireland received legislative power save for those matters specifically reserved in section 4 and section 9. These were "excepted" or "reserved matters". With respect to immigration, the subject matter of "treason, treason felony, alienage, naturalization, or aliens as such or domicile" was included in the list of reserved powers[1]. Any law made in contravention of those express limitations shall, so far as it contravenes those limitations, be regarded as void.

13. There was, therefore, a distinction between "reserved" and "transferred" powers based on the provisions of the 1920 Act itself. At the acknowledged risk of over-simplification "excepted" powers would not be transferred while there was the possibility of a future transfer of those reserved powers. Transferred matters included administration of justice, law and order, health and social services, transport, agriculture, industrial development and education. The principle of parliamentary sovereignty was retained and Westminster could still legislate on all matters and could extend such legislation to Northern Ireland including, of course, on those matters which were within the competence of the devolved Parliament[2].

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[1] Section 4(1)(6) of the Government of Ireland Act (1920)
[2] Section 6(2) of the Government of Ireland Act (1920)

14. A drafting feature of many legislative acts of the old Stormont Parliament was the inclusion of a provision in the words set out below. Laws which had originally been enacted on a UK wide basis, and dealt with subject matter which was subsequently a transferred matter, could be amended or even repealed. The choice of phrase was typically:

    "References in this Act to enactments of the Parliament of the United Kingdom shall be construed as references to those enactments as they apply to Northern Ireland".

15. A comparable approach was adopted in the Northern Ireland Constitution Act (1973). Again, there was a division between express "reserved" in schedule 2 to and "excepted" matters in schedule 3 and all other subject areas which could then be considered to be "transferred" matters[3]. In accordance with schedule 2, paragraph 7 "nationality; immigration; aliens as such" was included as an excepted matter. Measures of the Northern Ireland Assembly were to have the same force and effect as an Act of Parliament[4]. Section 4(4) provided:

    "(4) This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland but, subject to the said section 17, a Measure may amend or repeal any provision made by or under any Act of Parliament in so far as it is part of the law of Northern Ireland."

16. The current model of devolution in Northern Ireland derives from the multi-party negotiations which led to the Good Friday Agreement in April 1998. The human rights, equality, self-determination and consociationalism aspects are arguably novel but it does share many of the technical and administrative characteristics that were contained in the Government of Ireland Act (1920). Section 23 provides that executive powers in Northern Ireland continue to be vested in the Crown. However, with respect to transferred matters, prerogative and executive powers shall be exercised by Ministers and Northern Ireland Departments[5].

17. Acts of the Assembly are primary legislation within the context of the devolved arrangements in which they exist. The devolved legislature can be regarded as the primary law maker for Northern Ireland subject only to the limitations contained in the devolution statute itself[6]. For example, the division between transferred, excepted and reserved matters continues. The Secretary of State may alter the division by laying before Parliament an Order in Council. Reserved matters may become transferred matters as occurred with justice and policing powers in 2010[7]. Section 4 provides as follows:

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[3] Section 2 of the Northern Ireland Constitution Act (1973) providing for the initial devolution of legislative and executive responsibility

[4] Section 4(3)

[5] Executive power is exercised by the Ministers and Departments but not by the Executive Committee itself - see Solinas (2009) NIQB 43; Re Hughes Application (2018) NIQB 30; and most recently restated by Scoffield J in Re Application by the Northern Ireland Human Rights Commission (2021) NIQB 91

[6] And arguably common law constitutional rights or rule of law standards as expressed by the UKSC in Axa General Insurance Ltd v. Lord Advocate (2012) 1 AC 868

[7] Northern Ireland Act 1998 (Amendment of Schedule 3) Order (2010)

“4 - Transferred, excepted and reserved matters.

(1) In this Act—

“excepted matter” means any matter falling within a description specified in Schedule 2;
“reserved matter” means any matter falling within a description specified in Schedule 3;
“transferred matter” means any matter which is not an excepted or reserved matter.
(2) If at any time after the appointed day it appears to the Secretary of State—
(a) that any reserved matter should become a transferred matter; or
(b) that any transferred matter should become a reserved matter,
he may, subject to subsections (2A) to 3D(2) , lay before Parliament the draft of an Order in Council amending Schedule 3 so that the matter ceases to be or, as the case may be, becomes a reserved matter with effect from such date as may be specified in the Order.”

18. The Northern Ireland Assembly is capable, within its legislative competence as set out by the 1998 Act, of amending, repealing and replacing Acts of the UK Parliament in so far as they apply to Northern Ireland. The Assembly is entitled to pursue fundamentally different policies than the Westminster Parliament. This is clear from section 5(6):

“5(6) This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland.”

19. This option is available for any subject matter whether it is contained in primary legislation enacted by Parliament or secondary legislation brought into effect by Ministers under delegated powers provided it is within the legislative competence of the Assembly as defined in section 6 and 6A of the Northern Ireland Act (1998). A provision of an Act is not law if it contravenes these provisions[8].

20. Section 6(2) sets the limits of law making for the Northern Ireland Assembly:

“(2) A provision is outside that competence if any of the following paragraphs apply—

(a) it would form part of the law of a country or territory other than Northern Ireland, or confer or remove functions exercisable otherwise than in or as regards Northern Ireland;

(b) it deals with an excepted matter and is not ancillary to other provisions (whether in the Act or previously enacted) dealing with reserved or transferred matters;

(c) it is incompatible with any of the Convention rights;

[8] Section 6(1) and section 6A(1)-6A (1) of the Northern Ireland Act (1998) respectively

(ca) it is incompatible with Article 2(1) of the Protocol on Ireland/ Northern Ireland in the EU withdrawal agreement (rights of individuals);

(d) it is in breach of the restriction in <u>section 6A(1)</u>

(e) it discriminates against any person or class of person on the ground of religious belief or political opinion;

(f) it modifies an enactment in breach of <u>section 7</u>."

21. The question of what qualifies as ancillary is assisted by reference to section 6(3) and section 98(2). Matters are "ancillary" if they deal with the subject matter incidentally or they are necessary for the enforcement or effectiveness of other provisions or are consequential to those other provisions.

22. Section 6(3) provides:

"(3) For the purposes of this Act, a provision is ancillary to other provisions if it is a provision—

(a) which provides for the enforcement of those other provisions or is otherwise necessary or expedient for making those other provisions effective; or

(b) which is otherwise incidental to, or consequential on, those provisions;

and references in this Act to provisions previously enacted are references to provisions contained in, or in any instrument made under, other Northern Ireland legislation or an Act of Parliament."

23. Section 98(2) provides:

"(2) For the purposes of this Act, a provision of any enactment, Bill or subordinate legislation deals with the matter, or each of the matters, which it affects otherwise than incidentally."

24. Some matters beyond the legislative scope of the Northern Ireland Assembly are identified by general subject area while others are defined by reference to specific legislation. Section 7 lists entrenched enactments and modification or repeal by an Act of the Assembly, whether express or by necessary implication, is prohibited.

25. Section 8 of the 1998 Act provides that the consent of the Secretary of State shall be required in relation to a Bill which contains (a) a provision which deals with an excepted matter and is ancillary to other provisions (whether in the Bill or previously enacted) dealing with reserved or transferred matters or (b) a provision which deals with a reserved matter.

26. The Northern Ireland Court of Appeal in *Re Neill's Application*[9] held that the purpose of section 8 was to inhibit the legislative powers of the Assembly. In relation to certain excepted matters and all reserved matters, Parliament had decided that the Assembly should only be competent to legislate where the Secretary of State's consent had been obtained. The objective was to enable the UK government (through the Secretary of State) to prevent the Assembly legislating in areas it considered

[9] (2006) NICA 5, para 41

inappropriate. LCJ Kerr described the essence of the constraint as a “curb”, applied by the Secretary of State, on the legislative power of the Assembly.

27. It is important at this juncture to note that this requirement to obtain the Secretary of State’s consent does not affect the scope of legislative competence. That, as a matter of law, is ultimately determined by the courts. Whether a matter is within or without scope depends on the nature and purpose of the particular provision considered against the provisions of the Northern Ireland Act (1998). The legislative process is intended to ensure that where such consent is required it is obtained. Whether the Secretary of State provides that consent is a matter of political judgment and discretion.

28. Section 9 requires that the Minister with responsibility for introducing a Bill into the Assembly make a written statement to the effect that it is within legislative competence. Section 10, together with the Assembly’s Standing Orders, govern the circumstances in which consent of the Secretary of State is sought.

29. Excepted matters are listed in schedule 2. They include the Crown, Parliament, international relations, defence, elections, national security and other matters. Of central importance to the content of this report is paragraph 8 of schedule 2. It provides:

> *“Nationality, immigration, including asylum and the status and capacity of persons in the United Kingdom of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents”.*

30. The topics of nationality, asylum, the free movement of persons and the issue of travel documents are relatively straightforward topics to identify and differentiate. In very broad terms it is suggested that “nationality” amounts to determination of citizenship and includes, at its core, the grant or revocation of British citizenship under the British Nationality Act (1981). “Asylum” includes the grant or refusal of asylum in accordance with UK legislation which serves to discharge the state’s obligations under the Refugee Convention (1951) and EU law. “Free movement rights” derive from the EU Treaties and are now governed by the EU-UK Withdrawal Agreement of 19th October 2019 and the Trade and Co-Operation Agreement. It is the ability to leave, enter, reside and work throughout the EEA states. The “issue of travel documents” consists of passports and other documents to those subject to immigration control.

31. However, it is the phrase *“immigration … including the status and capacity of persons in the United Kingdom of persons in the United Kingdom who are not British citizens” w*hich requires the greatest attention. Immigration, given its natural and ordinary meaning and considered in this context, concerns entry into and departure from the United Kingdom together with leave to remain and rights of residence, settlement and family reunification. The “status and capacity” of non-citizens must be taken to go beyond this, however.

32. The phrase is not defined in the 1998 Act. Nor is the identical phrase defined in section 6B of schedule 4 to the Scotland Act (1998). “Status” of persons in the United

Kingdom is described in the following terms by the authors of *Macdonald's Immigration Law and Practice:*[10]

> *"Status is an important concept in immigration law. The term is not defined in immigration legislation. It is however a term generally used by immigration officers, practitioners and judges. The term refers to the person's immigration identity. This immigration identity comprises both an assertion concerning whether their presence in the UK is lawful and their categorization under the rules – whether as a visitor, student or family member. To those who have knowledge of immigration law and practice, the short-hand reference to a person's immigration status, provides a reference to the nature and conditions of their entry and stay".*

33. Reserved matters are enumerated in schedule 3 to the Northern Ireland Act (1998). Potentially relevant to matters considered in this report are domicile[11], the data protection regime[12] and financial services[13].

C. Judicial Approach to Devolved Legislation

34. The approach of the courts to the interpretation of the devolution settlements has been considered in a number of decisions of the appellate courts. In the case of *Robinson v. Secretary of State for Northern Ireland*[14] Lord Bingham said:

> *"The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act does not relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody".*

35. In the case of *Martin v. Miller*[15] the UKSC considered whether the increase in the maximum sentence for the offence of driving whilst disqualified made in the Criminal Proceedings etc. (Reform) (Scotland) Act (2007) was within the legislative competence of the Scottish Parliament as defined by section 29 and schedule 4 to the Scotland Act (1998). In this context "reserved powers" under the Scotland Act are equivalent to "excepted powers" under the Northern Ireland Act (1998). An Act of the Scottish Parliament cannot modify the law on reserved matters unless such modifications are incidental to or consequent on any provision which does not relate to reserved matters and does not have a greater effect on reserved matters than is necessary to give effect to the provision.

36. The subject matter of the Road Traffic Offenders Act (1988) was a reserved matter but criminal law and procedure was not. Section 29(4) of the Scotland Act (1998) provides that the question of whether a provision of an Act of the Scottish Parliament

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[10] Macdonald's Immigration Law and Practice, 10th edition, section 1.118
[11] Paragraph 6 of schedule 3 to the Northern Ireland Act (1998)
[12] Paragraph 40 of schedule 3 to the Northern Ireland Act (1998)
[13] Paragraph 23 of schedule 3 to the Northern Ireland Act (1998)
[14] (2002) UKSC 32
[15] (2010) UKSC 10

relates to a reserved matter is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all circumstances. The UKSC held that purpose of the sentence increase was to contribute to the reform of the summary justice system by reducing pressure on the higher courts. An increase in the sentencing powers of sheriffs when dealing with statutory offences was seen as a necessary part of that process. The change was pre-eminently a matter of Scots criminal law and, therefore, could not be considered a "reserved matter" for the purpose of section 29(4) of the Scotland Act (1998).

37. The UKSC explained the correct manner of approaching the question of the scope of devolved competence in Scotland in the case of *Imperial Tobacco Ltd v. Lord Advocate*[16]. First the question of competence must be determined in each case according to the provisions in the statute[17]. Parliament has already defined the demarcation. It was not for the Court to say by which legislature any particular issue is better addressed. Secondly, those rules must be interpreted in the same way as other rules found in a UK statute. Legislation should be construed according to the ordinary meaning of the words used in what is intended to be a coherent, stable and workable devolution scheme. Thirdly, the description of the Act as a constitutional statute does not, in and of itself, assist with interpretation. Instead, the purpose of the Act will inform the language. One of the purposes of the 1998 Act was to enable the Parliament to make such laws within the powers given to it as the devolved legislature thought fit. It was intended, within carefully defined limits, to be a generous settlement of legislative authority.

38. The impugned provisions of the Tobacco and Primary Medical Services (Scotland) Act (2010) were to be examined according to their purpose and effect as required by section 29(3). Then the rules in the 1998 Act were to be considered. Drawing the two exercises together, it was clear that the rules did not "relate to" reserved matters as defined in the devolution statute. They were concerned with discouraging smoking and were within legislative competence.

39. In the case of *Re Agricultural Sector (Wales) Bill (2013)*[18] the UK Supreme Court had to adjudicate on a dispute concerning the scope of express devolved powers under the Government of Wales Act (2006). The (then) legislative scheme for Wales was distinct from the approach in Scotland and Northern Ireland. The "reserved powers" model whereby competence is given in all respect of all matters unless excepted was not followed. Instead, part 4 and schedule 7 to the 2006 Act gave legislative competence only in respect of enumerated matters. This is, in the words of Lord Reed and Lord Thomas, was a "conferred powers" model[19].

40. The National Assembly of Wales passed the Agricultural Sector (Wales) Bill (2013) in order to implement the policy of the Welsh government to retain a regime for the regulation of agricultural wages in Wales. The previous scheme had been abolished by Parliament by the Enterprise and Regulatory Reform Act (2013)[20]. The devolution arguments of the law officers for the UK government and the Welsh authorities

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[16] (2012) UKSC 61
[17] Section 29 and schedules 4 and 5 to the Scotland Act (1998)
[18] (2014) UKSC 43
[19] (2014) UKSC 43, paragraph 30
[20] Section 72 abolished the Agricultural Wages Board

centred on whether such a scheme could be classified as relating to "agriculture" which was expressly devolved or whether it should be classified as relating to employment and industrial relations.

41. Parliament had defined, in fairly general and abstract terms, permitted or prohibited areas of legislative activity. The aim was to achieve a constitutional settlement. The Supreme Court held that the 2006 Act did not require that a provision of a Bill should only be capable of being characterized as relating to a devolved subject. The legal and practical effects of the Bill were consistent with agriculture. It did not matter that, in principle, it might also be regarded as relating to a subject which had not been devolved[21].

42. In the *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*[22] the UK Law Officers challenged a number of provisions of legislation enacted by the Scottish Parliament[23]. The Bill was adopted by the Scottish Parliament against the background of significant disagreement between the Scottish and UK Governments concerning Brexit in general and the UK Parliament's enactment of the European Union (Withdrawal) Act (2018) in particular.

43. The UK government law officers contended that the Bill as a whole related to reserved matters of international relations including with the EU and was contrary to the 1998 Act. That argument was rejected. The Court restated the proposition that in order to "relate to" a reserved matter, a provision of a Scottish bill must have "more than a loose or consequential connection" with it. The Bill did not intrude upon the conduct of the UK's international relations which are a prerogative of the Crown. Rather, the Bill regulated the legal consequences in Scotland of the cessation of EU law as a source of domestic law relating to devolved matters[24].

44. Section 17 of the Bill required the consent of Scottish Ministers to certain subordinate legislation drafted by UK Ministers if it was to take effect in Scotland. The UKSC held this to be inconsistent with the continuing supremacy and sovereignty of the UK Parliament. It would have amounted to a qualification of the UK Parliament's unqualified legislative power. It purported to make the UK Parliament incapable of authorising UK Ministers to make relevant secondary legislation without the consent of the Scottish Ministers. The provision could be not reconciled with section 29(7) of the Scotland Act (1998)[25].

45. The Court also restated the position that there is no absolute protection for UK legislation enacted by Westminster. In general, it is open to the Scottish Parliament to amend or repeal legislation enacted by the UK Parliament so long as it is consistent with the devolution scheme created by the Scotland Act (1998). Equally, the

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[21] (2014) UKSC 43, paragraph 65
[22] (2018) UKSC 64
[23] The legal basis for the referral was section 33 of the Scotland Act (1998) which permits a direct reference to the UKSC. It provides that the Advocate General, the Lord Advocate or the Attorney General may refer the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament to the Supreme Court for decision.
[24] Paragraphs 29-33
[25] The provision is comparable to section 5(6) of the Northern Ireland Act (1998). Section 28(7) provides: "This section does not affect the power of Parliament to make laws for Scotland".

enactment of a policy deliberately rejected by the UK Parliament does not mean that it relates to a "reserved matter".

46. In broad terms, the judgment recognizes the breadth of the Scottish Parliament's powers but this, predictably, is always subject to the principle of parliamentary sovereignty. It is undiluted by the legislative recognition of the Sewell convention and the description of devolution as a permanent constitutional feature of the UK. At paragraph 41 the Court considers section 28(7) and proclaims:

> *"That provision makes it clear that, notwithstanding the conferral of legislative authority on the Scottish Parliament, the UK Parliament remains sovereign, and its legislative power in relation to Scotland is undiminished. It reflects the essence of devolution: in contrast to a federal model, a devolved system preserves the powers of the central legislature of the state in relation to all matters, whether devolved or reserved."*

47. These principles were restated, perhaps more forcefully, in the *UNCRC Reference* case[26]. In March of this year the Scottish Parliament had passed the United Nations Convention on the Rights of the Child (Incorporation)(Scotland) Bill and later that month the European Charter of Local Self-Government (Incorporation) (Scotland) Bill. Several aspects of the enactments were challenged by the UK law officers.

48. The references did not take issue with the Scottish Parliament's decision to incorporate the UNCRC or the ECLSG[27]. Instead, the dispute concerned the extent to which some of the provisions of the Bills would impinge on matters which fall outside the legislative competence of the devolved Parliament. These were (i) a requirement to interpret law, including an Act of Westminster, consistently with the UNCRC; (ii) judicial strike down of law potentially including previous Acts of Parliament; (iii) declarations of incompatibility; and (iv) what has to be described as an extraordinary and maximalist approach to the devolution settlement which prohibited acts by public authorities, including UK Ministers, which were incompatible with the UNCRC. This final provision could only really operate with the courts acting as a legislative editor called upon to rewrite certain provisions when necessary to ensure compliance with the outer boundaries of the Scotland Act (1998).

49. In paragraph 7 of the judgment, the Court set out the nature of devolution under the Scotland Act (1998):

> *"The Scottish Parliament is a democratically elected legislature with a mandate to make laws for Scotland. It has plenary powers within the limits of its legislative competence. But it does not enjoy the sovereignty of the Crown in Parliament: rules delimiting its legislative competence are found in section 29 of and Schedules 4 and 5 to the Scotland Act, to which the courts must give effect. And Parliament also has an unlimited power to make laws for Scotland, a power which the legislation of the Scottish Parliament cannot effect: section 28(7) of the Scotland Act.*

[26] Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (2021) UKSC 42

[27] The United Kingdom is a signatory to both Treaties.

The Scotland Act must be interpreted in the same way as any other statute. The courts have regard to its aim to achieve a constitutional settlement and therefore recognise the importance of giving the Scotland Act a consistent and predictable interpretation, so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its legislative power. That is achieved by interpreting the rules as to competence in the Scotland Act according to the ordinary meaning of the words used."

50. The law making powers of the Assembly are restated in the judgment of Mr. Justice Scoffield in *Safe Electricity A&T Limited and Patrick Woods for Judicial Review*[28]. In this matter the Court had the benefit of the recent judgments of the UKSC in the Scottish cases. The scope of legislative autonomy is described as considerable. In order to restrict that autonomy in any given subject area Parliament must act in a certain way:

"[45] Where Parliament wished to preclude the Assembly from so acting it might do so in a number of ways. It could render the relevant subject matter of the Assembly's (proposed) legislation an excepted matter; it could entrench the enactment the Assembly was proposing to amend or repeal; or it could simply legislate in clear terms to the effect that any provision in an Act of the Assembly purporting to amend or repeal a particular provision would have no force. In short, Parliament can always assert its will against a devolved legislature such as the Assembly even in relation to a devolved matter; but, in order to avoid the prospect of legislative 'ping-pong' over a contested provision, with successive amendments made by the Assembly and undone by Westminster, an intrusion into the current devolved settlement would likely be required.

[46] Within the sphere of devolved competence, there are two categories of matters which can in principle be dealt with by the Assembly. The first and simplest category is that of transferred matters. Such matters are fully devolved and authority to deal with them has been 'transferred' to the devolved administration (subject always to the sovereignty of Parliament mentioned above). The second category is that of reserved matters which might, in principle, be suitable for consideration by the devolved administration but which, for the moment, have been 'reserved' to be dealt with by Westminster. These include, by way of example only, matters such as civil aviation, competition law, human genetics and consumer safety in relation to goods. The list of reserved matters is set out in Schedule 3 to the NIA. There is no list of transferred matters because the way in which the devolution settlement works is that legislative competence for all matters has been transferred to the Northern Ireland Assembly save for those which have been excepted or 15 reserved from that transfer of responsibility. As section 4(1) of the NIA puts it, a transferred matter "means any matter which is not an excepted or reserved matter."

[47] Provision is also made for alterations to the devolution settlement by means of converting a reserved matter to a transferred matter (devolving it)

[28] (2021) NIQB 93, para 40-48

or converting a transferred matter to a reserved matter (un-devolving it). The Secretary of State may take these steps by laying before Parliament a draft Order in Council amending Schedule 3 to the NIA so that a matter becomes, or ceases to be, a reserved matter (see section 4(2)). This must be approved by a resolution of each House of Parliament (see section 4(4)). There are some additional requirements where this is proposed, including in relation to different subject matters. Generally, however, such a change must not be made unless the Assembly has passed a resolution with cross-community support seeking the change (see section 4(3)).

[48] There is no limitation on the Assembly's power to legislate for transferred matters, other than those relating to legislative competence more generally. Where the Assembly wishes to legislate in respect of a reserved matter, the consent of the Secretary of State is required in relation to the relevant Bill (see section 8(b))."

D. General Principles

51. The legislation and leading cases have been set out in some detail to try and frame the constitutional arrangements that regulate the powers and relationship between the devolved and central UK institutions. The arrangements have been pragmatic rather than principled responding, in each jurisdiction, to contemporary political circumstances. The process is ongoing and has been described as a "process rather than an event". The result is that devolution is asymmetrical[29]. The scope of legislative and executive power in Scotland, Wales and Northern Ireland are not identical but do share many similar characteristics.

52. All developments have, however, remained subject to that overarching principle of the supremacy of Parliament. The answer to whether a matter is reserved, excepted or transferred is determined by reference to the intent of Parliament in the respective devolution acts. The choice of Parliament to address a particular subject in primary legislation does not have the effect of forever more displacing the jurisdiction of the devolved administrations. Such an outcome could only be achieved through clear and unambiguous language giving effect to Parliamentary intent.

53. If the scope of devolution on a particular subject matter is to change, for example on housing, health or employment, this should by way of express amendment to the devolution statute. In the case of Northern Ireland Act (1998) this is achieved by considered amendment to schedule 2 or schedule 3.

54. Just as Parliament must expressly legislate to curtain fundamental rights, and so pay the political price, so too must it legislate expressly to alter the devolution settlement. Constitutional reform should not be achieved by stealth or inadvertence. As set out above, the UK Supreme Court in both the *Continuity Bill* case and in the *UNCRC Bill* reference stressed importance of consistent and predicable interpretation of the devolution statutes so that devolved nations can have coherent, stable and workable systems within which to exercise their legislative power.

[29] Public Law, Mark Elliott & Robert Thomas, 3rd edition, pg. 300

55. While the Northern Ireland Assembly does not enjoy the sovereignty of the Crown in parliament, it nonetheless holds formidable democratic legitimacy. It is a fundamental part of the current constitutional settlement under which Northern Ireland remains a constituent part of the United Kingdom unless and until there are positive votes for Irish reunification in each jurisdiction on the island. It is also the result of an international peace agreement between the United Kingdom and Ireland. Its establishment and functions were, in effect, endorsed by concurrent referendums on the island of Ireland in May 1998. The relevant sections of Strand One of the Good Friday Agreement stated:

> *"3. The Assembly will exercise full legislative and executive authority in respect of those matters currently within the responsibility of the six Northern Ireland Government Departments, with the possibility of taking on responsibility for other matters as detailed elsewhere in this agreement.*
>
> *4. The Assembly - operating where appropriate on a cross-community basis - will be the prime source of authority in respect of all devolved responsibilities.*
>
> *27. The Assembly will have authority to legislate in reserved areas with the approval of the Secretary of State and subject to Parliamentary control."*

56. A legislative consent motion is the means by which a devolved parliament, such as the Northern Ireland Assembly, consents to the UK Parliament legislating in an area of devolved competence. The current approach is set out in the Assembly's standing orders[30]. It applies to primary legislation rather than secondary legislation[31]. It is based on what has now become known as the Sewel convention. It was set out in a memorandum of understanding between the UK governments and the devolved governments in 2013 in the following terms:

> *"The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government[32]".*

57. It is a political principle but does not have legal force. In the *Miller (no.1)* case the Supreme Court said:

> *" … we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But*

[30] Standing Orders of the Northern Ireland Assembly (2020) SO 42A

[31] Explained in full in Northern Ireland Assembly Research Paper 87-2020 "Review of legislative consent motions, their use and recent developments" by Emma Dellow-Perry and Raymond McCaffrey; 25th September 2020

[32] Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee (October 2013)

the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law[33]*".*

58. In general terms it is not outside the legislative competence of the Assembly to amend, repeal or modify legislation enacted by the UK Parliament. Section 5(4) of the Northern Ireland Act (1998) makes it abundantly clear that there is no absolute protection for UK legislation. The legislative competence of the Assembly, consistent with the limitations contained in the Act, allows intervention on any subject matter so far as it is part of the law of Northern Ireland. Enacting a policy that was rejected by the UK Parliament is unobjectionable. Acts of the devolved legislatures are primary legislation. Acts of the UK Parliament do not automatically enjoy a higher normative value than devolved laws.

59. It is permissible for the devolved legislatures, including the Northern Ireland Assembly, to react to UK wide legislation that does not reflect their own policy objectives. Disapproval of the measures can come in the form of amendment, modification or repeal provided it is within their legislative competence. However, it would not be consistent with the concept of parliamentary sovereignty outlined by the UKSC in the *Scottish Continuity Bill* case to enact measures which purported to make the legal effect of Westminster legislation conditional on devolved consent. The Assembly may amend, modify and repeal but it cannot prospectively prevent UK legislation on any transferred subject matter.

60. It should also be repeated that statements of Ministers of the UK government in Parliament as to their belief that a particular subject matter is reserved is of no consequence at all[34]. Equally, the corporate and repeated view of UK government that the "hostile environment" measures come as a package is irrelevant.

61. As described by the UKSC in the *Imperial Tobacco* case each measure must be considered on its own merits as should the true scope of provision of the devolution legislation they supposedly trespass. Lord Hope observed the question required one first to understand the scope of the matter which is reserved and, secondly, to determine by reference to the purpose of the provisions under challenge (having regard among other things to their effect in all the circumstance) whether those provisions "relate to" the reserved matter. The purpose of an enactment for this purpose may extend beyond its legal effect, but it is not the same thing as its political motivation.

62. The phrase "relate to" in the Scottish legislation does not present a higher hurdle than the phrase "deals with" in section 6(3) of the Northern Ireland Act (1998). It is submitted that they are comparable in requiring more than a loose or consequential connection.

63. The question of whether a particular measure in devolved legislation falls within, or lies beyond, legislative scope must be determined on the basis of content rather than

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[33] R (Miller) v Secretary of State for Exiting the European Union; In re McCord; In re Agnew [2017] UKSC 5, [2018] AC 61

[34] For example, see the contributions of Minister of State for Immigration Mark Harper on 7th November 2013 in House of Commons Public Bill Committee: Immigration Bill concerning what became the right to rent provisions in the Immigration Act (2014) and contribution of Minister for State James Brokenshire on 3rd November 2015 on what was to become further hostile environment measures in the Immigration Act (2016).

label. It is the job of the courts to determine, as a matter of law, whether and to what extent a specific provision of a bill is within the legislative competence of the Assembly.

64. The terms of devolution can be altered by Parliament either expressly or by clear implied intention. As such the UK Parliament can definitively prevent future devolved intervention in particular subject areas but this is achieved by amendment to the list of reserved or transferred matters. It is not done by legislating on a UK wide basis with respect to transferred matters in the expectation that there can be no reaction from the devolved institutions.

65. Acts of Parliament are usually regarded as "always speaking"[35]. This is also reflected in section 31 of the Interpretation Act (NI) (1954)[36]. That means that an updated construction, which allows for changes since the Act was initially drafted, is appropriate. A different approach is required where the Act in question is in the nature of a contract or implements an international treaty. When considering whether an updated construction is correct the court must examine the wording of the enactment, its purpose and whether the new state of affairs is of a similar nature to that in respect of which the enactment was passed[37]. An updating construction should only be applied, however, when it can be seen to be consistent with the intention of Parliament. Section 98 of the Northern Ireland Act (1998) is entitled "Interpretation". It sets out a number of important definitions and interpretative approaches to the Act. It does not, however, state that section 31 of the Interpretation Act (NI) (1954) is applicable.

66. The "hostile environment" measures predominantly found in the Immigration Act (2014) and the Immigration Act (2016) govern matters which go beyond the entry and residence of migrants in the United Kingdom. They impact upon various public policy matters which must be considered, on their face at least, to be transferred matters. Examples include matters of marriage, driving, employment, social security, healthcare and housing. The question of whether, and to what extent, the Northern Ireland Assembly can amend, modify or repeal such measures will be determined by reference to the Northern Ireland Act (1998) read in the light of the principles set out above.

67. The decisive question will be always be whether, properly examined, the measure qualifies as a transferred matter within the legislative competence of the Assembly or not. The outcome will be determined by analysis of the rule being brought into effect by the Assembly against the true scope of the exception enacted by Parliament in schedule 2 or 3 as the case may be.

68. As can be seen in other devolution contexts the subject matter may be capable of being classified under more than one heading. The subject matter may, from the perspective of a lay person, have a predominant purpose. There may or may not be

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[35] R v. Ireland (1998) 1 AC 147; R(Quintavalle) v. Secretary of State for Health (2003) UKHL 13; ZYN v. Walsall Metropolitan BC (2014) EWHC 1918 (Admin)

[36] Section 31(1) of the Interpretation Act (NI) (1954) provides that: "Every enactment shall be construed as always speaking and if anything is expressed in the present tense it shall be applied to the circumstances as they occur, so that effect may be given to each enactment according to its true spirit, intent and meaning"

[37] Bennion, Bailey and Norbury on Statutory Interpretation, 8th edition; section 14.2

an obvious political motive for the provision. However, that is not the test of legislative competence under the Northern Ireland Act (1998). The focus is necessarily on adherence to section 6(3). The courts will be required to determine whether the provision deals with an excepted matter and is not ancillary.

69. Laws of general application which affect all persons in Northern Ireland, regardless of citizenship or immigration status, in areas of transferred competence are valid, and within legislative competence, so long as the impact they have on the excepted matter is ancillary. As set out above section 98(2) provides that they will be regarded as dealing with the subject matter incidentally, consequentially or are necessary for the enforcement or effectiveness of other provisions. Laws of general application which have the incidental consequential effect of ameliorating the detriments that accompanied much of the hostile environment legislation are likely, it is suggested, to be considered as ancillary to the excepted matter.

70. Should such a dispute arise the courts would also have to determine what is the true scope of the exception for "immigration, asylum and the status and capacity of persons in the United Kingdom who are not citizens of the United Kingdom" in paragraph 8 of schedule 2. To date the provision has not been considered in detail by the courts[38]. Neither has the equivalent Scottish provision.

71. The scope of legislative competence in a particular subject area of transferred power does not wax and wane depending on the frequency, nature and character of UK legislation. It is determined by reference to the Northern Ireland Act (1998) rather than, for example, the content of the Immigration Act (2014), Immigration Act (2016) and what is currently the Borders and Nationality Bill (2021). The movement of a transferred matter to become a reserved matter is subject to the procedure in section 4(2) of the Northern Ireland Act (1998). The alteration of the distinction between an excepted matter and a transferred matter is affected by amendment to schedule 2.

72. The Northern Ireland Act (1998) is a statute of constitutional character which gives effect within UK domestic law to the obligations assumed under the Good Friday Agreement. It is intended to provide a system of good government for the jurisdiction. The UKSC in its case law has repeatedly held that the devolution statutes should be approached in a manner which leads to consistent, coherent and stable government. An updating construction to the terms of the Act is appropriate for matters such as changes in technology, social conditions or medical advances.

73. The expansion of "hostile environment" measures into ever greater aspects of life does not necessarily have the effect of shrinking the extent of the Assembly's legislative reach. The UK Parliament can address any issue it chooses in primary legislation but that does not alter the devolution settlement. The inclusion of

[38] In the case *Re Margaret O'Connor*38 Girvan J consider the legality of the NIO designating a legal assistant in the DPP as a "public service post" reserved for British citizens. The Department of Finance and Personnel had issued equivalent directions under the Civil Service (NI) Order (1999). Consequently, the applicant, a solicitor and Irish citizen living and working in Belfast, was not eligible. The paragraph 8 exception was considered but not the phrase "status and capacity". Instead, the case was decided against the applicant on the basis that the post could benefit from the public service exception to the free movement of workers which was provided for in what was then article 39(4) EC (now article 45(4) TFEU).

transferred matters under an immigration banner does not, it is submitted, result in a situation where the Northern Ireland Assembly cannot react within the scope of its own competence under the 1998 Act.

74. Updated constructions which reorder the very nature of devolution are not, it is submitted, of the same character and cannot be assumed to be the intention of Parliament. The more persuasive approach is that the scope of paragraph 8 of schedule 2 is not subject to interpretative inflation, at the expense of the existing division of transferred and excepted powers, each and every time Westminster legislates on clearly devolved matters and utilizes the label of immigration when doing so.

75. A matter which was within the Assembly's legislative scope as a transferred matter on day 1, such as housing, marriage or driving for example, that is then subsequently addressed by UK legislation and given the label of "immigration" on day 2, does not thereby become an excepted matter. The scope of the immigration exception in paragraph 8 of schedule 2 should be regarded as relatively fixed rather than elastic. Like it's counterparts in Wales and Scotland, the Northern Ireland Act (1998) is intended to provide a coherent, stable and workable devolution scheme in the jurisdiction. That purpose is of constitutional significance and it would be significantly undermined if all matters addressed by Westminster in primary or secondary legislation, regardless of their content, were to be transformed into excepted matters.

76. It cannot be the case that all aspects of a migrant's life in Northern Ireland can be subsumed into the immigration exception in paragraph 8 of schedule 2 and placed beyond the legislative scope of the Northern Ireland Assembly in this way. As a matter of statutory construction, having regard to the words used, its context and the importance of the devolved institutions, it is submitted that the better view is that the immigration exception concerns the nature and conditions of their entry, stay and departure. The term "status and capacity" does not extend to every interaction between the migrant and other residents of Northern Ireland or the migrant and public authorities.

77. Housing, health, social security, marriage and driving were transferred matters under the Northern Ireland Act (1998) before the arrival of the hostile environment measures and, it is submitted, they remain so today. The ability of the Northern Ireland Assembly to react to those measures and to either amend, modify or repeal specific provisions, so far as they form part of the law of Northern Ireland, will have to be determined by reference to the provisions of the Northern Ireland Act (1998) discussed above.

78. It is acknowledged that there is a rational view point which might question the merit of the Assembly legislating on a particular matter (within its competence as provided for by section 6) but which requires the consent of the Secretary of State (pursuant to section 8) when that consent is highly unlikely or certain to be refused. To adopt such an approach is, it is submitted, is to allow the scope of the Assembly to be significantly restricted.

79. Firstly, refusal, and more importantly, the reason for refusal is not known until it is sought. The decision would, presumably, be subject to judicial review on the

traditional grounds of challenge such as reasonableness, illegality, frustration of the legislative purpose and/or improper motive. Secondly, the refusal of consent is a matter over which the devolved institutions has no direct control but such a situation does have political implications for both the Assembly and for the UK government. The refusal by a Secretary of State to grant consent could be viewed as UK government frustration of the objectives of the democratically elected devolved legislature. For the Assembly to fail to act when it is opposed to the measures and could be interpreted as acquiescence, toleration and/or endorsement of the hostile environment.

E. The Hostile Environment – An Overview

80. In 2012 the then UK Home Secretary, Teresa May, told the Telegraph Newspaper that:

> *"The aim is to create here in Britain a really hostile environment for illegal migration … What we don't want is a situation where people think that they can come here and overstay because they're able to access everything they need"*

81. The phrase "hostile environment" had a history of use both within the Home Office and further afield. It had been used to describe warzones in which journalists were unsafe, financial laws aimed at preventing the funding of terrorism or workplaces in which an employee was subjected to discrimination or harassment on the basis of a protected characteristic. Henceforth it was to be deployed not against insurgents, terrorists or work place bullies and creeps but against individuals lacking regular immigration status in the UK.

82. There was, however, no official government paper which followed this announcement setting out the objectives of the policy, the intended benefits and acknowledged risks, together with the means of achieving them. The basic idea was simple enough to describe in broad terms in the media – unlawful residence in the United Kingdom could be discouraged by preventing access to basic public and private services. If the essentials of a decent and comfortable life were removed from the undocumented, then logically, such persons and their family members were more likely to give up on life in the UK and try somewhere else. If the moment of supreme jeopardy for the undocumented was usually the crossing of a physical border staffed by vigilant immigration officials then this jeopardy was to be multiplied and encountered every day in a myriad of ways.

83. The subject areas chosen in which these bureaucratic barriers would be assembled were spread across many departments of government. This can be seen in the initial "Hostile Environment Working Group" which included Ministers of State for Immigration, Care Services, Employment, Housing and Local Government, School, Foreign and Commonwealth Affairs, Justice, Universities and Science together with the Exchequer Secretary to the Treasury and the Parliamentary Under Secretaries for

Transport and Health[39]. It is also notable that many of the subject areas chosen would appear to be within the competences of the devolved administrations yet they were absent from the process.

84. The Interventions and Sanctions Directorate (ISD) was established within the Home Office and tasked with implementing a wide range of measures to make it increasingly difficult for those who do not have the appropriate status to access benefits and services, increasing compliance with the Immigration Rules and compelling regularization of status or departure.

85. Law is politics made real and the true impact and character of the "hostile environment" became clear with the enactment of the Immigration Act (2014). The legislation was soon supplemented with the Immigration Act (2016). Chief amongst the features of the 2014 Act was the widespread delegation of immigration functions to public servants, agencies and private individuals. The practice of checking immigration status was to extend far beyond trained immigration officials. Banking, renting accommodation from landlords, obtaining a driving licence, registering a marriage and receiving healthcare were to become new interfaces between individuals and the UK's immigration system. The measures were also accompanied by diminishing rights of appeal, reductions in legal aid and extension of the "no recourse to public funds" condition.

86. Such post-entry controls would inevitably disadvantage far more people than those groups the measures were said to be aimed at dissuading from residing in the UK. The hostile environment was constructed in such a way as to create difficulties not just for those without immigration status but also for lawful migrants and for British and Irish citizens. Those who have the right to reside in the UK may not always have the documentation to demonstrate such status. Those persons without the means for Home Office fees, legal advice or unfortunate enough to suffer from Home Office error have often been collateral damage alongside the policy's prime target.

87. The "Windrush Scandal" whereby workers, and their families, who had come to the UK from the Caribbean lawfully to obtain work in the years prior to 1973, and had been subjected to the hostile environment rules decades later, is perhaps the most commonly known and understood example of such injustice. Affected individuals had been denied employment, healthcare, housing, suffered destitution and family separation and even detained and deported[40].

88. However, it is not the only example. The creation of a system whereby common place interactions between individuals and the state, or between private individuals, is encroached on by one party or the other having to consider complex and punitive immigration rules, and the other show proof of status, is one which is bound to cause anxiety and suspicion. The hostile environment rules have also been found to be indirectly discriminatory in the housing market in England and Wales[41]; ineffective in

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[39] Independent Chief Inspector of Borders and Immigration: An inspection of the "hostile environment" measures relating to driving licenses and bank accounts (January to July 2016)
[40] "Windrush Lessons Learned Review"; Independent Review by Wendy Williams (March 2020)
[41] Report by the Equality and Human Rights Commission: Public Sector Equality Duty assessment of hostile environment policies; (November 2020)

reducing net immigration numbers[42]; legitimizing xenophobia and racism[43]; straining relations between police and immigrant communities; results in forced and exploitative labour[44]; creates implementation costs for other branches of government and third parties; and detrimental to public safety[45].

89. More recently the Home Office has abandoned the use of the term "hostile environment" and now speaks of the "compliant environment"[46]. Nonetheless, the substantive rules remain in place. The policies are still described as right, fair and proportionate" by the Home Office[47] and the governing Conservative party more generally. It is suggested that the conclusions of Melanie Griffiths and Colin Yeo are more compelling:

> *"The hostile environment for migrants is a specific policy approach and represents a significant development in the UK's immigration strategy by effectively admitting that governments cannot meaningfully enforce immigration laws or ensure impermeable borders. Although the Home Office remains responsible for operationalizing the immigration system, the hostile environment deputises responsibilities, devolving the spaces and agents of immigration policing across everyday society, and making an unprecedented range of agencies, services, institutions, companies, charities and private individuals responsible for checking immigration status, passing on information to the Home Office and delivering immigration-related exclusions.*
>
> *The policies were based on little evidence, planning or monitoring, they do not appear to have meaningful impact numbers, and serious questions arise over their ethics, efficiency, effectiveness and logic.*
>
> *The hostile environment is a moral and punitive political stance; creating and discipling deportable people, sustaining racialized hierarchies and requiring UK residents to inflict considerable harm on each other, with profoundly significant consequences for individuals and broader society[48]".*

90. In his conclusions on the measures the Independent Chief Inspector of Borders and Immigration, said the following:

> *" … justification for extending the 'hostile environment' measures is based on the conviction that they are 'right' in principle, and enjoy broad public support, rather than on any evidence that the measures already introduced*

[42] National Audit Office, Immigration Enforcement Report HC 110 Session 2019-2020 (17 June 2020)
[43] Bordering Britain: El-Enany 2020
[44] Group of Experts on Action Against Trafficking in Human Beings (GRETA); Third Evaluation Report: Access to justice and effective remedies for victims of trafficking in human beings; published 20th October 2021. Available at https://rm.coe.int/greta-third-evalution-report-on-the-united-kingdom/1680a43b36
[45] Home Affairs Committee Report on Delivery of Brexit; sections 116-122
[46] https://news.sky.com/story/new-home-secretary-sajid-javid-disowns-pms-hostile-environment-11354251
[47] https://homeofficemedia.blog.gov.uk/2020/05/05/no-recourse-to-public-funds-nrpf/;
[48] Melanie Griffiths and Colin Yeo: The UK's hostile environment: Deputising immigration control; Critical Social Policy1-24, pg. 18

are working or need to be strengthened, since no targets were set for the original measures and little has been done to evaluate them[49].

91. The House of Commons Home Affairs Committee was also critical of the "hostile environment" approach and cautioned against its extension to EU citizens after Brexit took effect:

> *"120. The hostile environment is a policy that is broad in scope and which relies for its implementation on many different parts of society, including colleges, landlords, employers, and banks. We find it unacceptable that the Government has not yet made any assessment of the effectiveness of the policy and call on them urgently to do so.*
>
> *121. We question the appropriateness of a policy that discourages individuals from reporting a crime or seeking medical attention. We call for this aspect of the policy to reviewed and recommend that sensitivity and discretion be used while the review is underway…*
>
> *122. We are very concerned at the possibility that the hostile environment could be extended to include EEA nationals and apply to an estimated three million more people living legally in the UK without any evidence that the policy is working fairly and effectively. This has the potential to create further errors and injustices, which we have already seen causing unnecessary distress, and to increase the administrative burden on individuals, employers and landlords, without any evidence that the system works…"*[50]

92. The purpose of this piece of work is to consider to what extent the Northern Ireland authorities can, consistent with the current constitutional arrangements, differentiate Northern Ireland law from those measures imposed in UK wide legislation under the banner of immigration in a number of devolved subject areas.

93. The UK government has repeatedly emphasised that each of the "hostile environment" measures within the 2014 and 2016 Acts are distinct and operate independently of the others but they are to be regarded as a 'package' in that their power to influence the decisions made by illegal migrants comes from their combined and cumulative impact. That may well be the practical and political basis for their introduction in UK wide legislation which extends to Northern Ireland but it does not provide a conclusive answer as to whether, and to what extent, the Northern Ireland institutions may react and amend, modify or repeal those same measures.

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[49] Independent Chief Inspector of Borders and Immigration: An inspection of the "hostile environment" measures relating to driving licenses and bank accounts (January to July 2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/567652/ICIBI-hostile-environment-driving-licences-and-bank-accounts-January-to-July-2016.pdf

[50] HC421 Home Affairs Select Committee 'Home Office delivery of Brexit: immigration' Third Report of Session 2017–19 https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/421/42106.htm

F. Hostile Environment - Right to Rent

i) Mapping the Hostile Environment in Northern Ireland

94. The Immigration Act (2014) introduced what is sometimes referred to as the "right to rent". It is, of course, not a right to rent but a deprivation of the ordinary common law freedom to contract previously enjoyed by all adults. It created restrictions on letting residential tenancies throughout the United Kingdom. Some persons were disqualified from renting[51], others who continued to enjoy the ability to rent faced additional restrictions and many potential tenants will face additional unnecessary checks and conditions. Obligations were imposed on landlords and agents. In effect, landlords were prohibited from authorizing an adult to occupy premises if disqualified as a result of their immigration status[52]. Civil penalties could be imposed[53]. Chapter 1 of part 3 to the Immigration Act (2014) applies throughout the United Kingdom[54]. However, the roll out of the scheme has, to date, been limited to England[55].

95. Part 3 of the 2014 Act was clearly enacted with the intention of it being extended to Northern Ireland. This can be seen in the manner in which provision has been made for an appeal procedure to the County Court[56], enforcement of penalty notices[57], consultation with the Equality Commission[58] and the anti-discrimination code of practice having regard to the Race Relations (NI) Order (1997)[59]. The codes of practice published by the Home Office are also addressed to landlords in Northern Ireland[60]. Together they amount to more than 100 pages and have been updated to reflect many of the changes that accompanied Brexit. However, the fact that the "right to rent" scheme has not yet been brought into force in this jurisdiction is not immediately clear[61]. For example, the guidance on avoiding unlawful discrimination advises private landlords in Northern Ireland to follow the advice[62].

96. Part 2 of the Immigration Act (2016) creates a new criminal offence of leasing premises in contravention of the right to rent scheme[63]. The amendments allow for a maximum sentence of 5 years in prison, or a fine, or both, on conviction on indictment[64]. There is a defence of reasonable enquiries and a landlord can demonstrate compliance with the prescribed requirements if he or she obtains

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[51] Section 21 of the Immigration Act (2014) provided that a person is disqualified from "occupying premises under a residential tenancy agreement as his only or main home if he is (i) not a relevant national; and (ii) does not have a right to rent

[52] Section 22(1)-(10) of the Immigration Act (2014)

[53] Section 23 of the Immigration Act (2014) in respect of landlords and section 25 in respect of agents

[54] Section 76(1) of the Immigration Act (2014)

[55] Immigration Act 2014 (Commencement, no.3, Transitional and Saving Provisions) Order 2014/2771, article 6

[56] Section 30(10)(c) of the Immigration Act (2014)

[57] Section 31(4) of the Immigration Act (2014)

[58] Section 33(3) of the Immigration Act (2014)

[59] Section 33(1)(b) of the Immigration Act (2014)

[60] Home Office Code of Practice for Landlords: Avoiding unlawful discrimination when conducting "right to rent" checks in the private rented residential sector (October 2014); Home Code of Practice on right to rent: Civil penalty scheme for landlords and their agents

[61] Although it is stated that the scheme does not operate in Scotland, Wales or Northern Ireland in Home Office Right to Rent: Landlord's penalties (November 2020)

[62] Ibid, see pg. 8/16 of that guidance

[63] Sections 33A (in respect of landlords) and section 33B (in respect of agents) are inserted by section 39 of the Immigration Act (2016) Act

[64] Section 33C inserted by section 39 of the Immigration Act (2016)

certain documents[65]. It also provides for the landlord to terminate any agreement where all occupiers are disqualified and evict those previously resident[66]. Such notice has the status of a High Court order[67] and provides grounds for applying for an order for possession of a dwelling house[68].

97. The criminal offences and powers of eviction set out above are directed at *"a residential tenancy agreement relating to premises in England*". However, the Act provides that the Secretary of State may by regulations make any such provision for enabling any of the residential tenancies, or provisions of a similar effect, to apply to Wales, Scotland or Northern Ireland[69]. Such regulations may not, however, confer functions on any of the devolved authorities[70].

98. The "right to rent" scheme was considered in detail by the Court of Appeal for England and Wales in *R(Joint Council for the Welfare of Immigrants) v. Secretary of State for the Home Department*[71]. The focus of the judicial review challenge was not upon the effect of the proposals on those to whom it was primarily targeted, i.e. irregular immigrants who are disqualified from renting private accommodation. Rather, the concern was that the scheme would unlawfully discriminate against non-disqualified persons. Typically, this would be persons who had a right to abode or leave to enter/remain but did not have a British passport. The concern was particularly acute if the person had attributes, such as a name, which was not ordinarily perceived as ethnically British. The argument was made that "rational landlords[72]", facing potentially severe sanctions for breach, would behave defensively and prefer prospective tenants who could easily and unequivocally show that they had the right to live in the UK.

99. The research evidence provided by both the Joint Council and by the Residential Landlords Association showed an inclination to discriminate[73]. The Home Office's own evaluation, however, found no hard evidence of systematic discrimination. The evidence provided to the Court on the effectiveness of the measures in discouraging illegal immigration was described as being "difficult to quantify" but was accepted as having made some, and not insignificant, contribution to that aim[74].

100. At first instance the High Court found that, on the evidence, the scheme resulted in discrimination on grounds of nationality and/or ethnicity and that the Secretary of State was responsible for such discrimination[75]. On appeal, the Court agreed that those with a right to rent, but without British passports, were the subject of

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[65] Immigration (Residential Accommodation)(Prescribed Requirements and Codes of Practice) Order (2014) SI 2014/2874
[66] Section 33D inserted by section 40 of the Immigration Act (2016)
[67] Section 33D(7) of the Immigration Act (2014)
[68] Section 33E inserted by section 41 of the Immigration Act (2016)
[69] Section 42(1) and 42(2) of the Immigration Act (2016)
[70] Section 42(4)
[71] (2020) EWCA Civ 542
[72] This was the phrase used by the JCWI representatives. However, the Court of Appeal expressly disapproved of the description in paragraph 160. Instead, it was said that the rational landlord valued the rule of law and would not discriminate
[73] The evidence of discrimination is considered at paragraphs 76-79
[74] See paragraph 146
[75] R(Joint Council for the Welfare of Immigrants) v. Secretary of State for the Home Department (2019) EWHC 452 (Admin)

discrimination on the basis of their actual or perceived nationality and the scheme was the cause of such discrimination[76]. It was accepted that some landlords do discriminate against prospective tenants because of the scheme but this must be kept in perspective and viewed against the code of practice[77] and the statutory prohibition on race discrimination in the Equality Act (2010)[78].

101. Ultimately, the scheme was upheld on the grounds as capable of being operated in a proportionate and non-discriminatory manner by landlords. It was a proportionate means of achieving its legitimate objective and it could not be said that Parliament's assessment was manifestly without reasonable foundation. If the discrimination that had occurred as a result of the scheme is greater than that which Parliament envisaged, then Parliament (or the Secretary of State) could take measures to ameliorate the situation[79].

102. In March of 2018 the Independent Inspector of Borders and Immigration reviewed the "right to rent" scheme and concluded that:

> *"Overall, the RtR scheme is yet to demonstrate its worth as a tool to encourage immigration compliance (the number of voluntary returns has fallen). Internally, the Home Office has failed to coordinate, maximise or even measure effectively its use. Meanwhile, externally it is doing little to address stakeholders' concerns"*[80]

103. The basic disqualification rule contained in section 21 has been amended as a result of the UK's exit from the European Union and the ending of the transition period provided for in the Withdrawal Agreement[81]. Since the 1st July 2021, EEA, EU and Swiss nationals must prove their right to rent alongside those with requiring leave to enter or remain under the Immigration Act (1971). The list of "relevant nationals" is now limited to (i) British citizens[82]; (ii) Irish citizens[83]; and (iii) those who have been granted leave to remain or enter under the residence scheme immigration rules which implement the UK's obligations under the Withdrawal Agreement[84].

ii) Options for Mitigation

104. Housing has been the subject of extensive Northern Ireland specific regulation by the old Stormont Parliament[85], the Secretary of State in Orders in Council during the

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[76] Paragraph 66, (2020) EWCA Civ 542

[77] Home Office Code of Practice for Landlords: Avoiding unlawful discrimination when conducting 'right to rent' checks in the private rental sector (published October 2014)

[78] Section 13 of the Equality Act (2010) prohibits direct discrimination including on the protected characteristic of race in the provision of premises

[79] Paragraph 147

[80] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695273/An_inspection_of_the_Right_to_Rent_scheme.pdf (see para 9.14)

[81] Regulation 20 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions)(EU Exit) Regulations 2020/1309

[82] Section 21(5)(a) of the Immigration Act (2014)

[83] Section 21(5)(aa) of the Immigration Act (2014)

[84] Section 21(5)(ab) read together with section 17 of the European Union (Withdrawal Agreement) Act (2020) together with part 2 of the EU-UK Withdrawal Agreement of 19 October 2019

[85] Housing Act (NI) (1923), Housing Acts Amendment Acts (NI) (1924); Housing Act (1925); Housing Act (NI) (1926); Housing Act (no.2) (NI) (1926); Housing Act (NI) (1927); Housing Act (NI) (1928); Housing Act (NI) (1929); Planning and Housing Act (NI) (1931); Housing Emergency Powers Act (NI) (1939); Housing

period without devolved rule[86] and by the Northern Ireland Assembly since the establishment of power-sharing following the Good Friday Agreement[87]. It is quite clearly, it is submitted, a transferred matter. Irish land law, conveyancing and the housing market in Northern Ireland is distinct from that which operates in England and Wales or Scotland.

105. To date the right to rent provisions have not been extended to Northern Ireland. That power remains and there has been no definitive statement by any Home Secretary that the scheme has been abandoned. The Northern Ireland Assembly is not able to prevent them from taking effect prospectively. To adopt such an approach would contravene the terms of section 5 of the Northern Ireland Act (1998) in much the same way as did section 17 of the *Scottish Continuity* Bill. It would represent an unlawful attempt to qualify the power of the UK Parliament to legislate, whether by primary or secondary legislation, for this jurisdiction in the sphere of housing.

106. Instead, any action taken by the Assembly to prevent the discriminatory impacts that have already been found to accompany the “right to rent” scheme would, it is submitted, need to be reactive in nature. Section 5(6) expressly allows for the Assembly to modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland.

107. The right to rent scheme has been enacted by the UK Parliament but not yet extended to this jurisdiction. At the time of writing the ability of a person to rent a property in Northern Ireland is determined by the law of contract as developed by the common law. Landlord and tenant assume some rights and some obligations under the various housing statutes.

108. It is submitted that the current situation in the housing context is apt to illustrate the point that the intervention of Westminster on a particular issue under the banner of immigration does not necessarily have the effect of extinguishing the devolved authorities’ ability to act in a transferred matter. The Northern Ireland Assembly enjoys legislative competence to regulate housing in this jurisdiction. That state of affairs exists regardless of the fact that Westminster has enacted a right to rent scheme in the Immigration Acts and elected to delay its roll out beyond England.

109. Should the scheme be brought into effect in Northern Ireland by way of regulations by the Secretary of State for the Home Department, as envisaged by section 76, they

(Temporary Accommodation) Act (1942); Housing (Requisitioning of Premises) Act (NI) (1944); Housing Act (NI) (1945); Housing and Local Government (Miscellaneous) Provisions Act (NI) (1946); Housing (No.2) Act (NI) (1946); Housing Act (NI) (1948); Housing Act (NI) (1951); Housing (Miscellaneous Provisions) and Rent Restriction Law (Amendment) Act (NI) (1956); Housing Act (NI) (1961); Housing Act (NI) (1963); Housing (Miscellaneous Provisions) Act (NI) (1964); Housing Executive Act (NI) (1971); Housing on Farms Act (NI) (1972)

[86] Department of Housing, Local Government and Planning (Dissolution) (NI) Order (1976); Housing (NI) Order (1976); Housing Finance (NI) Order (1977); Housing (NI) Order (1978); Housing (NI) Order (1981); Housing Benefits (NI) Order (1983); Housing (NI) Order (1983); Housing (NI) Order (1986); Housing (NI) Order (1988); Housing (NI) Order (1992); Housing Benefit (Payment to Third Parties) (NI) Order (1996); Housing Support Services (NI) Order (2002); Housing (NI) Order (2003); Housing (Amendment) (NI) Order (2006); Private Tenancies (NI) Order (2006)

[87] Housing (Amendment) Act (NI) (2010); Rates (Amendment) Act (NI) (2012); Housing (Amendment) Act (NI) (2016); Houses in Multiple Occupation Act (NI) (2016); Private Tenancies (Coronavirus Modifications) Act (NI) (2020); Housing (Amendment) Act (NI) (2020)

will form part of the law of Northern Ireland. It is submitted they will form part of the housing law of Northern Ireland and be capable of modification in line with the legislative competence of the Assembly.

110. Measures of general application which regulate the relationship between landlord and tenant, regardless of the immigration status of either party, will not fall within the scope of the immigration exception in paragraph 8 of schedule 2 to the 1998 Act. They are, quite clearly, dealing with housing. In short, the devolved legislature cannot alter the migrant's immigration status but it can legislate to provide, or restore, a right to contract for accommodation. The consequence that it will also result in a benefit to some persons in Northern Ireland whose immigration status is in doubt is an ancillary matter incidental to the purpose and effect of the legislation which is to govern the housing market.

111. Should the Secretary of State choose to extend the right to rent scheme to Northern Ireland, it is suggested that the Northern Ireland Assembly could react by putting on a statutory footing the existing common law right to rent between private parties. This could extend to all adults, regardless of nationality or immigration status, and would have the practical effect of disapplying the current scheme as contained in chapter 1 of part 3 of the Immigration Act (2014).

G. Hostile Environment - Driving

i) Driving on the Island of Ireland

112. The Department of the Economy estimated that there were approximately 110 million cross-border person visits annually on the island of Ireland[88]. People make cross-border journeys for a wide variety of reasons including to work, study, shop, visit friends and family, or as tourists. The great majority of these trips require the use of a vehicle and for the most part partition is barely visible.

113. The law of transport, road safety and motor insurance in both jurisdictions has been assisted by European Union law. In particular, Directive 2009/103/EC represented the consolidation of a number of directives on the subject of motor vehicle insurance. It is intended to assist EU residents who have had the misfortune to be involved in a road traffic accident within the territory of the Union. It does not, however, harmonise the law on liability, quantification of damages or limitation periods. Equally, the Directive does not govern comprehensive insurance.

114. Among the purposes of the Directive 2009/103/EC (Motor Insurance Directive "MID") is the reinforcement and consolidation of the motor insurance market and the free movement of persons and vehicles within the European Union. In addition to serving economic ends the Directive also has a very obvious social purpose – ensuring that victims of road traffic accidents are able to recover compensation for the damage they have suffered irrespective of the negligent driver's ability to pay.

115. This could only be secured through the partial harmonization of motor insurance requirements. Accident victims should also be guaranteed comparable treatment

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[88] https://www.economy-ni.gov.uk/sites/default/files/publications/economy/movement-people-northern-ireland-ireland-border.pdf

regardless of where across the Union the accident occurs. The Directive required that all member states ensure that their drivers have, at a minimum, third party insurance cover in article 3 MID and the establishment of a national body to compensate victims of insured drivers in article 10. This was accompanied by a direct right of action for victims of road traffic accidents against the driver's insurer in the state of domicile of the victim[89].

116. While these rights existed in both the law of Ireland and Northern Ireland, and arose prior to and independently of the obligations in EU, the scope of protection has been consistently been ensured by judgments of the CJEU. In particular, additional exemptions to the requirement to compensate a victim based on the conduct of the negligent driver or their particular insurance cover have been resisted[90].

117. Following Brexit, there is a Green Card Agreement between the UK and EU to allow for mutual recognition of insurance requirements. However, if the hostile environment measures are seen to reduce the scope of cover available this may have consequences for the continued free flow of traffic across the border. All drivers, regardless of immigration status, are required under EU law to have in place third party insurance. When the cover actually in place is found to not fully extend to cover the driver who caused the accident in particular circumstances the risk then moves to the national body or the member state under the *Francovich* principle of state liability. Articles 6 and 7 MID requires that member state authorities (Ireland) are required to check that third state vehicles (UK) which enter the territory of the EU have insurance which meets the requirements of EU law.

ii) Mapping the Hostile Environment in Northern Ireland

118. The "hostile environment" for irregular migrants extends to the roads of the United Kingdom including Northern Ireland. The task of obtaining a valid driver's licence and appropriate insurance for those using the roads has also been impacted. This can only, it is submitted, have consequences for road safety. The law now criminalizes the very act of driving on the roads when the person behind the wheel does not have valid leave. The concern has to be that the UK government is prioritizing the symbolic importance of these hostile environment measures over the health and safety of road users.

119. The original provisions were explained in the following way by (then) Minister of State for Immigration Mark Harper:

> *"It has previously been too easy for those here illegally to hold a UK driving licence and use it not only for driving, but as a piece of identification to help them access benefits, services and employment to which they are not entitled … UK driving licences are often used by banks and building societies as a means of establishing someone's identity. Through this, illegal migrants could access services such as rented accommodation and financial services, helping*

[89] Article 18 of Directive 2009/103/EC

[90] Ruiz Bernaldez (1996) 2 CMLR 889; Candolin v. Pohjola (2006) 3 CMLR 17; Damijan Vnuk v. Zavarovalnica Triglav dd (2015) Llyods I.R. 142; Nunez Torreiro v. AIG Europe Ltd (2017) 12 WLUK 533; Fidelidade Compania v. Caisse Suisse (2017) RTR 26; Rodrigues de Andrade v. Proenca Salvador (2018) 4 WLR 75

them to establish a settled lifestyle in the UK, even though they have no right to be here"[91].

120. Section 46 of the Immigration Act (2014) creates a residence requirement for the grant of driving licences. Section 47 provides that driving licences can be revoked on grounds of immigration status. The rules have been in force since the 14th July 2014[92] and apply throughout the United Kingdom including in Northern Ireland[93].

121. The legislation amends the Road Traffic (NI) Order (1981) by requiring the Department of Transport only to issue a licence after being satisfied that the applicant is normally and lawfully resident in Northern Ireland[94]. A person is considered not to have that status if the person requires leave to enter or remain in the United Kingdom but does not have it[95].

122. The responsibility of issuing driving licences for residents of Northern Ireland falls to the Driver and Vehicle Agency (DVA). It is an executive agency of the Department for Infrastructure. The Operations Testing Directorate issues driver licences. The grant of driver's licence, the regulation of public transport and taxis as well as the creation of road traffic offences have long been matters of the law of Northern Ireland. The first requirement to register a vehicle and to hold a driver's licence on Irish roads was contained in the Motor Car Act (1903)[96]. The original requirement to hold third party insurance was contained in Motor Vehicles and Road Traffic Act (NI) (1930).

123. It is already a criminal offence for a person to drive on a road a motor vehicle of any class if he or she is not the holder of a licence authorizing him to drive a motor vehicle of that class[97]. It is also an offence to cause or permit another person to do so[98]. The failure to deliver upon revocation a revoked licence is also a criminal offence[99]. Typically, motor insurance policies require a valid licence. Therefore, the failure to hold a valid driver's licence often prevents a driver from obtaining insurance. The offence of driving with no insurance at least covering third party risks is a strict liability offence[100].

124. In addition, the Immigration Act (2016) confers on an authorized officer a power of entry to a person's home for the purpose of searching for a driver's licence[101] and power to enter premises to detain a motor vehicle[102]. Section 44 contains a criminal offence of driving when unlawfully in the United Kingdom. The provision has not yet

[91] Home Office Immigration Bill Factsheet: Clauses 41-43 (October 2013)
[92] Article 2 of the Immigration Act 2014 (Commencement No.1, Transitory and Savings Provisions) Order 2014/1820
[93] Section 76(1) of the 2014 Act
[94] Section 13 and 13A of the Road Traffic (NI) Order (1981)
[95] Section 13A(2) of the Road Traffic (NI) Order (1981)
[96] Sections 3 (requirement to hold a licence) and section 19 (application to Ireland) read together.
[97] Article 3(1) of the Road Traffic (NI) Order (1981)
[98] Article 3(2) of the Road Traffic (NI) Order (1981).
[99] Article 10(3) of the Road Traffic (NI) Order (1981). Ordinarily, it must be shown that the driving licence was indeed revoked and that notice was served on the defendant. See Fitzpatrick in "Road Traffic Offences of Northern Ireland"; sec 3.5
[100] Article 90(1) of the Road Traffic (NI) Order (1981)
[101] Section 43 of the Immigration Act (2016) read together with schedule 2 to the Immigration Act (1971)
[102] Section 44 of the Immigration Act (2016) adds a new section 24E to the Immigration Act (1971)

been brought into force[103] but will allow for a term of up to 6 months imprisonment and/or a fine up to the statutory maximum in Northern Ireland[104].

125. The offence is committed when (a) the person drives a vehicle on a public road at a time when that person is not lawfully resident in the United Kingdom; and (b) at that time the person knows or has reasonable cause to believe that the person is not lawfully resident[105]. Police may also detain the person's vehicle[106]. On conviction the criminal court may order forfeiture of the vehicle[107].

126. The new powers are intended to assist police in checking immigration status of motorists they encounter, to allow for detention of vehicles regardless of ownership and bring those driving on valid foreign driving licences within scope. It is also anticipated that there will be drivers who are involved in accidents causing injury to innocent third parties but do not have valid insurance policies. In such circumstances the claim will fall to be met by the road traffic insurer or, as a last resort, the Motor Insurance Bureau (MIB).

127. In 2016 the Independent Chief Inspector of Borders and Immigration concluded that the arrangements in place between the Home Office and the DVLA in Britain were, in general, working well. However, the report raised concern about the consequences of error for affected individuals whose licence had been revoked but they could not be aware of this fact and the lack of adequate data sharing arrangements and the failure to record. The author said:

> *"However, justification for extending the 'hostile environment' measures is based on the conviction that they are 'right' in principle, and enjoy broad public support, rather than on any evidence that the measures already introduced are working or needed to be strengthened, since no targets were set for the original measures and little had been done to evaluate them.[108]"*

iii) Options for Mitigation

128. There is some research supporting the proposition that road safety is improved by the licensing of drivers[109]. At the time of writing 16 states and the District of Colombia

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[103] Section 94 of the Immigration Act (2016) provides that the Secretary of State may, by regulations, appoint days for the commencement of different parts of the legislation.
[104] Section 44 of the Immigration Act (2016) adds a new section 24C(2) to the Immigration Act (1971).
[105] Section 25C(1) of the Immigration Act (1971)
[106] Section 44 of the Immigration Act (2016) adds section 24D to the Immigration Act (1971)
[107] Section 44 of the Immigration Act (2016) adds section 24F to the Immigration Act (1971)
[108] Independent Chief Inspector of Borders and Immigration: An Inspection of the "hostile environment" measures relating to driving licences and bank accounts; sec 7.23 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/567652/ICIBI-hostile-environment-driving-licences-and-bank-accounts-January-to-July-2016.pdf
[109] "Providing driver's licences to unauthorized immigrants in California improves traffic safety"; PNAS, (2017) 114 (16) 4111-4116 by Leuders, Hainmueller and Lawrence; DeYoung DJ, Peck RC, Helander CJ (1997) Estimating the exposure and fatal crash rates of suspended/revoked and unlicensed drivers in California. Accid Anal Prev **29**:17–23; American Automobile Association (2011) *Unlicensed to Kill* (AAA Foundation for Traffic Safety, Washington, DC); Brar SS - (2012) *Estimation of Fatal Crash Rates for Suspended/Revoked and Unlicensed Drivers in California* (Department of Motor Vehicles, Sacramento, CA); Institute of Government Studies University of California (Berkeley) "Drivers Licences for Undocumented Aliens" (2005)

in the USA have enacted laws to allow unauthorized immigrants to obtain driver's licenses[110].

129. The regulation of driving licences, motor vehicle insurance and related road traffic offences are, it is submitted, transferred matters. Provisions enacted by Westminster can be amended, repealed and/or modified by the Northern Ireland Assembly in accordance with the legislative competence provided by the Northern Ireland Act (1998).

130. The ability of a migrant to drive a car in this jurisdiction cannot be said to fall within the scope of the exception in paragraph 8 of schedule 2 to the 1998 Act. The requirement to have a licence and minimum insurance remain issues of transferred competence. The intervention by Westminster on transport in the Immigration Acts (2014-2016) to impose additional obligations on the devolved transport authorities is, of course, constitutionally permissible.

131. Equally, the Northern Ireland Assembly can respond and alter the arrangements in so far as they apply in Northern Ireland. Rules of general application which require all persons in Northern Ireland regardless of immigration status, to obtain a driving licence and adequate motor vehicle insurance are consistent with the scheme of devolution. The suggested measures concern road safety and transport. They do not deal with the immigration status or capacity of the irregular migrant as provided for by paragraph 8 of schedule 2. Their purpose is to enhance road public safety and the incidental benefit to the irregular migrant is "ancillary" as provided for by sections 6(3) and 98(2) of the 1998 Act.

132. As with all hostile environment policies the impact of revoking driving licences is often felt by those who are in the UK lawfully but who temporarily fall out of status or lose the ability to prove their status due to the complexity of the rules, inappropriate legal advice or by administrative error by the Home Office. During the research for this work an immigration solicitor based in Belfast recalled clients losing their driving licence following a Home Office error in processing visa applications and after wrongful refusals by the Home Office. The impact can be severe particularly on persons living in rural areas or with caring responsibilities. The solicitor described one client losing her employment due to being unable to drive and another client being unable to attend antenatal hospital appointments. Both of these clients had been wrongfully refused visas and were later granted appropriate status.

133. There are obvious benefits to the registration, identification and accountability of all road users. For many decades ensuring road safety has been assisted by driver registration and compulsory third party insurance.

134. The residence requirement for the grant of a driving licence contained in article 13 and 13A of the Road Traffic (NI) Order (1981) can be repealed, amended or modified by the Northern Ireland Assembly and returned to its pre-Immigration Act (2014) state. These are matters of the law of Northern Ireland unrelated to immigration and nationality. The insertion of hostile environment measures into what road safety legislation does not, it is submitted, come within scope of the immigration exception in paragraph 8 of schedule 2 to the Northern Ireland Act (1998). Road safety and

[110] https://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx

transport have been devolved matters since the Government of Ireland Act (1920). They were identified as transferred matters in Strand One of the Good Friday Agreement and subsequently excluded by Parliament from the lists of excepted matters in schedule 2 and reserved matters in schedule 3 to the Northern Ireland Act (1998).

135. The hostile environment measures in the 2014 and 2016 Immigration Acts do not have the result of altering the devolution settlement in the Northern Ireland Act (1998). For the reasons already addressed it cannot be said that every single activity that could be engaged in by a migrant can be removed from devolved competence by implication when legislation from Westminster emerges.

H. The Hostile Environment - Right to Work

i) The Right in International Human Rights Law

136. The right to work is protected in international human rights law. It is contained in article 23 of the Universal Declaration of Human Rights (UDHR). It provides that everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. It is also contained in the International Covenant on Economic, Social and Cultural Rights:

> *6(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

137. Since the adoption of the Covenant by the General Assembly in 1966, several universal and regional human rights instruments have recognized the right to work. At the universal level, the right to work is contained in article 8 of the International Covenant on Civil and Political Civil Rights (ICCPR); in article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination; in article 11(1)(a) of the Convention on the Elimination of All Forms of Discrimination against Women; in article 32 of the Convention on the Rights of the Child; and in articles 11, 25, 26, 40, 52 and 54 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

138. Article 25 of the Migrant Workers Convention requires that protection is extended without reference to immigration status. The UK is not a signatory to the Convention but this is the standard contained in international human rights law. It provides as follows:

> *Article 25*
>
> *1. Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:*
>
> *(a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;*

(b) Other terms of employment, that is to say, minimum age of employment, restriction on work and any other matters which, according to national law and practice, are considered a term of employment.

2. It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article.

3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.

139. Several regional instruments recognize the right to work in its general dimension, including the European Social Charter of 1961 and the Revised European Social Charter of 1996, article 15 of the African Charter on Human and Peoples' Rights (art. 15) and the Additional Protocol to the Similarly, the right to work has been proclaimed by the United Nations General Assembly in article 6 of the Declaration on Social Progress and Development, in its resolution 2542 (XXIV) of 11 December 1969.

140. The European Convention on Human Rights (ECHR) does not explicitly protect the right to work. Nevertheless the case law of the European Court of Human Rights protects some aspects of this right[111]. Irregular migrant workers are also afforded protection under certain provisions of the ECHR. This could, in appropriate circumstances, include article 4 and its prohibition of forced labour; article 6(1) and its guarantee of a right to a fair trial in respect of criminal charges and civil rights; article 8 recognises that professional and business activities can sometimes come within scope; and article 14 guarantees equal enjoyment of Convention rights on the basis of protected characteristics. The Convention on Action against Trafficking in Human Beings (2005) and the Palermo Protocol also provide protection and rights of redress for those subjected to trafficking.

141. The centrality of the right to work to the international human rights law regime has been stated in forceful terms by the UN Economic and Social Council[112]:

"The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community".

ii) Mapping the Hostile Environment in Northern Ireland

142. Restrictions on the right to work depending on immigration status existed before the arrival of the hostile environment measures in the 2014 and 2016 Immigration Acts. Work permits were introduced in UK law as early as 1916 to non-Commonwealth citizens. After the Second World War the European Voluntary Workers Scheme

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[111] The Right to Work in the ECHR; Rory O'Connell (2012) 2 EHRR 176

[112] UN CESCR General Comment No. 18 The Right to Work; adopted on 24th November 2005

(EVWS) was initiated by the Ministry of Labour. Under the Commonwealth Immigrants Act (1962) and the Immigration Act (1971) further restrictions were introduced including the loss of the right of entry to the UK for most Commonwealth citizens. The UK's admission as a member state of the then European Economic Community conferred rights of entry, residence and employment on citizens of the other member states.

143. Section 8 of the Asylum and Immigration Act (1996), together with the Immigration (Restrictions on Employment Order) (1996), created a criminal offence of employing a person subject to immigration control whose status did not allow for that work. This provision approach extended to Northern Ireland[113]. Employer sanctions were extended and fortified[114] with each revision of the immigration statutes. Important features of the Immigration, Asylum and Nationality Act (2006), and the Immigration (Restrictions on Employment Order) (2007) were the addition of a civil penalty imposed by the Home Office[115] and higher criminal sanctions for breach of the requirement[116]. Again, the provision extended to Northern Ireland and allowed a term of imprisonment for up to 2 years[117] on indictment or 6 months and the maximum fine following conviction by the Magistrates Court[118].

144. At the present time the right to work in the United Kingdom is available to British citizens and those with a right to abode; Irish citizens who are exempted from immigration control; EEA nationals who exercised free movement rights and have retained them under the Withdrawal Agreement; those with indefinite leave to remain; refugees and those with humanitarian protection or discretionary leave. Work visas are available for those entering the UK for employment purposes and other visas such as spouse visas carry work permissions. Persons released on immigration bail may be permitted to work[119]. However, while the right to work for those on immigration bail exists in theory, in practice bail conditions generally restrict the right to work. Asylum seekers in the UK are not permitted to work but can apply for permission to work if they have waited over 12 months for an initial decision on their asylum claim or for a response to a further submission for asylum and they are not considered responsible for the delay in decision making.

145. The hostile environment measures have dealt with enforcement, penalties and sanctions for work conducted in breach of the immigration legislation. Part 1 of chapter 2 of The Immigration Act (2016) creates a criminal offence of illegal working[120]. Section 34 provides that if a person is given leave to enter or remain in the United Kingdom it may be given subject to a condition restricting his work or

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[113] Section 13(6)
[114] Amendments were made by the Nationality, Immigration and Asylum Act (2004), the Asylum (Treatment of Claimants, etc.) Act (2004) and repealed by the Immigration, Asylum and Nationality Act (2006)
[115] Section 15 of the Immigration, Asylum and Nationality Act (2006)
[116] Section 21 of the Immigration, Asylum and Nationality Act (2006)
[117] Now 5 years following 2016 amendments set out below
[118] Section 21(2) of the Immigration, Asylum and Nationality Act (2006)
[119] Section 24 of the Immigration, Nationality and Asylum Act (2006) as amended by schedule 10(2), paragraph 39(a) permits employment as the person is to be treated as if they have been granted leave to enter
[120] Brought into effect on the 23rd May 2016 pursuant to regulation 3(1)(e) of the Immigration Act 2016 (Commencement No. 1) Regulations 2016/603

occupation in the United Kingdom[121]. A person will commit an offence if he or she works at a time when disqualified by reason of immigration status and knows or has reasonable cause to believe that he or she is disqualified[122]. Failure to secure leave to enter or remain, such status becoming invalid, ceasing to have effect or being subject to a condition preventing work renders a person disqualified[123].

146. On conviction in Northern Ireland the Magistrates Court may impose a sentence of up to 6 months in prison and/or a level 5 fine[124]. The prosecutor must consider whether referral to the Crown Court for the purposes of a confiscation order under the Proceeds of Crime Act (2002) is appropriate[125].

147. Section 35 of the 2016 Act reforms the existing offence of knowingly employing an irregular migrant worker. A sentence of five years imprisonment is now possible following conviction whereas the previous maximum sentence on indictment was two years[126]. Under section 36 of the Immigration Act (2016) the Secretary of State for the Home Department may, by regulations, make further provision for illegal working in Scotland or Northern Ireland[127]. Section 38 and schedule 6 to the Immigration Act (2016) permit Immigration officers to issue illegal working and closure notices.

148. The position of Director of Labour Market Enforcement was created in the 2016 Act to, in part, assess the scale and nature of non-compliance with employment rules and pursue orders against employers. It was reported that the position had fallen vacant in January 2021 due to the UK government's disappointment with those shortlisted[128].

iii) Options for Mitigation

149. The question of whether any measures of the Assembly in response to rules set out above concern the transferred matter of employment or the reserved matter of immigration must be determined by reference to the provisions of the Northern Ireland Act (1998).

150. The old Northern Ireland Parliament legislated to restrict access to work in the jurisdiction in the Safeguarding of Employment Act (NI) (1947). Northern Ireland workers were defined as only including those persons (a) who were born at a place which is within Northern Ireland; or (b) ordinarily resident in Northern Ireland on the 1st January 1945; (c) ordinarily resident for at least 10 of the past 20 years; (d) married to persons born in Northern Ireland; or (e) children of a parent born in Northern Ireland[129]. Those persons outside of scope could not become engaged in a

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[121] Section 34(1) amends the Immigration Act (1971) by amending section 3(1)(c) of the Immigration Act (1971)
[122] Now section 24B of the Immigration Act (1971)
[123] Section 24B(2) of the Immigration Act (1971)
[124] Section 24B(3) inserted by section 34 of the Immigration Act (2016)
[125] Section 24 read together with sections 218 (committal by Magistrates Court) and section 156 (confiscation order by Crown Court) of the Proceeds of Crime Act (2002)
[126] Amendment pursuant to section 35(4) of the Immigration Act (2016)
[127] Section 36(2)(b), together with schedule 4, of the Immigration Act (2016) allows for amendments relating to illegal working under the Licensing Act (2003)
[128] Financial Times, 26th January 2021; Delphine Strauss – "UK Government position on labour market abuse to fall vacant; available at https://www.ft.com/content/4b5c4dbb-5638-4ff3-b9fb-ff7b8cf8dd10
[129] Section 1(1)(a)-(e) of the Safeguarding Employment Act (NI) (1947)

contract of service or apprenticeship unless authorized by a permit issued by the Ministry of Labour[130]. Such permits were granted at the discretion of the Ministry and would be limited to a specific employer or specific place[131]. Contravention of the Act was a criminal offence[132]. The discriminatory system was abolished with the United Kingdom's accession to the European Economic Community in 1972.

151. The ability of migrants to work in the United Kingdom, including in Northern Ireland, has been a fundamental aspect of the immigration system since, at least, the Immigration Act (1971). Limitations on the right to work feature heavily in the Immigration Rules and have been repeatedly revisited by Parliament in the various Immigration Acts. Leave to enter or remain is often accompanied by conditions relating to employment.

152. The link between immigration status, entry and residence to the UK and employment in the UK is one which existed at the time of the enactment of the 1998 Act. The control of migrants' access to work is, and has been, intrinsically linked to the UK immigration system. The ability of migrants to lawfully work within the UK must, it is submitted, be considered to come within the scope of the immigration exception in paragraph 8 of schedule 2 to the 1998 Act. It is an "excepted matter" within the meaning of the devolution settlement. The choice of the UK Parliament to attach ever more punitive consequences to its enforcement cannot be said to have narrowed the potential scope of devolution in the same way as other hostile environment measures have.

153. It is suggested that it is not open to the Northern Ireland Assembly to devise a differentiated immigration and employment regime which is more or less generous to migrants than that which exists in the rest of the United Kingdom. Such a venture could not, it is submitted, be regarded as a transferred matter and merely ancillary to the excepted matter of immigration, asylum including the status and capacity of persons in the United Kingdom who are not citizens of the United Kingdom. Such an approach would have to be viewed as contravening the parameters of the ancillary definition in sections 6(3) and 98(2) of the 1998 Acts. These would not be matters which were incidental or consequential to other employment provisions.

154. The history of the old Stormont Parliament imposing greater restrictions on the ability of migrants to work than occurred elsewhere in the United Kingdom seems, at first consideration, to contradict this conclusion. It is a historical fact there has been in the past a differentiated employment system in this jurisdiction. "Alienage, naturalization, or aliens as such, or domicile" were reserved powers under the Government of Ireland Act (1920). However, the system set up by the 1947 Act was based on agreement between the Unionist government and the Home Office in the aftermath of the Second World War. Enabling powers were sought and granted by for the purpose of restricting the employment of Irish citizens born or resident in the

[130] Section 2(1)
[131] Section 3(6)
[132] Section 2(3)

soon to be Republic. It also had the effect of imposing restrictions on persons from Great Britain[133].

155. The previous devolution settlement was realigned by agreement between the Northern Ireland and UK authorities to permit discrimination against workers in the 1940s. It is suggested that a similar request from the devolved authorities at this time to prevent discrimination against potential workers on the basis of immigration status is unlikely to get a sympathetic response from the UK government.

156. Where the Northern Ireland Assembly does have the option of intervention is the protection of those irregular migrant workers who have been exploited in the work force and are subsequently unable to enforce their rights under the current system of employment and civil litigation. These are transferred matters and would involve the devolved institutions implementing international human rights obligations some of which are already assumed by the United Kingdom[134].

157. Depriving irregular migrant workers of the right to work has the potential for "creating an illegal underclass of foreign, mainly ethnic minority workers and families who are highly vulnerable to exploitation"[135]. While granting the right to work to such persons may be beyond the legislative competence of the Assembly, enacting measures which compensate for exploitation is not. Many employment rights are provided by legislation on the basis of there being a valid contract of employment which is capable of enforcement before civil courts of employment tribunals. For example, the Employment (NI) Order (1996) restricts protection to migrants dependent on immigration status. The doctrine of illegality often means that irregular migrant workers are unable to rely upon contractual and statutory rights such as protection against unfair dismissal and minimum pay, rest and health and safety conditions. Such unfortunate outcomes can be seen in the cases of *Zarkasi v. Anindita*[136] and *Soteriou v. Ultrachem Ltd*[137].

158. At the moment persons who are employed in Northern Ireland in breach of restrictions on the right to work contained in immigration law are susceptible to three aspects of punishment. Firstly, they are liable to removal. Secondly, they are committing a criminal offence and can be prosecuted. Thirdly, there is the possibility of a confiscation order for income earned under the Proceeds of Crime Act (2002). Malcom Wu described the current situation in the following terms:

> *"Regarding access to legal redress, the UK falls notably short of international standards. At the international level, all exploited irregular migrant workers (IMW) are entitled to basic labour redress as a starting point. Where IMWs are also victims of trafficking, they are entitled to additional remedies such as compensation. However, the UK's enforcement of the doctrine of illegality*

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[133] An account of the motivations of the Unionist government and the negotiations with the UK government can be found in Borders and Employment: Opportunities and Barriers by Elizabeth Meenan; Working Paper No.15 (2006)

[134] Council of Europe Convention on Action Against Trafficking in Human Beings (2005); Slavery Convention (1926)

[135] Colin Yeo, "Briefing: what is the hostile environment, where does it come from, who does it affect?" (Free Movement Organization, 1 May 2018)

[136] 2012 ICR 788

[137] 2004 EWHC 983 (QB)

only entitles victims of trafficking to access legal redress. Even then, depending on the culpability of the victim for illegally entering and working in the UK, they may not be entitled to all of the statutory labour protections and contractual remedies. Instead, they may have to rely upon alternative recourse such as an action in tort. While they may also seek compensation under the Modern Slavery Act 2015, the process for doing so is problematic and its effectiveness remains to be seen[138]".

159. These concerns were most recently restated by the Council of Europe Group of Experts on Action Against Trafficking in Human Beings (GRETA) in the Third Evaluation Report on the United Kingdom:

> "*Other political and legislative initiatives risk increasing vulnerabilities to human trafficking and having a detrimental impact on the situation of victims. In February 2020, the UK government announced plans for a new points-based immigration system that will apply to both EEA and non-EEA migrants, prioritising high-skilled workers. Frontline and migrant organisations have noted that the offence of illegal working, part of the UK's hostile environment for undocumented migrants, acts as a major driver of exploitation and barrier to justice, as exploitative employers are able to use threat of immigration and criminal repercussions towards workers who challenge precarious working conditions, propagating impunity for cases of human trafficking for labour exploitation. A study commissioned by the IASC has shown that the homeless population in Britain is extremely vulnerable to exploitation. … This vulnerability is compounded for EU nationals by threat of removal and makes them much more likely than UK nationals to enter unsafe work and end up in situations of exploitation. Civil society respondents have reported an increased reluctance of victims from EU countries to enter the NRM system for fear of removal and deportation[139]".*

160. The Northern Ireland Assembly has already exercised its competence in the field of modern slavery in the form of the Human Trafficking (Criminal Justice and Support for Victims) Act (Northern Ireland) (2015). Part 1 established new offences of human trafficking, slavery, servitude and forced or compulsory labour. The measures amended former comparable offences contained in the Sexual Offences Act (2003) and the Asylum (Treatment of Claimants, etc.) Act (2004). Part 3 sets out assistance to victims. Part 4 extends protection to victims into criminal investigations and procedures.

161. The legislation is concerned with human trafficking and exploitation. There is the potential, also, to protect irregular migrants but that effect should be regarded as "ancillary" to the excepted matter of immigration for the purposes of the Northern

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[138] "A Hostile Environment": Examining the rights and remedies afforded to exploited irregular migrant workers in the United Kingdom; Malcolm Wu; Journal of Immigration, Asylum and Nationality Law; JIANL (2021) 35(2) 108-128, pg. 109

[139] Group of Experts on Action Against Trafficking in Human Beings (GRETA); Third Evaluation Report: Access to justice and effective remedies for victims of trafficking in human beings; published 20th October 2021, pg 19/107. Available at https://rm.coe.int/greta-third-evalution

Ireland Act (1998). Such protection is incidental to the transferred matter of employment and the administration of justice.

162. The higher courts have already tempered the consequences of employers exploiting irregular migrant workers. There has been a steady erosion of the harshest edges of the illegality doctrine in light of the greater awareness of human trafficking and forced labour. In *Allen v. Hounga*[140] the UKSC allowed an appeal by an irregular migrant who had been subjected to abuse by her employer. It was held that the race discrimination claim would not fail on account of her status. The abuse she suffered was comparable to trafficking. The public interest in favour of allowing the award for injury to feelings consequent upon wrongful dismissal clearly outweighed that which would support allowing the employer to escape all liability. The relatively modest award of damages was directed at compensating her for racist abuse rather than rewarding profit for working in breach of immigration law. The illegality defence under the Immigration, Asylum and Nationality Act 2006 could not be interpreted as showing a Parliamentary intention to prevent formation of employment contracts with illegal entrant workers, which were therefore not unenforceable.

163. In the case of *Patel v. Mirza* the UKSC held that doctrine of illegality would require a balancing of potentially conflicting interests. The Court reviewed the unsatisfactory development of illegality over recent years as well as how it had come to be applied in the immigration context. There were two policy reasons for the common law doctrine of illegality as a defence to a civil claim. The first was that a person should not be allowed to profit from his or her own wrongdoing. The second was that the law should be coherent, not self-defeating, and should not condone illegality.

164. The question of whether allowing a civil claim by a particular claimant would be unduly harmful to the integrity of the legal system depended on a “trio of necessary considerations”[141]. This included whether the purpose of the prohibition that had been transgressed would be enhanced by denying the claim; whether denying the claim might have an impact on another relevant public policy; and whether denying the claim would be a proportionate response to the illegality. Within that framework, a range of factors might be relevant and it was not helpful to prescribe a definitive list. That said, the courts could not decide cases in an undisciplined way and a principled and transparent assessment had to be made. Potentially relevant factors included the seriousness of the conduct, its centrality to the contract, whether it was intentional, and whether there was disparity in the parties' respective culpability.

165. Punishment for wrongdoing was the responsibility of the criminal courts. The civil courts were generally concerned with determining private rights and obligations, and they should neither undermine the effectiveness of the criminal law nor impose additional penalties disproportionate to the nature and seriousness of any wrongdoing

166. In the case of *Okedina v. Chikale*[142] the Court of Appeal for England and Wales held that sections 15 and 21 of the Immigration, Asylum and Nationality Act (2006) could not be read as impliedly prohibiting contracts of employment, in the sense of

[140] *(2014) 1 WLR 2889*
[141] Paragraph 101
[142] *(2019) EWCA Civ 1393*

rendering them unenforceable by either party, where the employee did not have the requisite immigration status. The employee was summarily dismissed in June 2015. She brought contractual claims in the employment tribunal. The employee's appeal was allowed with the Court restating, and applying in these circumstances, the principle that an assessment of what the public interest required was necessary.

167. The Modern Slavery Act (2015) follows the model set in the Palermo Protocol and the Convention. It creates specific criminal offences but provides for the possibility of compensation in the form of slavery and repatriation orders. However, such an action requires conviction of the defendant and the court making such an order[143].

168. Some of the instruments to which the United Kingdom was[144], or currently is[145], a party to have been described as employing a victim-centered approach to irregular migrant workers who have been subjected to trafficking and slavery[146]. This is also a feature of the devolved legislation in this jurisdiction. However, this sits uneasily alongside many of the features of the hostile environment.

169. In respect of protection of labour rights for irregular migrant workers the concept of common law illegality can be reformed by the devolved institutions. So too, it is submitted can a separate right in tort to recover for compensation for labour provided to employers who engaged but did not pay their workers. This could take the form of statutory codification of the *quantum meruit ("the amount he/she deserves")* action. It would allow all persons in Northern Ireland, including irregular migrant workers, to pursue a claim to recover money for goods or services provided to a defendant in circumstances where that plaintiff cannot enforce the claim under the Employment (NI) Order (1996) or for breach of contract.

170. Where the contract of employment has been prohibited due to illegality, this remedy allows for restitution of the value of the services provided. The claimant (irrespective of their immigration status and without requiring a definitive finding of being a victim of trafficking or slavery) would sue, not on the basis of the illegal contract, but on this distinct basis. The right of action could be limited to payment for work undertaken or could include compensation for general damages. This approach is consistent with the opinions of Lord Toulson and Lord Sumption in *Mirza v. Patel w*hich stress the importance of public policy assessment. The UKSC also endorsed the judgment of the New York Supreme Court in *Nizamuddowlah v. Bengal Cabaret Inc*[147]:

> *"Even illegal aliens have the right to pursue civil suits in our courts, and the practice of hiring such aliens, using their services and disclaiming any obligation to pay wages because the contract is illegal is to be condemned. The law provides penalties for aliens who obtain employment in breach of their visa obligations, but deprivation of compensation for labor is not*

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[143] Section 9 of the Modern Slavery Act (2015)
[144] Directive 2011/36/EC
[145] Council of Europe Convention on Action Against Trafficking in Human Beings (2005)
[146] A Hostile Environment": Examining the rights and remedies afforded to exploited irregular migrant workers in the United Kingdom; Malcolm Wu; Journal of Immigration, Asylum and Nationality Law; JIANL (2021) 35(2) 108-128, pg. 114
[147] 48 N.Y. 2d 875

warranted by any public policy consideration involving the immigration statutes".

171. Conditions on a person's entry or residence into the United Kingdom, which include restrictions on the ability to work, are beyond the scope of amendment, repeal or modification by the devolved institutions. They are correctly considered to be matters of immigration within scope of paragraph 8 of schedule 2. However, the manner and extent to which the protection of human rights by the United Kingdom is implemented within Northern Ireland is not. Access to the courts, protection equivalent to that which exists in employment law and/or the creation of civil law claims by irregular migrants can properly be regarded as devolved matters. These are matters of employment law and civil justice rather than immigration or nationality within the meaning of schedule 2 to the Northern Ireland Act (1998).

172. In terms of consequences for irregular migrant workers the devolved authorities cannot, consistent with the Northern Ireland Act (1998), act to confer rights of entry or residence on those who do not have it. They cannot purport to interfere with the UK government's approach to removal.

I. The Hostile Environment – Marriage

i) The Right in International Human Rights Law

173. The right to marry and form a family is a fundamental aspect of family and private life in international human rights law. It features in article 23 ICCPR and article 10 ICESCR. Equality in marriage between men and women is protected by article 16 CEDAW. The rights of migrants to benefit from marriage is contained in articles 4 and 44 of the Convention on the Rights of Migrants. The ICRPD also protects the right to marriage of persons with a disability in article 23.

174. Article 12 ECHR guarantees the right to marry and found a family. The ECtHR has, however, held that the right is a qualified one which can be subject to proportionate interferences when adopted for legitimate purposes[148]. States have been granted a wide margin of appreciation in the formulation of national laws. This extends to allowing the contracting states to impose reasonable conditions on the right of foreign nationals to marry in order to ascertain whether the proposed marriage is genuine or one of convenience.

175. Previous restrictions on the right to marry contained in the UK immigration law were held to be incompatible with the Convention[149]. The payment of fees by those subject to immigration control and the requirement of certain length of leave before the right could be exercised at all was found to be contrary to article 12 and articles 14 and 9 ECHR read together[150].

176. The Secretary of State could lawfully prevent a marriage between a Bolivian national and an Italian national where it was established that it was one of convenience. A

[148] Frasik v. Poland (App. 22933/02)
[149] Immigration and Asylum (Treatment of Claimants, etc.) Act (2004) and Immigration (Procedure for Marriage) Regulations (2005)
[150] O'Donoghue & others v. United Kingdom (2011) 53 EHRR 1

marriage of convenience could exist despite the fact that there was a genuine relationship and in the absence of any deception or fraud as to its existence. The true focus in determining whether a marriage was one of convenience was to look at the parties intention in contracting the marriage[151].

ii) Mapping the Hostile Environment in Northern Ireland

177. The validity and recognition of marriages, civil partnerships, polygamy and divorces are often an essential element in determining entry and residence for spouses, partners and children in the United Kingdom. With respect to foreign marriages the general position is based on the principle of *lex loci celebrationis*[152]. It provides that a marriage will be valid if conducted in accordance with the applicable law in the place of the parties' domicile.

178. Such rules, whether they are found in primary or secondary legislation, or in the Immigration Rules, must be considered to be fundamental to the UK's immigration regime and are not subject to amendment by the devolved administrations. These are rules governing entry into the United Kingdom rather than the conduct, rights or privileges of those already present.

179. The Immigration and Asylum Act (1999) introduced a duty on registrars to report sham marriages to the immigration authorities[153]. A "sham marriage" was one where certain persons[154] were not in a genuine relationship and the arrangement was to circumvent some aspect of the immigration regime[155].

180. Part IV of the Immigration Act (2014), however, represents a more significant intrusion by the immigration authorities into the sphere of marriage and civil partnership. Section 53 of the Immigration Act (2014) allowed for the extension of the scheme to Scotland and Northern Ireland. However, such an order may not impose additional duties on any of the devolved authorities[156].

181. Where a registrar refers a proposed marriage or civil partnership to the Secretary of State an investigation will follow where there are reasonable grounds for suspecting that the proposed marriage or civil partnership is a sham[157]. The decision maker will also consider the published guidance[158]. Notice will be given to the parties and the registration authority[159] and a decision must be provided within 70 days[160]. This has the result of extending the couple's notice period from 28 days to 70 days. The parties must, then, comply with the investigation[161]. The requirements can include

[151] R(Molina) v. SoS for the Home Department (2017) EWHC 1730 (Admin)
[152] Macdonald's Immigration Law & Practice, 10th edition, volume 1, section 11.23
[153] Section 24 of the Immigration and Asylum Act (1999)
[154] Initially this was where either or both of the parties were not a "relevant national". That term covered British citizens, EEA nationals and Swiss nationals
[155] Section 24(5) of the Immigration and Asylum Act (1999)
[156] Section 53(4)(a)-(d) of the Immigration Act (2014)
[157] Section 48(2)-48(6) of the Immigration Act (2014)
[158] "Immigration Act (2014); Marriage and Civil Partnership referral and investigation scheme: statutory guidance for Home Office staff, version 2.0 (published March 2021)
[159] Section 48(7) – 48(8D) of the immigration Act (2014)
[160] Section 48(9) and section 50(7) of the Immigration Act (2014)
[161] Section 50 of the Immigration Act (2014) together with Proposed Marriages and Civil Partnerships (Conduct of Investigations, etc.) Regulations (2015)

attendance for interview, providing further information, evidence, photographs or electronic documents.

182. In Northern Ireland each of the parties to a marriage must give notice to a registrar prior to the ceremony[162]. Additional information is required where one of the parties is not a "relevant national"[163]. This includes an obligation to provide details of immigration status, existing marriage, photographs and a declaration attesting to the truth of the statements made[164]. Following post-Brexit amendments, a "relevant national" is a British citizen, an Irish citizen or someone who has been granted or applied for residence under the EU settlement[165]. The marriage registrar may reject evidence which he or she regards as false[166] and must refer the marriage to the Secretary of State[167]. Equivalent requirements are imposed in respect of civil partnerships[168].

183. Many genuine couples are inevitably swept up in marriage investigations. These checks can be extremely invasive with reports of weddings being interrupted by Home Office officials[169], dawn raids carried out on homes[170] and email records reviewed. Couples may be asked extremely personal and intimate questions and have their relationship assessed for fraud. The Public Law Project also revealed that the Home Office uses an algorithm to decide which couples are to be investigated[171]. The 70 day extension can also negatively impact couples forcing them to rearrange or cancel wedding plans often at significant financial cost.

iii) Options for Mitigation

184. The law concerning marriage, divorce or dissolution of civil partnership, procedures and the forms to be used are different in Northern Ireland to other parts of the United Kingdom. From 2 March 2015, the marriage and civil partnership notice period in Scotland and in Northern Ireland was extended to 28 days for all couples regardless of their nationality. These provisions were replicated in Scotland[172] and Northern Ireland[173]. It should be noted that the extension of this requirement was achieved by way of regulations from the Home Secretary rather than by way of devolved legislation[174]. The Home Office description of the changes as having been

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[162] Article 3(1) of the Marriage (NI) Order (2003)
[163] Article 3A of the Marriage (NI) Order (2003)
[164] Article 3A – 3C of the Marriage (NI) Order (2003)
[165] Article 2(2) of the Marriage (NI) Order (2003) read together with section 17 of the European Union (Withdrawal Agreement) Act (2020) and part 2 of the EU-UK Withdrawal Agreement of 19th October 2019
[166] Article 3D of the Marriage (NI) Order (2003)
[167] Article 3E of the Marriage (NI) Order (2003)
[168] Section 139 - 139E of the Civil Partnership Act (2004) and the Civil Partnership Regulations (NI) (2005) (as amended)
[169] https://www.theguardian.com/uk-news/2019/apr/14/couples-sham-marriage-crackdown-hostile-environment
[170] https://www.theguardian.com/uk-news/2018/may/16/footage-emerges-of-distressing-home-visit-by-immigration-officers
[171] https://publiclawproject.org.uk/latest/sham-marriages-and-algorithmic-decision-making-in-the-home-office/
[172] Referral and Investigation of Proposed Marriages and Civil Partnerships (Scotland) Order (2015)
[173] Referral and Investigation of Proposed Marriages and Civil Partnerships (Northern Ireland and Miscellaneous Provisions) Order (2015)
[174] Exercising powers conferred under section 53 and 74 of the Immigration Act (2014)

"implemented by the Scottish Government and the Northern Ireland Executive" is, without more, perhaps misleading[175].

185. The regulation and recognition of marriages taking place in Northern Ireland has always been, and it is submitted clearly remains, a transferred matter under the Northern Ireland Act (1998). Reform by the Northern Ireland Assembly to, for example, part 4 of the Civil Partnership Act (2004), the Marriage and Civil Partnership (Northern Ireland) Regulations (2020), the Marriage (NI) Order (2003) or to the Matrimonial Causes (NI) Order (1978) which are of general application, applying to all persons wishing to marry, could not be considered to excepted matters within the scope of schedule 2 to the Northern Ireland Act (1998).

186. The UK Parliament is at liberty to legislate with regard to Northern Ireland for all matters whether transferred, excepted or reserved. This is the essence of the current model of devolution based on the enduring and unqualified sovereignty of Parliament. It should, however, have regard to the promises contained in the Good Friday Agreement and the Sewell convention.

187. It is submitted that the additions to the Marriage (NI) Order (2003) brought about by the Immigration Act (2014) and now contained in articles 3A-3E of that Order can be amended, repealed or modified by the Assembly pursuant to section 5(6) of the 1998 Act. The contents of the marriage notice, the marriage schedule and the duties on the registrar do not come within scope of paragraph 8 of schedule 2 of the 1998 Act simply because they will also apply to non-nationals.

188. Similarly, the choice of Parliament to target the right of marriage through the enactment of hostile environment measures does not alter the devolution scheme. In order to achieve such a result Parliament has the option of amending schedules 2 and 3 to the 1998 Act. Rules of general application which address the conditions of marriage in Northern Ireland can stipulate the requirements of each party to the act. Such rules can apply to all persons irrespective of immigration status.

189. The consequences which arise from a marriage conducted in Northern Ireland in accordance with the law of Northern Ireland may, it is accepted, have subsequent consequences for a person's immigration status. Such consequences, however, must be regarded as incidental, ancillary or consequential to the purpose of the reforms which would be to create a consistent and accessible system of marriage and civil partnership. The point is repeated - it simply cannot be the case that each and every single interaction a migrant has with the state, a church, a business or with other private parties falls within the immigration exception in the 1998 Act.

190. A sham marriage or civil partnership conducted for the purposes of achieving an advantage in the immigration system would come within scope of paragraph 8 of schedule 2 to the Northern Ireland Act (1998). Such an arrangement is not a genuine relationship when one of the parties intends to circumvent UK immigration controls. The duty on Northern Ireland registrars to inform the Home Office of such concerns is based on sections 24 and 24A of the Immigration and Asylum Act (1999). However,

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[175] Home Office Guidance v 2.0 – Immigration Act 2014: Marriage and Civil Partnership referral and investigation scheme, pg. 6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974164/marriage-civil-prtnr-referral-v2.0.pdf

the conferring of such responsibilities specifically on officials of devolved public authorities, such as in these circumstances on employees in the General Register Office (GRO), complicates the picture. The objective is related to the excepted subject matter of immigration but the means by which it is achieved is to utilize, or to use a more dramatic turn of phrase commandeer, the personnel of the GRO or the Department of Finance. It is clearly appropriate for the immigration authorities to prevent, to collect information on and to act on sham marriages. Whether the devolved authorities can, in an Act of the Assembly, reassert their own priorities for their own staff in this particular context of marriage is uncertain though it is at least arguable. It is suggested this represents the very edge of the transferred powers jurisdiction.

191. However, many of the provisions in schedule 5 of the Referral and Investigation of Proposed Marriages and Civil Partnerships (Northern Ireland and Miscellaneous Provisions) Order (2015) clearly go beyond this. The sharing of information relating to a "relevant national" does not equate to those whom the registrar has cause to believe are involved in deception. Marriage is a transferred competence under the Northern Ireland Act (1998) and the attempted registration of a "sham marriage" for immigration purposes represents a very small part of that sphere. It is suggested that it is open to the Northern Ireland Assembly to revisit, and if so minded modify, the scope of information gathered and transferred to the Home Secretary other than in relation to sham marriages. A wedding ceremony is primarily a matter of family law rather than immigration law. It remains part of the law of Northern Ireland, within the meaning of that phrase in the Northern Ireland Act (1998), and has not been transformed by the Immigration Acts.

J. Social Security – No Recourse to Public Funds Condition

i) Mapping the Hostile Environment in Northern Ireland

192. The grant of limited leave to remain or enter the United Kingdom is usually accompanied by a condition that the person have "no recourse to public funds" (NRPF). It applies to those who are subject to immigration control and are excluded from benefits under section 115 of the Immigration and Asylum Act (1999). The condition applies to those with leave to enter as a visitor, leave to remain as a spouse, leave to remain as a spouse or student and leave to remain under family or private life routes in the Immigration Rules or with work visas. The condition also applies to leave to enter or remain which was subject to a maintenance undertaking.

193. Such persons must pay tax in the United Kingdom but cannot expect equivalent support despite their contributions[176]. Equally, a sponsor may not receive public funds on behalf of the migrant.

194. Schedules 11 and 12 to the Immigration Act (2016) imposed further restrictions on support for migrants. The approach is again addressed in Nationality and Borders Bill currently before Parliament but not yet enacted. Clause 11 proposes that

[176] However, under regulation 2, part 1 of the Schedule to the Social Security (Immigration and Asylum) Consequential Amendments Regulations (2000) SI 2000/636 there are exemptions for certain means tested benefits.

accommodation for those who become destitute can be considered not just against the person's need but also against progress of efforts to regularize settlement, manner of entry into the UK and compliance with bail conditions. The proposal of housing asylum seekers in designated accommodation centres also features although it still has not brought into operation[177].

195. The condition of NRPF will not apply to people who have British or Irish citizenship, indefinite leave to remain, permanent residence, refugee status, humanitarian protection or discretionary leave. Social security benefits may be subject to a test of habitual residence, however.

196. There is a discretion not to impose the NRPF condition on private / family life visas and this can occur where (i) the applicant is destitute[178]; or (ii) there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of very low income. This was expanded to include where the person is at imminent risk of destitution, where there are particularly compelling reasons relating to the welfare of a child on account of low income or due to new exceptional circumstances relating to financial circumstances.

197. The Home Office describes indefinite leave to remain as the "general threshold" for permitting migrants to access public funds[179]. The purpose of the policy, and its effect in family life applications considered under article 8 ECHR, is described in primary legislation. Section 117B(3) of the Nationality, Immigration and Asylum Act (2002) provides that:

> *"It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek leave to enter or remain in the United Kingdom are financially independent, because such persons –*
>
> *(a) Are not a burden on taxpayers, and*
>
> *(b) Are better able to integrate into society."*

198. A migrant who goes on to claim any relevant social security benefits may be committing a criminal offence[180]. It may also negatively affect current and future immigration status[181].

199. At the present time the list of what comes within scope of "public funds" for the purpose of the Immigration Rules is set out in paragraph 6.2(a)-(i)[182]. It extends beyond the most well-known social security benefits and can also exclude children from accessing student loans, free school meals and free childcare. The list acknowledges the sometimes distinct social security arrangements across the United

[177] https://www.gov.uk/government/publications/the-nationality-and-borders-bill-factsheet/nationality-and-borders-bill-factsheet
[178] Home Office: Assessing Destitution (November 2019, version 3.0)
[179] https://homeofficemedia.blog.gov.uk/2020/05/05/no-recourse-to-public-funds-nrpf/
[180] Section 115 of the Immigration and Asylum Act (1999); section 24 of the Immigration Act (1971)
[181] Section 24 of the Immigration and Asylum Act (1999)
[182] Immigration Rules HC 395 (as amended); interpretation, para 6(a) – 6(i). See also public funds – HO guidance based on Immigration Rules

Kingdom. With regard to Northern Ireland it encompasses housing[183]; attendance, carer's allowance and disability living allowance[184]; universal credit, personal independence payment[185]; and/or discretionary support payments under in connection with the Welfare Reform (NI) Order (2015)[186].

200. Following the United Kingdom's exit from the European Union, and the expiration of the transition period, the immigration requirements for EU citizens and EEA nationals and their family members has changed. The previous free movement regime has been extinguished[187]. Those persons who are covered by the reciprocal arrangements in the Withdrawal Agreement will retain something approaching the previous rights of entry, exit, residence and equal access to social benefits. They should have applied to the EU Settlement Scheme by the 30th June 2021 although late applications can be accepted when there exists a reasonable excuse for the delay[188]. Failure to apply can mean that previously legal residence will lose that status and the person and/or their family member may lose access to some of their social security entitlements.

201. Those EEA nationals who have come to the United Kingdom since the start of the year must, however, obtain leave to enter or remain in order to visit or live and work in the UK. The Immigration and Social Security Co-Ordination (EU Withdrawal) Act (2020) makes newly arriving EEA citizens and their family members subject to UK immigration controls. The new points based system will apply from 2022 onwards to both categories – EEA nationals and non- EEA nationals. Entry and residence will be related to a specific purpose under the Immigration Rules and the "no recourse to public funds" condition may apply.

202. The policy of NRPF was the subject of challenge last year in the case of *R(On the Application of W (a child) v. Secretary of State for the Home Department*[189]. It was held that the regime whereby an applicant for leave to remain had a condition imposed that they would have no recourse to public funds was unlawful to the extent that it did not adequately reflect or give effect to the Home Secretary's obligation

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[183] (a) housing under Part VI or VII of the Housing Act 1996 and under Part II of the Housing Act 1985, Part I or II of the Housing (Scotland) Act 1987, Part II of the Housing (Northern Ireland) Order 1981 or Part II of the Housing (Northern Ireland) Order 1988

[184] (c) attendance allowance, severe disablement allowance, carer's allowance and disability living allowance under Part III of the Social Security Contribution and Benefits (Northern Ireland) Act 1992; income support, council tax benefit and, housing benefit under Part VII of that Act; a social fund payment under Part VIII of that Act; child benefit under Part IX of that Act; income based jobseeker's allowance under the Jobseekers (Northern Ireland) Order 1995 or income related allowance under Part 1 of the Welfare Reform Act (Northern Ireland) 2007

[185] (e) Universal Credit, Personal Independence Payment or any domestic rate relief under the Welfare Reform (Northern Ireland) Order 2015

[186] (h) a discretionary support payment made in accordance with any regulations made under article 135 of the Welfare Reform (Northern Ireland) Order 2015

[187] Part I and Part II of the EU-UK Withdrawal Agreement of 19th October 2019 (WA); Part I and schedule 1 to the Immigration and Social Security Co-ordination (European Union Withdrawal) Act (2020); Draft EU-UK Trade & Co-operation Agreement (CTA) of 24th December 2020 provisions on services/investment contained in part 1 and part 2, title II; EU Settlement Scheme and the Immigration Rules Appendix EU (latest update 29th January 2021)

[188] The Withdrawal Agreement itself does not impose such a deadline. Instead, article 10 provides that "Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter" shall be the beneficiaries of the rights contained in part 2

[189] (2020) EWHC 1299 (Admin)

under article 3 ECHR and the common law. The NRPF regime did not adequately recognise, reflect or give effect to the defendant Secretary of State's obligation not to impose the condition of NRPF in cases where the applicant was not yet but would imminently suffer inhuman or degrading treatment without recourse to public funds.

203. The condition was subject to further judicial consideration in the case of R*(Ncube) v. Brighton & Hove Albion CC*[190]*.* Local authorities could lawfully provide accommodation to street homeless persons with no "recourse to public funds" during the CV-19 pandemic. The applicant was a rejected asylum seeker who was street homeless and had sought accommodation from the defendant local authority.

204. Research by the Unity Project charity, together with Deighton, Pierce Glynn Solicitors, concluded that the NRPF policy was more likely to impact negatively upon women, expectant mothers, persons living with disabilities and children[191]. In England most families affected had at least one British child and the vast majority of these children were BME children. Another feature of the work was the high number of those who were working but could still experience destitution. Free school meals, free childcare as well as child and working tax credits were all measures created to facilitate assist in promoting child welfare and incentivize work.

205. Also, the UK Parliament's All Parliamentary Group on Homelessness recommended the immediate removal of NRPF condition to people in vulnerable circumstances. The impact of NRPF was highlighted during the Coronavirus crisis when migrants with lawful status in the UK found themselves unable to access support as they faced job losses during the pandemic. A Joint Council on the Welfare of Immigrants Report described NRPF as a public health risk as it prevented people from being able to safely self-isolate[192].

ii) Options for Mitigation in Northern Ireland

206. In England local authorities have a statutory duty to provide support to children in need[193]. Research by the Association of Directors of Children's Services found that safeguarding children in need due to their parents' immigration status including a NRPF condition was one of the most significant pressures on their budgets. Clearly, the condition of NRPF excludes those subject to immigration control from entitlement to the majority of welfare benefits. It does not, however, eliminate the need of such persons to assistance.

207. The Scottish government published "Ending Destitution Together". It is described as a strategy to improve support for people living with no recourse to public funds living in Scotland[194]. The document acknowledges the limitations on action that can be taken due to nationality and immigration being reserved matters under schedule 5 to

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[190] (2021) EWHC 578 (Admin)
[191] Access Denied: The Cost of the "no recourse to public funds" policy; June 2019; By Agnes Woolley
[192] https://www.jcwi.org.uk/no-recourse-to-public-funds-public-health-risk-destitution
[193] Section 17 of the Children Act (1989) which is equivalent to article 18 of the Children (NI) Order (1995) in this jurisdiction
[194] https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2021/03/ending-destitution-together/documents/ending-destitution-together-strategy-improve-support-people-no-recourse-public-funds-living-scotland-2021-2024/ending-destitution-together-strategy-improve-support-people-no-recourse-public-funds-living-scotland-2021-2024/govscot%3Adocument/ending-destitution-together-strategy-improve-support-people-no-recourse-public-funds-living-scotland-2021-2024.pdf

the Scotland Act (1998). An important distinction between Scotland and Northern Ireland also exists as social security is a devolved matter in the latter but not the former.

208. The strategy states that its aim is to:

> *" … prevent and mitigate destitution for people with No Recourse to Public Funds (NRPF), who are not permitted under UK immigration rules to access most mainstream benefits, local authority housing or homelessness services. People with NRPF can experience extreme poverty, rough sleeping, domestic abuse and labour exploitation as well as social isolation and exclusion because of UK Government immigration rules, which mean they are unable to access most support options designed to help people at the point of crisis.*
>
> *The purpose of this strategy is to address these issues as far as possible in Scotland, through increasing the accessibility, availability and coordination of dignified support for people during times of crisis. The strategy sets a direction of travel and initial actions for delivering: improved support for people during times of crisis; advice and advocacy to resolve underlying issues; and inclusive approaches to policy and service design which enable people to participate in society and access the support they need. The focus is on action which can be taken in partnership in Scotland, to deliver a cross government and multi-sectoral approach to achieving our goals, working across national and local government as well as the wider public and third sectors."*

209. The strategy is a response to the Equalities and Human Rights Committee of the Scottish Parliament's report in May 2017 entitled *Hidden Lives – New beginnings*[195]. The recommendations include:

- Piloting a hardship fund to support people with NRPF across Scotland who are facing crisis situations
- Ending homelessness for people who are NRPF and destitute asylum seekers
- Investing in the provision of diagnostic legal advice and advocacy support for people subject to NRPF and increasing access to specialist immigration advice to support local authorities assisting people with NRPF
- Improving access to primary health and mental health services and working with Public Health Scotland to address health inequalities experienced by people subject to NRPF

210. The strategy also requested that the UK government remove the Scottish Welfare Fund from the list of restricted benefits set out in paragraph 6 of the Immigration Rules. It has been incorporated into the co-operation agreement between the Scottish Nationalist Party and the Scottish Greens[196].

[195] https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2017/5/22/Hidden-Lives---New-Beginnings--Destitution--asylum-and-insecure-immigration-status-in-Scotland#Key-findings

[196] https://www.scotsman.com/news/politics/snp-green-deal-two-green-msps-to-become-government-ministers-under-agreement-to-hold-independence-referendum-by-2023-3354175

211. The NRPF has also provoked a response in London. London Councils represents 32 borough councils and the City of London. It estimated that in 2016/2017 local authorities in London were spending £53.7 million in support of an estimated 2,881 households subject to NRPF condition. The greatest costs were accommodation, council employees and subsistence. The annual spend was described as a "direct cost shunt resulting from central government policy".[197]

212. The imposition of NRPF conditions does not, obviously, eliminate the need for public support to vulnerable persons living in Northern Ireland. Instead, it often displaces the forum in which the need comes to the attention of state authorities. For example, article 18 of the Children (NI) Order (1995) provides:

> *18.— General duty of authority to provide social care for children in need, their families and others*
>
> *(1) It shall be the general duty of every authority (in addition to the other duties imposed by this Part)—*
>
> *(a) to safeguard and promote the welfare of children within its area who are in need; and*
>
> *(b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of social care appropriate to those children's needs.*

213. In the case of *Re Application for Judicial Review by JR30*[198] Treacy J held that the policy behind the provision was that the welfare of a child in need was often best promoted by securing the functional viability of his family unit. The duty imposed on local authorities to provide services in order to safeguard and promote the welfare and upbringing of children in need, included a duty to provide personal services not only for children themselves, but also for their families and carers.

214. The imposition of NRPF condition on the immigration status of a person in the United Kingdom and residing in Northern Ireland cannot be addressed directly by the Northern Ireland Assembly. It must be regarded as relating to the immigration status of a person. Such a condition remains the preserve of the immigration authorities. It is clearly a matter of immigration law and falls within the scope of the immigration exception in paragraph 8 of schedule 2 to the Northern Ireland Act (1998).

215. Social security, however, is a devolved matter in Northern Ireland. This is not the case in Scotland where such matters are reserved pursuant to the specific reservations in Head F, part 2 of schedule 5 to the Scotland Act (1998). Some benefits created and administered by the Scottish institutions have been left off the list of relevant welfare payments for the NRPF. This includes, for example, the Best Start Grant Pregnancy and Baby Payment.

216. Section 87 of the Northern Ireland Act (1998) creates a unique system of consultation and co-ordination between the devolved authorities and the UK government. The purpose is to secure, so far as possible, single systems of social

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[197] https://www.londoncouncils.gov.uk/our-key-themes/asylum-migration-and-refugees/no-recourse-public-funds

[198] (2010) NIQB 30

security, child support and pensions. Both the Secretary of State for Northern Ireland and the Northern Ireland Minister may, by regulations, make arrangements for such co-ordination.

217. The significant and controversial changes that featured in the Welfare Reform Act (2012) were not implemented in this jurisdiction until the Welfare Reform (Northern Ireland) Act (2015) and the Welfare Reform (NI) Order (2015) was introduced by Order in Council rather than by devolved legislation. The episode should put beyond any doubt the contention that the Assembly can, if it so chooses, deviate from the UK welfare benefit system on matters such as eligibility and level of support. The recent past shows that when such a move would not command universal political support amongst the executive parties deadlock can result. The issues relating to the financial implications of welfare mitigations in Northern Ireland should not apply in the same manner in this context. The number of residents would be very small and such a move could not be said to pose significant costs to the administration of the social security system in this jurisdiction and/or reduce the funds available for other matters should there be a commensurate reduction in block grant.

218. As stated the Northern Ireland Assembly cannot legislate to remove the NRPF condition from the immigration status of someone living in Northern Ireland. Instead, it can create new social welfare payments for persons who require support. Rules on eligibility and level of payment are matters which qualify as transferred matters. Social security for migrants who are, in any event, presenting for support to local health and social care trusts can benefit from such a scheme. Such an approach will not, it is submitted, contravene the distinction between transferred and excepted matters contained in the Northern Ireland Act (1998).

219. The list of applicable social security benefits currently contained in paragraph 6 of the Immigration Rules is exhaustive. Payments which do not appear on the list are not relevant to the NRPF condition on a person's grant of leave to enter or remain. The creation of a new social security benefit in Northern Ireland could, of course, be added to the list by the Secretary of State but this is uncertain. The experience in Scotland shows that this is not necessarily always the case. Also, the fact that the costs of support are, in any event, often being borne by public authorities is relevant.

220. Equally, the Northern Ireland Assembly could expand eligibility or the level of support for those social security payments which do not feature on the list of relevant benefits in paragraph 6 of the Immigration Rules.

K. The Hostile Environment – Healthcare

i) The Right in International Human Rights Law

221. The right to health was proclaimed by the World Health Organization as long ago as June 1946. Since that time, it has appeared in a number of international human rights treaties including in article 25 of the Universal Declaration of Human Rights and article 12 of the International Covenant on Economic, Social and Cultural Rights (1966). The right to healthcare was described in the terms below by the Committee on Economic, Social and Cultural Rights in its General Comment (no.14) of 11th August 2000:

"Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity."

222. The right to health is a fundamental part of our human rights protection and the dignity of the individual. It is protected, indirectly, by articles 3 ECHR (prohibition on torture, ill treatment and inhuman and degrading treatment or punishment) and article 8 ECHR (right to respect for private and family life)[199]. It is also addressed by article 13 of the European Social Charter under which states agree to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition[200].

223. In 2000 the World Health Organisation identified three fundamental goals for a health system: improving the health of the population it serves; responding to the reasonable expectations of that population; and collecting funds to do so in a way that is fair[201]. Even a cursory review of the distinct national health care systems that exist across Europe show the broad measure of national discretion that exists in their construction. Some states have established healthcare systems funded out of general taxation while others rely on a system of personal insurance. This variation is also found in the extent to which migrants may access these systems of public healthcare[202]. Arguments in favour of extending healthcare to migrants stress the public health benefits while those in opposition emphasize cost[203].

ii) Background to Provision of Free Public Health Care in Northern Ireland

224. It should be uncontroversial to say that admiration for the National Health Service (NHS) appears to be among the most widely and deeply held views across the United Kingdom. This extends to Northern Ireland. It is often regarded as a UK wide service based on values which emerged during and after the Second World War. The founding principle of the NHS was the provision of universal healthcare on the basis of need rather than means. It is this objective which is perhaps most readily associated with the NHS by the public.

225. Such care would be funded out of general taxation and be accessed free at the point of delivery. The approach was based on the Beveridge Report[204]. The phrase of cradle to grave care is one that is familiar to all and the NHS has gone on to become one of the largest employers on the planet. The duty on the Minister of Health was expressed in broad terms of section 1 of the National Health Service Act (1946):

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[199] See Council of Europe Thematic Report: Health Related Issues in the case law of the European Court of Human Rights

[200] The United Kingdom ratified the European Social Charter on the 11th July 1962

[201] World Health Report (2000) Health Systems: Improving Performance

[202] International Organisation for Migration: Migration and the Right to Health in Europe (2009) by Paola Pace and Sam Shapiro; Romero-Ortuno R. (2004): Access to healthcare for illegal immigrants in the European Union: should we be concerned? European Journal of Health Law, vol. 11 No. 3, pg 245-272

[203] British Medical Journal: Healthcare is not universal if undocumented migrants are excluded (2019) BMJ 366 by Helena Legido-Quigley, Nicola Pocok, Sok Teng Tan, Leire Pajin, Reepeepong Suphanchaimat; Kol Wickramage, Martin McKee & Kevin Pottie

[204] Social Insurance and Allied Services (Cmd 6404)

1.— Duty of Minister.

(1) It shall be the duty of the Minister of Health (hereafter in this Act referred to as "the Minister") to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with the following provisions of this Act.

(2) The services so provided shall be free of charge, except where any provision of this Act expressly provides for the making and recovery of charges.

226. The provision of healthcare in England and Wales is primarily now governed by the National Health Service Act (2006) and the Health and Social Care Act (2006). A separate NHS for Scotland was created with the passage of the National Health Service (Scotland) Act (1948) and it, too, has been subject to significant amendment. The extent to which the founding values continue to guide the operation of the NHS is a matter of legitimate and often fraught political debate but its distinct relationship with migrants cannot be doubted. Each health care system has, to varying degrees, limited access to health care on the basis of immigration status and nationality.

227. It is also important to note that the title of National Health Service can be misleading. While the values are said to be shared across the United Kingdom, and it is common to hear patients and practitioners speak of UK healthcare, it is in fact four separate health care systems – England, Scotland, Wales and Northern Ireland. Each healthcare system is founded on different legislation, operated by distinct public authorities, accountable to different executive Ministers and oversight bodies and eligibility for primary care and hospital treatment available can differ in scope.

228. The genesis of what is typically called the NHS in Northern Ireland is found in the Health Services Act (Northern Ireland) (1948). It introduced a system of universal healthcare comparable to the NHS in England. The Ministry of Health was required to promote for the benefit of "the people of Northern Ireland" services designed to secure (a) improvement in the physical and mental health of those people; (b) the prevention, diagnosis and treatment of illness; and (c) the ascertainment and prevention of mental deficiency and the care of those in need[205]. The services were to be provided free of charge except where expressly provided by the Act[206]. Importantly, the scope of the legislation included both health care and social care.

229. In Northern Ireland the Department of Health has overall responsibility for health and social care services. It is one of nine Northern Ireland Executive departments. The current Minister is Mr. Robin Swann. In terms of commissioning and providing services, the Department of Health discharges this duty to the Health and Social Care Board, Public Health Agency and a number of Health and Social Care bodies including the 5 regional trusts. Each public authority has specific functions. The Health and Social Care Board is responsible for commissioning services, managing resources and

[205] Section 1 of the Health Services Act (1948)
[206] Section 2

performance improvement. The Board also manages contracts for family health services provided by GPs, dentists, opticians and community pharmacists. These are services are not, however, provided by health and social care trusts. The health and social care trusts are the main providers of health and social care in the jurisdiction. They are the Belfast Trust, the Northern Trust, the Western Trust, South Eastern Trust, Southern Trust and Western Trust[207].

230. In order to understand the current legislative framework in which health and social care is provided it is necessary to outline the concepts of “primary medical services” and “general medical services” as set out in the Health and Personal Social Services (NI) Order (1972).

231. The provision of health and social care in Northern Ireland is based, primarily, on the Health and Personal Social Services (NI) Order (1972) and the Health and Social Care (Reform) Act (NI) (2009). In section 2 of the 2009 Act the Department’s general duty is expressed in slightly different language to that in the 1948 Act. The beneficiaries are to be “*people in Northern Ireland*” rather than “*the people of Northern Ireland”*. This point is worthy of note and clearly, as a starting point, includes migrants. It provides:

> *2 - (1) The Department shall promote in Northern Ireland an integrated system of—*
>
> *(a)health care designed to secure improvement—*
>
> *(i)in the physical and mental health of people in Northern Ireland, and*
>
> *(ii)in the prevention, diagnosis and treatment of illness; and*
>
> *(b)social care designed to secure improvement in the social well-being of people in Northern Ireland.*

232. The Department may provide, or secure the provision of, such health and social care, in order to discharge its obligation[208]. It may adopt all such measures that are calculated to facilitate or conducive or incidental to that task[209]. Primary care is health and social services which are accessed directly. This is usually, though not always, through a GP.

233. Article 98 of the Health and Personal Social Services (NI) Order (1972) retains the promise of providing services free of charge to the population. However, this well-known and much-loved approach is, in fact, subject to a number of exceptions. Schedule 15 to the 1972 Order governs charges in respect of certain services and other related matters including dental services[210].

iii) Mapping the Hostile Environment in Northern Ireland

234. Restrictions on access to health care exist on the basis of immigration status as well as with regard to different types of treatment. Access to health care was restricted by

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[207] Health and Social Care (Reform) Act (NI) (2009)
[208] Section 3 of the Health and Social Care (Reform) Act (NI) (2009)
[209] Section 3(2)(b)
[210] Health and Personal Services (NI) Order (1972), schedule 15, para 1(a)

the old Stormont Parliament in the Health Services (Persons not ordinarily resident in Northern Ireland) Regulations (1970)[211]. One of the key differences during this period was also the choice to restrict access to GPs.

235. Those rules provided that no health authority could provide services to persons who were not ordinarily resident in Northern Ireland. Exceptions were made for residents of Great Britain, the Channel Islands and New Zealand as well as those covered by Conventions.

236. Regulation 8 provided that “hospital, specialist and ancillary services shall be available to any person not ordinarily resident in Northern Ireland who becomes ill when in Northern Ireland, to the extent deemed necessary by the medical practitioner concerned with treatment to enable that person to return to their country of residence”.

237. The possibility of migrants being liable for NHS charges has existed in England and Wales since the enactment of the National Health Service Act (1977) but it seems this was rarely enforced. The National Health Service (Charges to Overseas Visitors) Regulations (1989) introduced this possibility but its enforcement seems to have been inconsistent. It was, however, fortified considerably in the National Health Service (Charges to Overseas) Visitors Regulations (2015). NHS trusts and local authorities were under a legal obligation to determine whether a patient is an overseas visitor to whom charges apply or are exempt[212].

238. In Northern Ireland article 42 of the 1972 Order (as amended) provides the Department of Health with a power to impose charges in certain circumstances. The provision was enacted before the arrival of the hostile environment measures and has developed independently of it. However, there is a reasonable argument that it has been influenced by political developments in Britain. It provides:

> *Provision of services to persons not ordinarily resident in Northern Ireland*
>
> *42.—(1) The Ministry may make available any services provided under this Order or the 2009 Act to such persons or classes of persons not ordinarily resident in Northern Ireland to such an extent and subject to such conditions as may be prescribed.*
>
> *(2) Where services are provided under paragraph (1) the Ministry may, subject to such exemptions as may be prescribed and subject to paragraph (3), determine charges for such services and recover them in accordance with paragraphs 3 and 4 of Schedule 15.*
>
> *(3) Regulations may provide that charges under paragraph (2) are only to be made in such cases as may be determined in accordance with the regulations.*

239. The statutory language is broad and permissive. The Department may make any service available to persons not ordinarily resident. There is no requirement on the Department to impose charges on any particular person or for any particular service.

[211] The Health Services (Availability of Services) Regulations (Northern Ireland) (1950), the Health Services (Availability of Services) (Amendment) Regulations (Northern Ireland) (1951) and the Health Services (Availability of Services) (Amendment) Regulations (Northern Ireland) (1957)

[212] Regulation 3(1) of the National Health Service (Charges to Overseas Visitors) Regulations (2015)

Nonetheless, the Department has exercised its discretion to impose such charges on a number of occasions and in a number of contexts[213].

240. Most significant amongst the measures currently in force is the Provision of Health Services to Persons Not Ordinarily Resident Regulations NI) (2015). The regulations adopt the previous approach of differentiating between those deemed to be "ordinarily resident in Northern Ireland" and those who are not and are therefore categorized as "visitors"[214]. Services are free to those in the former category whereas services forming part of health services shall be available to any visitor at a charge determined by the Department unless expressly exempted[215]. The Regulations cover both "services forming part of health services"[216] and "general health services"[217]. General health services include GP led services, general dental services, general ophthalmic services and pharmaceutical services.

241. The test of ordinary residence is derived from common law and does not coincide with nationality. It has been developed by the courts with the judgment of the House of Lords in *Shah v. Barnett LBC*[218] often regarded as the leading authority. The case concerned financial support for education and also considered the use of the phrase for taxation purposes. Lord Scarman, with whom the other members of the House of Lords agreed, observed that:

> *"Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."*

242. This approach was approved by the UKSC in *R (Cornwall County Council) v Secretary of State for Health and Another*[219] and also relatively recently by the Northern Ireland High Court[220]. In the context of the 2015 Regulations it is this common law

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[213] Provision of Health Services to Persons Not Ordinarily Resident Regulations (NI) (2005); Provision of Health Services to Persons Not Ordinarily Resident (Amendment) Regulations (NI) (2008); The Charges for Drugs and Appliances and Provision of Health Services to Persons Not Ordinarily Resident (Amendment) Regulations (NI) (2009); Charges for Drugs and Appliances and Provision of Health services to Persons Not Ordinarily Resident (Amendment) regulations (NI) (2009); Provision of Health Services to Persons Not Ordinarily Resident Regulations (NI) (2013); The Provision of Health Services to Persons Not Ordinarily Resident (Amendment) Regulations (2020); The Provision of Health Services to Persons Not Ordinarily Resident (Amendment) (Revocation) Regulations (2020); The Provision of Health Services to Persons Not Ordinarily Resident (Amendment) Regulations (2021)

[214] Regulation 2 of Provision of Health Services to Persons Not Ordinarily Resident Regulations (NI) (2015)

[215] Regulation 3 of Provision of Health Services to Persons Not Ordinarily Resident Regulations (NI) (2015)

[216] Provisions in part 2 of the 2015 Regulations. Regulation 2 provides that this phrase should be interpreted in accordance with part VI of the Health and Personal Service (NI) Order (1972). This is primary medical services, general dental services, general ophthalmic services or pharmaceutical services

[217] Provisions in part 3 of the 2015 Regulations. Regulation 2 provides that "services forming part of health services" means services forming part of health services" means accommodation, services and other facilities provided under Article 5 of the Order (the Department's duty to provide accommodation and medical services, etc) and includes accommodation, services and other facilities provided by a HSC trust

[218] (1983) 2 AC 309

[219] [2016] AC 137

[220] And by Mr. Justice McCloskey in 2018 NIQB 67, paragraph 43 in respect of health and social care arrangements between England and Northern Ireland

meaning, subject to limited statutory intervention, which continues to define the term. For example, regulation 2 discounts any temporary absence for up to 182 continuous days. Another legislative intervention is found in section 39 of the Immigration Act (2014). It provides that:

> *(1)A reference in the NHS charging provisions to persons not ordinarily resident in Great Britain or persons not ordinarily resident in Northern Ireland includes (without prejudice to the generality of that reference) a reference to—*
>
> *(a)persons who require leave to enter or remain in the United Kingdom but do not have it, and*
>
> *(b)persons who have leave to enter or remain in the United Kingdom for a limited period.*

243. Regulation 4 enumerates the types of health services for which no charge shall be imposed on a visitor. Instead, they will be provided free of charge at the point of access in a manner equivalent to those deemed ordinarily resident. This is qualified in the case of a visitor who, it appears, has travelled to the jurisdiction for specifically to receive those services[221]. They include the following services

- accident and emergency services in a hospital or minor injuries unit but excludes services provided whilst an in-patient or at an outpatient appointment[222]
- services provided outside a health service hospital unless covered by part 3
- family planning services[223]
- treatment in respect of certain diseases[224]
- treatment for sexually transmitted diseases[225]
- treatment for HIV[226]
- services provided under a detention order under the Mental Health (NI) Order (1986)[227]
- treatment provided on the basis of an order of court[228]

244. Regulations 5 - 22 lists the distinct categories of visitors who are exempt from health service charges. Those exemptions are only to the extent that a person who is

[221] Regulation 4(2)
[222] Regulation 4(1)(a)
[223] Regulation 4(1)(c)
[224] Regulation 4(1)(d) read together with paragraph 1 of schedule 1 includes the following - Acute encephalitis; Acute poliomyelitis; Anthrax; Botulism; Bruscellosis; Cholera; [Coronavirus Disease (COVID-19);Diphtheria; Enteric fever (typhoid and paratyphoid fever); Food poisoning; Haemolytic uraemic syndrome (HUS); Infectious bloody diarrhoea; Invasive group A streptococcal disease and scarlet fever; Invasive meningococcal disease; Legionnaires disease; Leprosy; Leptospirosis; Malaria; Measles; Mumps; Pandemic Influenza; Plague; Rabies; Rubella; Severe Acute Respiratory Syndrome (SARS); Smallpox; Tetanus; Tuberculosis; Typhus; Viral haemorrhagic fevers; Viral hepatitis; Whooping cough; Yellow fever
[225] Reg 4(1)(e0
[226] Reg 4(1)(f)
[227] Reg 4(1)(g)
[228] Regulation 4(1)(h)

deemed to be ordinarily resident would also be exempt[229]. The exempted categories are:

- those lawfully resident elsewhere in the United Kingdom for a period of not less than 12 months[230];
- work, study, volunteer position or taking up permanent residence in the United Kingdom[231]
- Those who would benefit under rights contained in EU law[232]
- Citizens of states which have entered into reciprocal arrangements[233]
- human trafficking
- exceptional humanitarian reasons
- Diplomats in accordance with the Vienna Convention; NATO forces; long term visits by UK pensioners; war pensioners; UK armed forces, crown servants; former residents working overseas; missionaries; prisoners and detainees including those detained under immigration legislation; employees on ships[234].

245. Refugees, asylum seekers and children are also exempt[235]. Regulation 9 provides:

> *No charge may be made or recovered in respect of any services forming part of health services provided to a visitor who—*
>
> *(a) has been granted temporary protection, asylum or humanitarian protection under the immigration rules made under section 3(2) (general provisions for regulation and control) of the Immigration Act (1971);*
>
> *(b) has made an application to be granted temporary protection, asylum or humanitarian protection under those rules; or*
>
> *(c) is a child, taken into the care of an authority under the Children (Northern Ireland) Order (1995)*

246. Regulation 21 includes patients whose need arose during a visit to Northern Ireland. Regulation 22 extends the benefits of the enumerated visitors to family members of those visitors.

247. Regulation 24 governs visitors to whom general medical health services will be available. The list replicates regulations 5-22 with the exception of visitors with EU rights and those whose treatment arose during a visit. Such persons are entitled to register with a GP practice for the period of their residence in Northern Ireland. Such visitors are entitled to access the full range of health services.

248. Within the European Union the Patient's Directive (EU) 2011/24/EU prescribes common principles and standards on quality, safety and transparency. It also, in effect, codifies some of the case law of the CJEU regarding the ability to avail of

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[229] Regulation 23
[230] Regulation 5(1)
[231] Regulation 6(1)-6(2)
[232] Regulation 7
[233] Regulation 8 read together with schedule 2
[234] Regulations 9-21
[235] Regulation 9

extramural and intermural care. It had assisted cross-border health care on the island of Ireland. In respect of health care charges for visiting patients the UK's obligations had been transposed in part 4 of the Health Services (Cross-Border Health Care) Regulations (Northern Ireland) (2013). These provisions have now been repealed.

249. The Health Services (Cross Border Healthcare and Miscellaneous Amendments) (Northern Ireland)(EU Exit) Regulations (2019) addresses the changes arising from the end of UK membership of the European Union that arise in respect of cross-border healthcare. The rights in the Directive The explanatory note to the Regulations includes an acknowledgment that:

> *"The subject matter of this instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter"*[236].

250. The NHS surcharge should also be considered at this point. Section 38 of the Immigration Act (2014) permits the Secretary of State to provide for a charge to persons who apply for immigration permission. Those charges must be specified having regard to the range of health services that are likely to be available free of charge to persons who have been given immigration permission[237]. This extends to health services available in Northern Ireland[238].

251. The Immigration (Health Charge) Order (2015) sets out the requirements for payment. Charges will apply to those seeking entry clearance or leave to enter[239.] The consequences of failing to pay the charge is that the application will be refused[240]. Article 7 provides for the possibility of exemptions in accordance with schedule 2. The Secretary of State also has a discretion to waive, reduce or refund all or part of the charge. Most applications for entry clearance or leave to remain are currently charged at £624 per adult and £470 per child[241].

252. Section 39 of the Immigration Act (2014) represents another intervention by the UK Parliament into the devolved arena of healthcare in Northern Ireland. It provides that persons who require leave to enter or remain in the United Kingdom but do not have it and persons who have leave to enter or remain for a limited period are persons who are not "ordinarily resident".

253. Article 7 of the Health and Personal Social Services (NI) Order (1972) is entitled the prevention of illness, care and after care. The Department "*shall make arrangements, to such extent as it considers necessary, for the purposes of the prevention of illness, the care of persons suffering from illness or the after-care of such persons*"[242]. The

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[236] Section 3.3 of Explanatory Memorandum to the Health Service (Cross Border Health Care and Miscellaneous Amendments) (Northern Ireland) (EU Exit) Regulations (2019) 2019 no. 784
[237] Section 38(4) of the Immigration Act (2014)
[238] Section 38(6) of the Immigration Act (2014)
[239] Regulation 3 of the Immigration (Health Charge) Order (2015)
[240] Regulation 6 of the Immigration (Health Charge) Order (2015)
[241] Schedule 1 (as amended) to the Immigration (Health Charge) Order (2015)
[242] Article 7(1) of the Health and Personal Social Services (Northern Ireland) Order (1972)

Department may recover from persons availing themselves of such services as is considered appropriate[243].

254. Article 15 of the 1972 Order addresses "general social welfare". It provides that "*in the exercise of its functions under Article 4(b) the Ministry shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate".*

255. Such arrangements may include arrangements for the provision by any other body or person of any of the social care on such terms and conditions as may be agreed between the Department and that other body or person[244]. The duty was considered by Mr Justice McCloskey (as he then was) in the case of *Re LW*[245] and more recently by Mr Justice Humphreys in *JR 139 (a minor)*[246]. It is to be considered a "target or macro duty" which does not, without more, provide enforceable private rights.

256. Section 121 of the Immigration and Asylum Act (1999) amended these each of these provisions to exclude persons subject to immigration control under section 115 and experiencing destitution. It went as far as to prohibit such assistance as would ordinarily be provided. Instead, affected individuals in Northern Ireland were to be eligible for assessment and support under section 95 of the Act with responsibility falling on the Department of Health[247].

iv) Options for Mitigation

257. The negative effect on health of hostile environment policies on migrants has been a matter of concern for trade unions representing health care workers[248], for doctors themselves[249] and charities representing those migrants[250]. There have been some reported cases in which the imposition of hostile environment health care charges have been linked to death[251].

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[243] Article 7(2) of the Health and Personal Social Services (Northern Ireland) Order (1972)
[244] Article 15(1A) of the Health and Personal Social Services (Northern Ireland) Order (1972)
[245] (2010) NIQB 62
[246] (2021) NIQB 76
[247] Section 15(6) and 15(7) of the Health and Personal Services (Northern Ireland) Order (1972) read together with section 95 of the Immigration and Nationality Act (1999) (as amended)
[248] UNISON – "The Hostile Environment and the NHS". Available at https://www.unison.org.uk/at-work/health-care/big-issues/more-campaigns/hostile-environment-nhs/up-front-charging/
[249] British Journal of General Practice: Access to Primary healthcare for asylum seekers and refugees: a qualitative study of service user experiences in the UK; *British Journal of General Practice 2019;* 69 (685): e537-e545; The negative health effects of hostile environment policies on migrants: A cross-sectional service evaluation of humanitarian healthcare provision in the UK - Wellcome Open Research 2019, 4:109 first published in 2019 and available at https://wellcomeopenresearch.org/articles/4-109
[250] "Patients Not Passports – Migrants Access to Healthcare During the Coronavirus Crisis"; June 2020. Available at: https://www.medact.org/2020/headlines/patients-not-passports-migrants-access-to-healthcare-during-the-coronavirus-crisis/
[251] See Open Democracy Article "How NHS staff are fighting back against the hostile environment" article of 17th May 2019 by James Skinner & Akram Salhab. The authors list Elfreda Spencer, Nasar Khan, Albert Thompson, Kelemua Mulat, Esayas Welday, Pauline Pennant, Beatrice, Saloum, Bhavani Espathi, as having died after being denied care or made destitute after receiving huge medical bills. Article available at https://www.opendemocracy.net/en/ournhs/how-nhs-staff-are-fighting-back-against-the-hostile-environment/

258. Healthcare is a devolved competence under the terms of the Northern Ireland Act (1998). That this is the case was set out concisely by Morgan LCJ in *Re JR*[252]. It was stated that:

> *"By virtue of section 4 of the Northern Ireland Act 1998 (the 1998 Act) a transferred matter means any matter which is not an excepted or reserved matter. General matters of public health are neither excepted nor reserved matters and consequently fall to be dealt with as transferred matters. By virtue of section 23 (2) of the 1998 Act the prerogative and other executive powers in respect of transferred matters are exercisable by any Minister or Northern Ireland department."*

259. The provision of healthcare to *persons in Northern Ireland* is, perhaps, the most significant area of devolved competence. It is certainly the one which commands the greatest proportion of the Stormont budget[253]. The objective of ensuring the highest possible level of health of the entire population, including those without regularised immigration status, is at the heart of the current devolution settlement. The Northern Ireland Court of Appeal described the Minister of Health as *having "a very wide discretion in the field of public health in the context of devolved/regional governance"*[254].

260. The targeting of health care by hostile environment measures in UK legislation, including but not limited to the Immigration Act (2014) and Immigration Act (2016), does not remove the subject from the category of transferred matters and transform it an excepted matter. The restriction of access to any aspect of healthcare is, it is submitted, at the discretion of the Department of Health under article 42 of the 1972 Order. As a general proposition it cannot be said to come within scope of the immigration exception in paragraph 8 of schedule 2 to the Northern Ireland Act (1998). It is open to the Department, by amending regulations, to expand the list of health conditions which do not attract charges. It is also open to the Department to increase the list of exempt visitors.

261. It is also open to the Northern Ireland Assembly to modify the meaning of "ordinarily resident in Northern Ireland". The Department of Health has published operation guidance on the 2015 Regulations. It explains the scope of eligibility to receive publicly funded health care and provides advice on the meaning of "ordinary residence".

262. The question of whether someone is "ordinarily resident" in Northern Ireland is governed by common law and statute. As explained above it will require a factual and legal assessment of all relevant circumstances. It is, in this context however, clearly a matter of the law of Northern Ireland.

263. It is also of note that the Welsh Assembly had previously departed from the approach in England to include failed asylum seekers as an exempt category from health care charges in the National Health Service (Charges to Overseas) Visitors (Amendment) (Wales) Regulations (2009) WSI 2009/1512. In its 2011 publication

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[252] (2016) NICA 20, paragraph 55
[253] Department of Finance Budget 2020-2021 statement (https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/Budget%202020-21%20-%20Ministerial%20Statement.pdf
[254] Re JR65 (2016) NICA 20, para 110-113

"Access denied – Or Paying When You Shouldn't" the Northern Ireland Human Rights Commission was informed by the Department of Health that its view was that "the competence to provide the legislative framework for entitlements to publicly funded medical care rests with it by virtue of the Northern Ireland Act 1998.[255]"

264. Charging arrangements are a devolved matter. The intervention by the UK Parliament to legislate on the precise point of who can be regarded as "ordinary resident" for the purposes of accessing public health care in Northern Ireland is constitutionally permissible. It is an exercise of the sovereignty of Westminster but for the reasons already explained this does not have the effect of displacing devolved competence. Had that been the intention of Parliament there are other legislative methods available. Consequently, it is submitted that amendment, repeal or modification of section 39 of the 2014 Act is an option open to the Northern Ireland Assembly.

265. The imposition of the NHS surcharge, as a condition of securing immigration status, is not a matter which could be considered to come within the legislative competence of the Assembly as provided for by the Northern Ireland Act (1998). This aspect of the immigration process is inseparable from the grant of right to enter or reside under the Immigration Act (2014) and the Immigration Rules. The devolved institutions could, however, elect to reimburse migrants who go on to reside in Northern Ireland but this could not alter the requirement to pay up front.

266. The restrictions on assistance to persons subject to immigration control, and at risk of destitution, inserted into the Health and Personal Social Services (Northern Ireland) Order (1972) must also be considered to be transferred matters. It is open to the Northern Ireland Assembly to restore the position permitting the Department of Health to make arrangements as it deems suitable and adequate to meet the migrant patient's needs consistent with its overall duty to promote the health and welfare of all the people in Northern Ireland.

L. The Hostile Environment – Banking

i) Mapping the Hostile Environment

267. Although banks and building societies were already required to review the identity of customers together with the source of their funds in the Money Laundering Regulations (2007) the "hostile environment" was also extended into this arena. Section 40 of the Immigration Act (2014) prohibits banks and building societies from opening current accounts for persons unless their immigration status has been checked[256]. The provision applies throughout the United Kingdom.

268. The UK government factsheet[257] described the purpose as being to:

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[255] "Access Denied – Or Paying When You Shouldn't": Access to publicly funded medical care: residency, visitors and non-British/Irish citizens (NIHRC January 2011, authored by Daniel Holder); see section 4 which refers to the DHSSPS response to the NIHRC on 14th December 2010

[256] Brought into effect by Immigration Act 2014 (Commencement No.2) Order (2014), article 2; 12th December 2014

[257] Immigration Bill Factsheet: Bank Accounts; Clauses 35-38 (Bank accounts); published by Home Office & HM Treasury (October 2013)

"Ensure that known illegal migrants are not able to open current accounts… being refused a current account will make it extremely difficult for the individuals concerned to access other lines of credit such as mobile phone contracts, credit cards or other types of loans (including a mortgage) which rely on a current account to make repayments … This will in turn assist in preventing illegal migrants from gradually building up a credit history and from illegally establishing a life in the UK"

269. Disqualified persons are defined in section 40A(3) as:

"(*3) A "disqualified person" is a person—*

(a) who is in the United Kingdom,

(b) who requires leave to enter or remain in the United Kingdom but does not have it, and

(c) for whom the Secretary of State considers that a current account should not be provided by a bank or building society."

270. Banks were also required to conduct regular checks[258] and close accounts under the amendments brought in with schedule 7 to the Immigration Act (2016). When such a review determined that an account holder was a "disqualified person" the institution was mandated to inform the Secretary of State of that fact together with other information[259] as provided by the Immigration Act 2014 (Current Accounts) (Excluded Accounts and Notification Requirements) Regulations (2016)[260]. The Home Office also published guidance on how it will exercise the powers made available to it[261].

271. The procedure sets out that the Secretary of State may apply for a freezing order under section 40D. In Northern Ireland this will be heard by the Magistrates Court[262.] Appeals are heard by the County Court[263].

272. The power to suspend and close bank accounts came under widespread criticism in the wake of the Windrush scandal[264]. In evidence to the House of Commons Home Affairs Committee in May 2018 the (then) Home Secretary Sajid Javid stated that the Home Office was not to go ahead with the closure of bank accounts of those suspected to be "disqualified persons"[265].

ii) Options for Mitigation

273. The consequences of losing access to banking services is obvious. Without such facilities individuals are at risk being unable to pay a mortgage, rent, utility bills, childcare and/or health care costs. Such persons can accrue debt, destitution and

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[258] Section 40A of the Immigration Act (2014)
[259] Section 40B
[260] Regulation 3
[261] Immigration Act (2014) Code of Practice: Freezing Orders (Bank Account Measures); brought into force on 30th October 2017 by The Immigration Act (2014) (Current Accounts) (Freezing Orders) Code of Practice Regulations (2017)
[262] Section 40D(9)
[263] Section 40E(4)
[264] https://www.theguardian.com/uk-news/2018/may/17/home-office-suspends-immigration-checks-on-uk-bank-accounts
[265] https://www.freemovement.org.uk/migrant-bank-account-closure-letters-sajid-javid/

housing insecurity. They may be unable to secure credit. An immigration solicitor in Belfast recounted assisting a client who was a single mother with a successful small business. Her business account was wrongly suspended and the error took several weeks to resolve. During this time she was unable to run her business and suffered financial loss and reputational damage.

274. Schedule 3 to the Northern Ireland Act (1998) lists "reserved matters". Such matters are beyond the legislative competence of the Northern Ireland Assembly. Paragraph 23(a) includes:

> *(a) financial services, including investment business, banking and deposit-taking, collective investment schemes and insurance;*

275. The hostile environment measures concerning banking will fall squarely within paragraph 23 of schedule 3 above rather than paragraph 8 of schedule 2. These are matters concerning financial services and banking rather than immigration and nationality. They are currently beyond the legislative competence of the Northern Ireland Assembly as provided for in the Northern Ireland Act (1998).

276. However, given that the current Home Office policy is to move away from the automatic closure of bank accounts the possibility of this reserved matter becoming a transferred matter under the mechanism provided for in section 4(2) of the Northern Ireland Act (1998) exists. An enactment of the Northern Ireland Assembly which sought to mitigate some of the effects of the hostile environment in some or all of the subject matters identified above might, it is suggested, benefit from corresponding provisions on banking. The practical ability to secure accommodation and motor insurance, for example, often require access to a bank account.

M. Borders and Nationality Bill

277. The Nationality and Borders Bill (2021) was published on the 6th July 2021. At the time of writing it had completed its second reading before Parliament and had been amended in public bill committee. The legislation implements large parts of the UK Government's New Plan for Immigration266. There was also a consultation process which ended in May 2021[267].

278. The Home Office has described the objectives of the Bill as including making the immigration system fairer and more effective in order to better protect those in genuine need of asylum; to deter illegal entry into the UK by breaking the business model of criminal trafficking networks; and to remove those from the UK with no right to residence.

279. There are a number of matters which have received considerable public attention including plans for the return of migrants to third countries, further measures to deter asylum claims in the UK and a new emphasis on the manner of arrival in the UK as consequential for the type of support that will be provided pending an application for residence and/or asylum. The proposals could establish a 'two-tier' protection

[266] https://www.gov.uk/government/consultations/new-plan-for-immigration/new-plan-for-immigration-policy-statement-accessible

[267] The time period for the consultation was criticised in some quarters. https://www.amnesty.org.uk/press-releases/uk-government-rushes-ahead-nationality-and-borders-bill-despite-majority-opposing

system, which unfairly distinguishes between refugees depending on their mode of arrival to the UK[268]. The Bill also addresses a number of matters that would seem to come within the sphere of transferred competences such as the identification, credibility and criminalisation of victims. An assessment of the extent to which the Bill falls within Scottish legislative competence has recently been published[269].

280. What is now clause 11(2) provides that refugees would be categorised as a 'Group 1 refugee' if they are considered to come within the scope of Article 31 of the Refugee Convention having arrived directly from a country where their life or freedom was threatened and have claimed asylum without delay. Those who could not satisfy those conditions would be categorised as "group 2 refugees". The latter group will be treated less favourably throughout and after the process of regularisation including reduced rights of family reunion and imposition of a no recourse to public funds condition if and when permission to remain was granted.

281. The offence of illegal entry to the UK is broadened and clarified[270]. The offence of assisting unlawful immigration will now have a maximum sentence of life imprisonment[271]. The requirement that a person act "for gain" in such conduct is removed[272]. This has led to some uncertainty over whether rescue agencies could, potentially, be vulnerable to prosecution for saving the lives of those at sea. Also, some of the measures have been described as being inconsistent with the promise of non-penalisation in the Refugee Convention[273]. The much criticized power to turn around boats in the English Channel has aroused much attention but it is very unlikely to be implemented in practice[274].

282. The legislation is to apply to the whole of the United Kingdom including Northern Ireland[275]. It does, however, include some measures which could be regarded as coming within scope of devolved competences in Northern Ireland. For example, part 5 concerns modern slavery. The Trafficking Directive will cease to be part of retained EU law in the UK[276] and the "victim of slavery" and "victim of human trafficking" are to be defined in regulations by the Secretary of State[277].

283. Trafficking is not necessarily and always a part of the immigration system. Those who claim to have been trafficked may seek leave to remain and/or support while navigating the immigration processes but the needs of such persons clearly go beyond that. The identification and protection of victims and the prevention of trafficking are duties that fall to the PSNI, the Public Prosecution Service, the Health and Social Care Trusts, the Independent Guardian Scheme and the Northern Ireland

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[268] Commons Library research Briefing; Nationality & Borders Bill by Melanie Gower; 15th July 2021
[269] JustRight Scotland and the Scottish Refugee Council jointly commissioned a legal opinion from Christine O'Neill QC and Brodies. Available at https://www.justrightscotland.org.uk/2021/11/legal-opinion-what-does-the-nationality-and-borders-bill-mean-for-devolution-in-scotland/
[270] Clause 39
[271] Clause 40(1)
[272] Clause 40(2) will amend section 25A(1) of the Immigration Act (1971) in this respect
[273] https://www.freemovement.org.uk/the-nationality-and-borders-bill-2021-first-impressions/
[274] https://www.freemovement.org.uk/only-french-cooperation-can-stop-the-channel-boats/?utm_source=rss&utm_medium=rss&utm_campaign=only-french-cooperation-can-stop-the-channel-boats&mc_cid=7f3199f133&mc_eid=75ac782875
[275] Clause 81(1)
[276] Clause 67
[277] Clause 68(1)

Court Service. The Assembly has already legislated to ensure the UK's obligations under international human rights law are adhered to in this jurisdiction as has the Scottish Parliament in the Human Trafficking and Exploitation (Scotland) Act (2015).

284. The Bill also contains further restrictions on the ability of asylum applicants to obtain support under part VI of the Immigration and Asylum Act (1999). The possibility of accommodating asylum seekers in specific accommodation centres is continued[278]. However, such a course of action remains subject to the duty to consult the Executive Office in section 41 of the Nationality, Immigration and Asylum Act (2002)[279]. As discussed above, the duties of local authorities in England and the Health and Social Care Trusts in Northern Ireland to support, safeguard and protect the interests of children will remain. The measures contained in the 2021 Bill are consistent with the ethos of the "hostile environment" and may be characterised as "cracking down on asylum" but they amount to further displacement of responsibility.

285. At the present time social workers in Northern Ireland conduct age assessments in accordance with the international and domestic legal framework for doing so[280]. They do so for the purposes of assessing what duties are owed to children under international and the law of Northern Ireland including Trafficking Act and the Children (NI) Order (1995). They have drafted a formal age assessment policy, due shortly for publication. They are currently guided by a professional instruction on the general approach to take; including multi-disciplinary input from both child experts and legal experts.

286. However, what is currently part 4 of the Bill amounts to much greater intervention by the UK government into this devolved arena. Clause 49 is intended to govern age assessment by local authorities. This will include health and social care trusts in Northern Ireland[281]. It provides for a system of referral for age assessment under which assessment by Trusts must, in effect, be validated by the Secretary of State[282]. Clause 51 confers on the Secretary of State the power, by regulations, to make provision about the processes for assessing the age of persons. A failure to consent to testing, including measurement of parts of a person's body, analysis of saliva, cell or other samples, must be taken into account as damaging to the person's credibility.

287. Under clause 52(1) it is intended that the Secretary of State would make regulations about age assessments. Such rules may include a range of issues which are currently the responsibility of the devolved health and social care authorities. They include (i) the information and evidence that must be considered and the weight to be given to it, (ii) the circumstances in which an abbreviated age assessment may be appropriate, (iii) protections or safeguarding measures for the age-disputed person, and (iv) where consent is required for the use of a specified scientific method, the processes for

[278] Clause 12

[279] Section 41(1) of the Nationality, Immigration and Asylum Act (2002) provides that the Secretary of State may not make arrangements under section 16 for the provision of premises in Northern Ireland unless he has consulted the First Minister and the deputy First Minister

[280] Children's Law Centre: Response to the Home Office's 'New Plan for Immigration' Consultation, May 2021. Available at https://childrenslawcentre.org.uk/

[281] Clause 48(c) provides that in relation to Northern Ireland "local authority" means a Health and Social Care trust established under Article 10 of the Health and Personal Social Services (Northern Ireland) Order 1991 (S.I. 1991/194 (N.I. 1))

[282] Clauses 49 and 50 read together

assessing a person's capacity to consent, for seeking consent and for recording the decision on consent. The regulations may also specific the qualifications and experience necessary for a person to conduct an age assessment and the consequences of a lack of co-operation. This could conceivably lead to a situation where age assessment in Northern Ireland for immigration purposes is conducted by different persons using different standards than age assessment for other reasons.

288. A further concern is found in what is currently clause 70 and 71 of the Bill. They address processing of visa applications and electronic travel authorisations respectively. Requiring individuals to display identification and travel authorisation at the border between north and south was one of the principal concerns which determined the ultimate shape of the Withdrawal Agreement and the need for bespoke arrangements between the jurisdictions on the island of Ireland. It was perhaps the single highest priority for the Irish government, and one reflected in the European Union position and ultimately accepted by the UK government, in the negotiations. It is currently set out in article 1(3) of the Ireland / Northern Ireland Protocol which provides states that:

> *"This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions"*

289. The existing arrangements between the United Kingdom and the Republic of Ireland under the common travel area are further protected in article 3. These provisions should be afforded primacy over all conflicting national measures by the Withdrawal Agreement itself and by section 7A of the European Union (Withdrawal) Act (2018). They should benefit from the same status as did directly effective European Union law under section 2 of the European Communities Act (1972). In this respect the provisions appear to be conceptually equivalent to what was described by a majority of the UKSC in *Miller (no.1)* as "an independent and overriding source of domestic law"[283]. The volume of material which benefits from this status has been greatly reduced but no other effect could be said to be consistent with the requirement in article 4(1) of the WA. That must mean *Van Gen den Loos* direct effect; supremacy as seen in *Costa, Simmenthal and Factortame*, consistent interpretation, effectiveness and the CJEU as the final authority on interpretation. It provides that:

> *"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."*

290. As already set out entry into the United Kingdom, including into Northern Ireland from the Republic of Ireland, would come within the immigration exception in paragraph 8 of schedule 2 to the 1998 Act. The extent to which the regime

[283] Gina Miller v. SoS for Exiting the European Union (2018) AC 61, para 61-66, 80

contemplated in clause 71 are practically achievable and consistent with the promises made in the Withdrawal Agreement are yet to be seen. Whether those promises, in particular articles 1 and 3, are capable of direct effect in the United Kingdom legal order, and what their true scope covers, is also yet to be determined. It is suggested that this may ultimately be a matter for the CJEU as the final interpreter of Union law including the Withdrawal Agreement and the Protocol.

Mark Bassett BL
December 2021

Afterword:

CAJ would like to express our sincere thanks to Mark Bassett BL for authoring this report. If you have any questions or feedback in relation to it, please contact Úna Boyd, Immigration Project Solicitor & Coordinator, Committee on the Administration of Justice (CAJ), on info@caj.org.uk or 028 9031 6000.

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