

# The Northern Ireland Protocol / Windsor Framework

A New Dawn for Human Rights  
Protections?

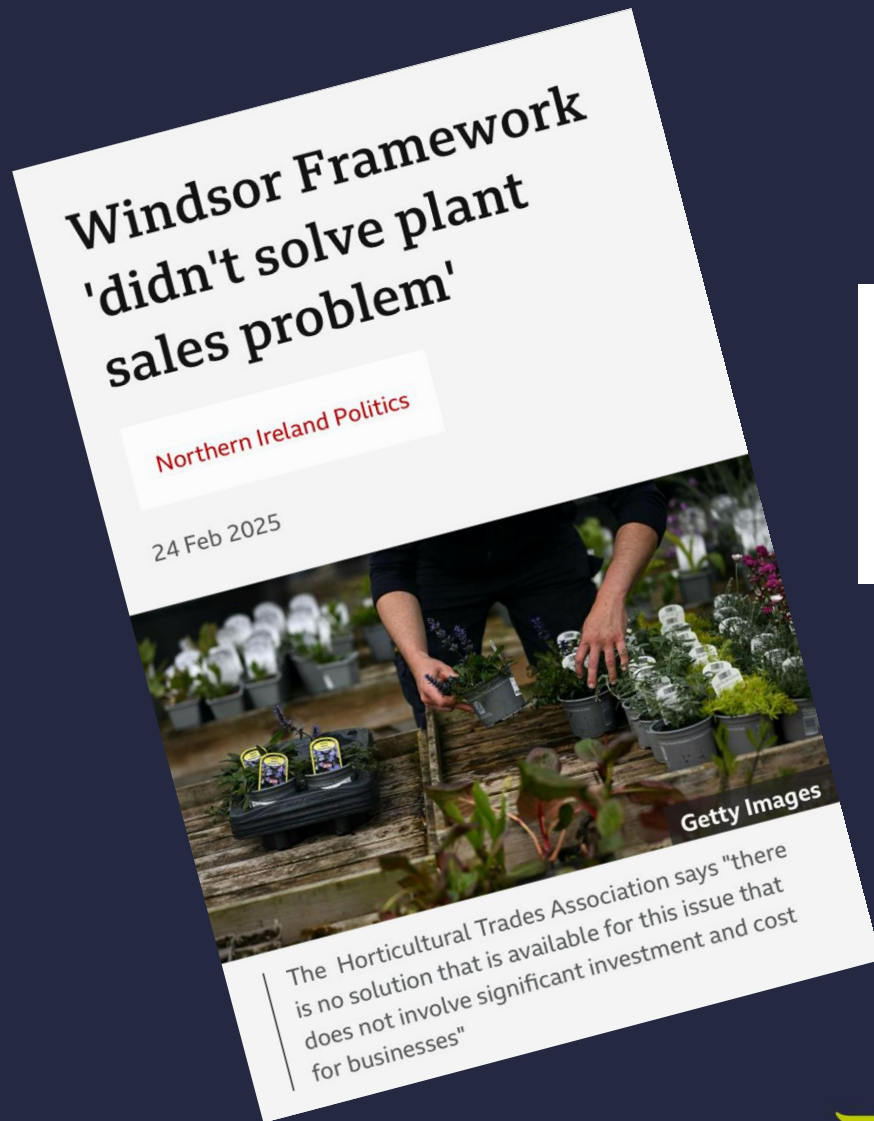
Darragh Mackin, Phoenix Law  
IPLS - 26<sup>th</sup> February 2025

**PHOENIX LAW**

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# Introduction

1. The Northern Ireland Protocol (now known as the Windsor Framework), part of the Withdrawal Agreement concluded between the European Union and the United Kingdom, is intended to address the difficult and complex impact of Brexit.
2. Its controversy is only outweighed by its importance.
3. The single most important piece of legislative architecture that governs the relationship between the UK and the EU.
4. It encapsulates issues that range from trade flows to free movement, from North–South co-operation, customs arrangements to democratic oversight by the Northern Ireland Assembly.



The Windsor Framework has not provided a solution for Northern Ireland consumers who want to buy plants from online retailers in GB, a trade body has told MPs.



## Court challenge over vote to extend post-Brexit trading arrangements dismissed



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## The Windsor Framework and the Northern Ireland Protocol and why they are important for peace on the island of Ireland

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*“I can’t think of a topic that has raised more challenging legal issues for these courts than the application of the Windsor Framework and the consequences that will apply where it overrides domestic legislation”*

*“These are some of the most groundbreaking and novel legal issues that these Courts have grappled with in the last decade”*

Dr Tony McGleenan KC, Senior Crown Counsel (19 Feb 2025)

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## 1. Litigating Politics:

- i. *Allister v Secretary of State for Northern Ireland* [2022] NICA 15
- ii. *Re Jamie Bryson* (unreported)

## 2. Litigating Rights:

- i. *Re SPUC* [2022] NIQB 9
- ii. *Re Dillon & Others* [2024] NICA 59
- iii. *Re NIHRC and JR295* [2024] NIKB 35

# Withdrawal Agreement

Withdrawal Agreement made between UK and EU.

## **Article 5 Withdrawal Agreement:**

“The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement. They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement. This Article is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation.”

## **Article 4(4) Withdrawal Agreement:**

“The provisions of the Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period”

# Status in UK Law

UKSC in *Re Allister*:

[188] The official description given to section 7A is significant as it denotes the purpose of the amendment was for the “general implementation of remainder of the Withdrawal Agreement.” Section 7A(1) provides that all rights, powers, liabilities, obligations, restrictions, remedies and procedures are “**without further enactment to be given legal effect or used in the United Kingdom.**” The phrase “without further enactment” tells us that this is automatic and so the **WA terms become part of domestic law.** This is confirmed by subsection 2 which states that the said rights, powers, liabilities, obligations, remedies and procedures concerned are specifically to be “recognised and available in domestic law” per 7A(2) and “enforced, allowed and followed accordingly as per 7A(2).”

[189] The terms of section 7A(3) define scope in a broad way as “every enactment” ‘... is to be read and has effect subject to subsection 2.’ “**Enactment**” is defined in section 39(1) of the interpretation provisions as “**an enactment whenever passed or made and includes inter alia an Act of Parliament.**” It follows that any Act of Parliament must be read and has effect subject to the WA. The WA has been made law by the EUWA 2018 as amended. **Therefore, any other Act must be read subject to the terms of this statute.**

## Article 2 NIP / WF:

- The United Kingdom shall ensure that **no diminution of rights, safeguards or equality of opportunity**, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity **results from its withdrawal from the Union, including** in the area of protection against **discrimination**, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
- Given direct effect as a result of Section 7a (see *Allister*).



# Article 2(1)

For a breach, it is necessary to prove:

- A right in the Rights, Safeguards or Equality of Opportunity Section of the Belfast Good Friday Agreement.
- An EU Law underpinning, including but not limited to discrimination and Annex 1 Directives.
- Diminution.
- The Diminution would not have occurred, had the UK remained in the EU.

# Rights, Safeguards, Equality of Opportunity

The parties affirm their commitment to the mutual respect, the **civil rights and the religious liberties** of **everyone in the community**. Against the background of the recent history of communal conflict, the parties affirm **in particular**:

- the right of free political thought
- the right to freedom of expression and expression of religion;
- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one's place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender, or ethnicity;
- the right to freedom from sectarian harassment; and
- the right of women to full and equal participation.

# Who is 'the Community'?

- “Everyone who is subject to Northern Ireland Law” (The UK Government Explainer)
- “civil rights...of everyone in the community”, which must extend to asylum seekers as well as UK or Irish citizens (Colton J in *Re Angsom's Application* [2023] NIKB 102 at §107] and §108)
- [69] *The argument advanced by the respondents that the RSE referenced in the B-GFA are limited to those which relate to the healing of sectarian division in Northern Ireland through reconciliation did not find favour with Colton J in either Angsom or Dillon. Whilst it is true to say that the B-GFA did not expressly reference immigration or asylum, there is no basis to exclude such individuals from the wide compass of “everyone in the community.” (Humphreys J in Re NIHRC & JR295)*

*[115] In our view, the trial judge correctly highlighted the breadth of “civil rights” in the RSE chapter of the B-GFA. Para 1 of that section affirms the parties’ commitment to the “civil rights and religious liberties of everyone in the community.” Some individual rights are then mentioned “in particular”, which are designed to illustrate rights of potentially special significance in the context in which the B-GFA was reached. Some of these rights, such as freedom of thought and religion, were and are well-known and well-recognised fundamental human rights. However, it is clear that the commitment to rights and safeguards encompassed within the RSE chapter was intended to extend much further than those rights specifically listed in para 1. The import of that chapter is that a broad suite of rights which had been recognised by the participants in the talks, and which were to be given further effect in the mechanisms to be established pursuant to the B-GFA (such as the incorporation into Northern Ireland law of the ECHR), would provide a baseline for individual rights-protection in the new arrangements which were to follow. The new arrangements for Northern Ireland’s governance were to be founded on the protection of citizens’ rights. There is no reason, in our view, to construe the broad language of the RSE chapter restrictively. That applies whether or not the VCLT interpretative approach applies or not.*

Must demonstrate that the protections are underpinned by EU Law.

The burden is on the applicant.

In SPUC the applicant failed to demonstrate that prohibition of abortion on grounds of severe foetal abnormality “*has been given effect or underpinned by European Union law*”. Court found that this was not within EU competence, therefore reliance on Article 2 unsuccessful.

That underpinning has been removed, in whole or in part, following withdrawal from the EU;

This has resulted in a diminution in enjoyment of this right; and

This diminution would not have occurred had the UK remained in the EU.  
(*Re SPUC* at §54)

In simple terms, *“But for the UK’s exit that diminution would have been able to occur, legally”* (Professor McCrudden)

# The Article 2 Battleground

- *Re Dillon & Others* [2024] NICA 59 ('The Legacy Act Challenge')
- *Re NIHRC & JR295* [NIKB] 35 ('The IMA Challenge')

During the period of the UK's membership of the EU, it was recognised that EU law was supreme and, in the event of a conflict existing between EU and relevant domestic law, the former would prevail.

*“Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus, there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.”*

*(Factortame) v Secretary of State for Transport [1991] 1 AC 603*



*[175] Read together, the provisions of article 4 of the WA and section 7A of the Withdrawal Act are juridically aligned to the approach to the supremacy of EU law under the 1972 Act and Factortame. In the circumstances where domestic law is inconsistent with the provisions of the WA and laws made applicable by article 4, the latter take precedence and domestic law is disapplied. This outcome does not occur at the whim of the courts but represents the will of Parliament as articulated in the Withdrawal Act.*

Humphreys J in *Re NIHRC & JR295* at §175

# Future Battlegrounds?

**Article 5 Withdrawal Agreement:-** *Duty for UK and EU to act in 'Full mutual respect and good faith' in carrying out tasks that flow from the Withdrawal Agreement.*

**Article 11(1) NIP/WF:-** *to be implemented to maintain necessary conditions for the continued North South Co-Operation including in the areas of (1) environment, (2) health, (3) agriculture, (4) transport, (5) education and (6) tourism, as well as in the areas of (7) energy, (8) telecommunications, (9) broadcasting, (10) inland fisheries, (11) justice and security, (12) higher education and (13) sport.*

**Article 13 NIP/WF:-** *Requirement to interpret provisions of protocol re Union law in line with CJEU Jurisprudence.*

***Any Questions?***