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Understanding the implications of article 2 of the Northern Ireland Protocol in the context of EU case law developments

Eleni Frantziou
Durham University
Sarah Craig
Queen's University Belfast
Correspondence email: eleni.frantziou@durham.ac.uk and se.craig@qub.ac.uk

ABSTRACT

Conscious of the careful balance stemming from the Rights, Safeguards and Equality of Opportunity provisions of the Belfast/Good Friday Agreement 1998, it was clear that human rights guarantees underpinned by European Union (EU) law would be a pivotal aspect of the Protocol on Ireland/Northern Ireland within the Withdrawal Agreement. The commitment is particularly prominent in respect of equality law, as a guarantee that no diminution of rights and equality protections would result from withdrawal from the EU was built into article 2(1) of the Protocol providing for non-diminution of rights in Northern Ireland post-Brexit. The purpose of this article is to identify and analyse recent developments in EU equality case law which may trigger the non-diminution obligation from the entry into force of the Protocol to the date of writing (ie between 1 January 2021 and 1 September 2022). This analysis is underpinned by a systematic case law review to provide an evidence-based analysis of: a) where divergence of equality protection standards is occurring presently; and b) where these concerns are likely to present in the future. The article identifies four substantive areas, namely religious discrimination, disability discrimination, gender equality in the field of pensions and social security, and migration law, which raise significant and complex questions about the practical feasibility of the non-diminution obligation. In light of the thematic case law analysis, the article offers broader reflections on the future direction of article 2 obligations, which could be used to approach the non-diminution commitment prospectively.

Keywords: Northern Ireland Protocol; Brexit; article 2 of the Northern Ireland Protocol; diminution of rights; Court of Justice of the European Union; equality.

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INTRODUCTION

Conscious of the delicate balance set up by the Rights, Safeguards and Equality of Opportunity provisions of the Belfast/Good Friday Agreement 1998[1] (the 1998 Agreement), both sides of the Brexit negotiations agreed early on that the maintenance in Northern Ireland of human rights guarantees underpinned by European Union (EU) law would be a central element of the Protocol on Ireland/Northern Ireland (the Protocol) annexed to the Withdrawal Agreement.[2] The significance of this commitment was particularly clear in respect of equality law, as EU secondary legislation has played a key role in codifying minimum standards in this field across the United Kingdom (UK). In the absence of an explicit guarantee of continued protection, it was feared that future changes could quickly jeopardise the 1998 Agreement. A guarantee that no diminution of rights and equality protections would result from withdrawal from the EU was, therefore, built into article 2(1) of the Protocol, which provides:

> 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.

The purpose of this contribution is to identify and analyse developments in EU case law that may trigger this non-diminution obligation since the entry into force of the Protocol to the date of writing, ie between 1 January 2021 and 1 September 2022. This undertaking has a twofold significance: first, it provides an evidence-based account of the areas where divergence is likely to occur, based on a verifiable and consistent methodology. Secondly, in light of the breadth of the developments we identify within only a short span of time, the article underlines the complexity of the non-diminution commitment, thus offering a critical perspective on its day-to-day feasibility and, as such, potentially serving as a justification for further policy changes or support for the institutions entrusted with carrying it forward.[3]

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1 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) 1998 (2114 UNTS 473).

2 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020) UKTS 3/2020.

3 Ibid. Sch 3, para 7 gives the obligation that the Northern Ireland Human Rights Commission (NIHRC) and Equality Commission for Northern Ireland (ECNI) must monitor the implementation of article 2(1) Protocol rights.

Our analysis proceeds by explaining key assumptions we have made and the methodology we have used to come to our findings, in the next section, before going on to lay down and closely analyse the direct implications of these findings. The substantive areas of equality and human rights law where we have identified significant changes or potential upcoming changes fall mainly into four categories: religious discrimination; disability discrimination; gender equality in the field of pensions and social security; and migration law. We then provide some reflections on the broader themes stemming from this case law, which could be used to approach the non-diminution commitment prospectively. These are: reliance on the principle of proportionality; the use of human dignity as an underpinning of equality and social rights; and a commitment to effective judicial protection and, particularly, access to the court. A final section concludes.

METHODOLOGY AND UNDERLYING ASSUMPTIONS REGARDING THE SCOPE OF THE ARTICLE 2 OBLIGATION

A broad interpretation of article 2

The language of 'non-diminution' used in article 2 of the Protocol is arguably difficult to unpack, and the nature of the obligation it enshrines has been the subject of extensive academic debate.[4] While it is not the primary purpose of this article to contribute to this debate, it is essential for us to set out our overall understanding of article 2, as this informs the developments that we have identified as relevant to its operation.

More specifically, whereas article 2 of the Protocol speaks of 'non-diminution' in a general way, when it is read alongside its annexes it appears to create a two-tiered obligation to track EU standards. First, there is a broad obligation not to fall below the level of protection of equality and human rights as it was at time of the Protocol's entry into force on 1 January 2021 in any area that pertains to the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement.[5]

4 See, for a thoughtful summary and analysis, Paul Evans, Alexander Horne and Tasneem Ghazi, Legislative Scrutiny and the Dedicated Mechanism for Monitoring Article 2 of the Ireland/Northern Ireland Protocol under the UK's January 2020 Withdrawal Agreement with the EU (ECNI 2022).

5 Thomas Liefländer and Daniel Denman, 'The Withdrawal Agreement, Protocol on Ireland/Northern Ireland' in Manuel Kellerbauer, Eugenia Dumitriu-Segnana and Thomas Liefländer (eds), *The UK–EU Withdrawal Agreement: A Commentary* (Oxford University Press 2021) 407, 414–416; Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Rights, opportunities and benefits in Northern Ireland after Brexit' (NIHRC and IHREC 2020) 42.

Second, article 2 also sets up a narrower in scope, yet in substance more intense, obligation to track *and align* with developments in EU law prospectively, in relation to six equality directives listed in annex 1 of the Protocol:

- Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services;
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast);
- Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
- Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation;
- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC;
- Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

A need for prospective tracking and alignment (known as 'dynamic alignment') is clear in respect of these directives, as they continue to be interpreted by the Court of Justice of the European Union (CJEU) after the entry into force of the Withdrawal Agreement.[6] However, this is not necessarily the case for other areas of EU equality and human rights law associated with the Rights, Safeguards and Equality of Opportunity part of the 1998 Agreement, which are not specifically identified in the Protocol and are, therefore, more difficult to pin down and track.

Nevertheless, even though the annex 1 directives entail a more *obvious* obligation to track legal developments than the rest of the EU *acquis* on equality and human rights, when read against the Protocol's aim, in light of the 1998 Agreement, of maintaining parity of standards between Ireland and Northern Ireland, article 2 justifies a broader perspective towards alignment, cutting across the elements of equality

6 This has been recognised by the UK Government: 'UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland' (2020) para 7.

and human rights law that can be linked to the 1998 Agreement.[7] In this regard, developments in EU case law pose a particular difficulty. While *new* developments in non-annexed areas (eg new legislation) may indeed not be covered by the non-diminution commitment, case law developments are different because judicial interpretation will often relate to pre-existing measures covered by article 2, thus in practice requiring continued tracking and alignment. Thus, even though article 13(2) of the Protocol[8] provides that case law developments should be 'interpreted in conformity with the relevant case law of the Court of Justice of the European Union', the practical outworking for NI courts is very complex. For instance, if the CJEU were to revise its position on employment benefits for migrants by interpreting secondary legislation in the light of human dignity (a non-annexed area), should this be viewed as an entirely new development? If a narrow view were taken, there would be no need for alignment in that area, provided the decision came after the transitional period. But this view is problematic when placed in the context of the CJEU's interpretive ethic, which views judicial decisions as authoritative interpretations of the core obligation (as this may from time to time be expressed in secondary legislation) and which therefore has a retroactive effect in principle (evidenced in the fact that the CJEU has had specifically to limit this retroactive effect in cases with budgetary implications, such as pensions law).[9] In short, then, while taking a broader view does not conceptually *resolve* the ambiguity around the limits of article 2, it does avoid it in practice and also minimises the risk of under-inclusion in breach of the Protocol. Over-inclusion, in turn, does not pose a risk of the UK breaching the Protocol, as article 2 only sets a minimum alignment obligation, which can be exceeded if desired.

For these reasons, in this article we have preferred to take a broad view of article 2, and therefore include case law developments in equality and human rights beyond the annex 1 directives, thereby also capturing broader questions of EU discrimination and human rights law. As detailed in our methodology, however, we recognise that our ability to identify the relevance of these broader developments to the terms of the 1998 Agreement is more limited and that our approach may be subject to a greater degree of contestation than in respect of the

7 Colin Murray and Clare Rice, 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72 Northern Ireland Legal Quarterly 1, 18.

8 Article 13(2) provides: 'Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union.'

9 See, most famously, Case 43/75, *Defrenne v Sabena* [1976] ECR 455.

explicitly listed annex 1 directives. As such, to ensure that our findings retain analytical value regardless of one's stance on the scope of the article 2 obligation, we have researched the two types of developments separately and have made specific note of the involvement or not of an annex 1 measure in our analysis.

Methodology

The findings of this article are underpinned by a series of original systematic reviews of EU case law based on date-defined and term-specific searches of each of the annex 1 directives and of the rights we considered relevant to the 1998 Agreement in the official database for EU case law (curia.eu). The relevant dates searched for were 1 January 2021–1 September 2022. The terms searched for differed depending on the measure. First, for each of the annex 1 directives, we searched for mentions of the relevant directive by directive number (2004/113/EC; 2006/54/EC; 2000/43/EC; 2000/78/EC; 2010/41/EU; 79/7/EEC). Secondly, our mapping of case law developments beyond the annex 1 directives was completed by term-specific searches of provisions of the EU Charter of Fundamental Rights that broadly correspond to the rights covered by paragraph one of Strand Three of the 1998 Agreement, relating to Rights, Safeguards and Equality of Opportunities:

- right to free political thought;
- right to freedom and expression of religion;
- right to pursue democratically national and political aspirations and seek constitutional change by peaceful and legitimate means;
- right to freedom of choice of one's residence;
- right of equal opportunity in all social and economic opportunity;
- right to freedom from sectarian harassment;
- right of women to full and equal political participation;
- right of victims to remember as well as to contribute to a changed society;
- respect, understanding and tolerance in relation to linguistic diversity;
- the need to ensure that symbols and emblems are used in a manner which promotes mutual respect rather than division.

We considered the corresponding provisions of the Charter to be articles 1, 10, 11, 20, 21, 22, 23, 26, 40 and 45 thereof, which cover, respectively, the following rights: human dignity; the freedom of expression; equality before the law; non-discrimination; linguistic diversity; equality between women and men; the integration of persons with disabilities; the right to vote; and the right to move freely. The reason for our use of Charter provisions for this part of our analysis

is that the Charter is reliably referred to in CJEU case law and, as such, provides a clear basis for identifying relevant developments in this field.

By following a methodology based on the systematic mapping of case law, we tried to compile an exhaustive list of developments with actual or potential relevance for the Protocol. We subsequently read through all of the identified case law and coded it as 'core' or 'peripheral' (core being cases that have a substantive bearing on the target provision and peripheral being cases that merely mention the provision but do not go on to examine it). The analysis that follows highlights only the case law falling within the 'core' category. Our mapping is, however, available in full on request.[10]

DEVELOPMENTS IN EUROPEAN UNION HUMAN RIGHTS AND EQUALITY LAW[11]

Religion in the workplace

One of the most significant recent developments at the EU level relates to religion as a protected characteristic in the context of the Framework Equality Directive 2000/78 (Equality Directive) – arguably the most wide-ranging of the measures listed in annex 1. On 17 July 2021, the Court handed down a significant Grand Chamber ruling in *WABE and Müller*, which partially clarified the application of the Equality Directive to the wearing of religious symbols at work.[12] This ruling concerned two joined cases from Germany, each involving a female

10 An earlier version (covering the period between 1 January 2021–1 January 2022) will be publicly available on the website of the ECNI.

11 Seminal judgments have been noted within the following thematic groupings for the purposes of clarity. It must be noted that not all judgments fall within these. A notable example being Case C-817/19 *Ligue des droits humains* EU:C:2022:491 concerning a landmark data protection ruling by the Grand Chamber in respect of passenger name record (PNR) data which airline carriers store for the purposes of check-in etc for flights. In light of Directive 2016/681 (PNR Directive) data concerning passengers flying between the EU and a third country is sent to the member state of which the passengers were arriving and departing to screen for crime and terrorism offences. Despite the Ligue des droits humains seeing an annulment of the Belgian law transposing this Directive, the CJEU confirmed the overarching validity of the Directive. Despite noting that the directive 'entails undeniably serous interferences with the rights guaranteed in Arts. 7 and 8 CFR', with appropriate stricter safeguards in place the overarching rationale of the PNR Directive was deemed to be appropriately proportionate by the court. For further analysis, see Kristina Irion, 'Repairing the EU Passenger Name Record Directive: the ECJ's judgment in Ligue des droits humains (Case C-817/19)' (*European Law Blog* 11 October 2022).

12 Joined Cases C-804/18 and C-341/19, *IX v WABE eV and MH Müller Handels GmbH v MJ* EU:C:2021:594 (hereafter *WABE and Müller*).

Muslim employee who had been asked to remove her headscarf by a private-sector employer. The first claimant was a special needs teacher at WABE, a nursery school chain, which had a policy that prohibited *all* religious symbols at work. The second claimant was a sales assistant at the cosmetics and drugstore chain Müller Handels, which had a policy prohibiting 'conspicuous or large-sized' symbols. The legal question in both cases was the same: do religious neutrality policies that ban some or all religious symbols constitute discrimination within the EU's Equality Directive and, if so, do they constitute indirect or direct discrimination? While the former can be justified by reference to occupational requirements, the latter cannot.

In *WABE and Müller*, the Court affirms its earlier case law in *Bougnaoui* and *Achbita*, by holding that company rules restricting religious symbols can 'be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality in the workplace, in order to take account of the wishes of its customers or users'.[13] However, the Court clarifies that the means of achieving this legitimate aim must be appropriate as well as necessary, and that the relevant standard is one of strict proportionality in respect both of 'the concept of a legitimate aim and the appropriate and necessary nature of the means taken to achieve it'.[14] Like the European Court of Human Rights in *Eweida*,[15] the CJEU accepts that 'an employer's desire to display, in relations with both public- and private-sector customers, a policy of political, philosophical or religious neutrality may be regarded as legitimate'[16] and indeed notes that the employer's wish to project an image of neutrality forms part of the freedom to conduct a business recognised in article 16 of the Charter, 'in particular where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers'.[17] However, the employer is now required to prove stricter proportionality conditions.[18] This is further supported by Case C-282/18 *MIUR*, which found that national legislation excluding Catholic religious education teachers in public education establishments from aspects of employment law relating to fixed-term employment contracts was contrary to the Equality Directive. The fact that Catholic education teachers needed

13 Ibid para 60. See also, to that effect, judgment of 14 March 2017, Case C 188/15 *Bougnaoui and ADDH* EU:C:2017:204, para 33; Case C-157/15 *Achbita v G4S Secure Solutions NV* EU:C:2017:203, paras 37–38

14 *WABE and Müller* (n 12 above) para 61; see also judgment of 16 July 2015, Case C-83/14 *CHEZ Razpredelenie Bulgaria* EU:C:2015:480, para 112.

15 *Eweida v The United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10, ECtHR 15 January 2013.

16 *WABE and Müller* (n 12 above) para 63.

17 Ibid. See also *Achbita v G4S* Secure Solutions (n 13 above) paras 37–38.

18 *WABE and Müller* (n 12 above) paras 68–69.

to hold a suitability certificate issued by an ecclesiastical authority was not considered an 'objective reason' for justifying an exception on the basis of religious freedom because that certificate was issued once and not before each school year leading to the conclusion of a fixed-term employment contract.[19]

These cases have had a direct significance for annex 1 of article 2 of the Protocol. In the spring of 2022, the Northern Ireland Assembly enacted the Fair Employment (School Teachers) Act 2022, which superseded a large-scale exclusion of schoolteachers from protection against discrimination in the workplace. Even though the special position of Northern Ireland was recognised in both the Preamble of the Equality Directive and in article 15 thereof, allowing specific provisions to operate regarding recruitment to certain professions, the aforementioned cases suggested that the Court may now be ready to scrutinise wide-ranging access rules applying to specific religions more closely, even in educational settings. While the introduction of the new legislation has largely removed the concern and supports the implementation of the broader equality framework established in Northern Ireland under the Fair Employment (Northern Ireland) Act 1989 and the Fair Employment and Treatment (Northern Ireland) Order 1998, the rulings remain relevant to Northern Ireland in at least two further respects.

First, both cases show greater willingness on the part of the Court to challenge rules applicable to a *specific* religion and to heighten the proportionality scrutiny of measures concerning both substantive occupational requirements (membership of specific religion or certification in that religion) and functional occupational requirements (such as dress codes). This stricter approach affects both private and public employers in Northern Ireland and may be used to challenge employment practices in excepted fields under section 70 of the Fair Employment and Treatment (Northern Ireland) Order 1998, such as religious instruction, as well as any over-reliance by employers on occupational requirements under the same provision. Second, the application of the *WABE* ruling to Northern Ireland will require significant contextualisation to prevent the possibility of abuse by employers, considering the complex status of religious symbols in Northern Ireland under the 1998 Agreement. Earlier studies have found that 'symbols such as flags, items of dress and adornments have proven to be particularly problematic in NI worksites' and 'can

19 Case C-282/18, *YT, ZU, AW, BY, CX, DZ, EA, FB, GC, IE, JF, KG, LH, MI, NY, PL, HD, OK v Ministero dell'Istruzione, dell'Università e della Ricerca – MIUR* EU:C:2022:3, para 125.

heighten hostility, animosity and relational discord'.[20] The decision of the Court in *WABE*, therefore, needs to be treated with particular care. Whereas, on the facts of the case, the Court was protective of Muslim workers' right to display their religion without discrimination, an outright ban on the exclusion of specific symbols from the workplace and the strong proportionality scrutiny of limitations to the wearing of all symbols may have undesired effects in a region with a recent history of sectarian violence, where they may become a source of division or undetected discrimination by a dominant religious group.[21] Here, the recognition of the need of special consideration for Northern Ireland in the Directive's Preamble is significant: while the ruling's findings on the meaning of direct and indirect discrimination are authoritative, their application by courts in Northern Ireland can be nuanced, in line with the Preamble, to ensure that they serve the purposes of equality legislation, rather than undermining it.

Disability discrimination

Another annex 1 area where developments have taken place at the EU level since the entry into force of the Protocol is disability discrimination. In this field, which has already been identified by the European Commission as requiring further legislative action,[22] a series of recent cases have strengthened the position of disabled persons in relation to added requirements, conditions, or incentives for their integration in the workplace, and in relation to justifications for the exclusion of persons with disabilities from certain professional roles.

For example, in its judgment in *Szpital Kliniczny*,[23] the Court elaborated on the concept of disability within the Equality Directive. The claimant in this case challenged her employer's decision to grant a disability allowance to workers with a disability only on the condition that they submit their disability certificates after a specific date (chosen by the employer), thus excluding from the allowance workers who had already submitted their certificates before that date.

20 D Dickson and O Hargie, 'Sectarianism in the Northern Ireland workplace' (2006) 17 International Journal of Conflict Management 45, 52.

21 Ibid 64.

22 European Commission, *Report from the Commission to the European Parliament and the Council on the Application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')* 19.03.2021 COM(2021) 139(final) 23–24.

23 Judgment of 27 January 2021 in Case C-16/19, *Szpital Kliniczny im dra J Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie* EU:C:2021:64.

The claimant questioned the compatibility of the employer's actions with the Equality Directive, but a key problem arose regarding the relevant comparators: since the employer was granting the relevant allowance to other employees with a disability, could it be said that they discriminated against the claimant or treated her less favourably than other employees *because* of her disability? The Court noted that the prohibition of discrimination laid down in the Equality Directive is not 'limited only to differences in treatment between persons who have disabilities and persons who do not have disabilities'.[24] Rather, disability discrimination may comprise any form of 'less favourable treatment or particular disadvantage … experienced *as a result* of disability'.[25] This interpretation is important because it significantly strengthens the role of the Equality Directive in disability discrimination cases in the absence of further legislative intervention. First, it extends the relevant comparator for establishing disability discrimination. As a result of the ruling, discrimination is not confined to less favourable treatment of persons with a disability by reference to persons without a disability. Rather, it includes less favourable treatment *within* the protected class, too, namely any discrimination amongst persons with disabilities, provided the discrimination is closely linked to the disability. Secondly, the ruling not only recognises this broader pool of possible comparators for establishing discrimination, but also recognises that any discrimination or less favourable treatment that is inextricably linked to the protected characteristic of disability – regardless of whether it operates within or outside the protected class – amounts to *direct* discrimination, and therefore cannot be justified.[26]

Similar findings were reached in the *Jurors*,[27] *Tartu Vangla*[28] and *HR Rail*[29] rulings, all of which concerned reliance on 'genuine occupational requirements' under article 4 of the Equality Directive as justifications for excluding disabled persons from certain professional roles. In all three cases, the Court found that absolute bars on employment were unjustifiable and required the adoption of reasonable accommodation measures, including adjustments and assignment to a different service, in line with article 5 of the Directive, read in the light of articles 21 and 26 of the Charter of Fundamental Rights of

24 Ibid para 29 (emphasis added).
25 Ibid para 29 (emphasis added).
26 Ibid paras 51–53.
27 Judgment of 21 October 2021 in Case C-824/19, *TC and UB v Komisia za zashtita ot diskriminatsia and VA (Jurors)* EU:C:2021:862.
28 Judgment of 15 July 2021 in Case C-795/19, *XX v Tartu Vangla* EU:C:2021:606.
29 Case C-485/20, *XXXX v HR Rail SA* EU:C:2022:85, para 49.

the European Union as well as article 5 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD).[30]

These cases have immediate implications for the law in Northern Ireland and, more specifically, for the legal standard required to prove discrimination. There is an incompatibility between section 3(A)(5) of the Disability Act 1995, which provides statutory protection against disability discrimination in Northern Ireland, and the Court's findings in *Szpital Kliniczny*, as section 3(A)(5) of the Act posits the absence of disability as the relevant comparator:

> A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.

This incompatibility clearly triggers the dynamic alignment obligation set out in article 2 of the Protocol, as it pertains to the interpretation of an annexed directive (2000/78/EC) and the legislation should therefore be amended. As shown by the *Szpital Kliniczny* ruling, Northern Ireland must ensure that the implementation and interpretation of disability discrimination does not render the concept of disability dependant on the *absence* of disability as the key comparator. Rather, the existence of any discrimination resulting from disability must be accommodated, even if this treatment is less favourable by reference to other members of the protected class, rather than outside it.

Beyond the abovementioned developments regarding the concept of disability discrimination, the case law also highlights a broader shift in the Court's understanding of the integration of persons with disabilities from what was once an aspirational protection[31] to what may now be seen as an enforceable element of EU equality law,[32] through the application of articles 21 and 26 of the EU Charter of Fundamental Rights and the international law obligation to comply with article 5

30 *Jurors* (n 27 above) para 63.

31 See eg judgment of 11 July 2006 in Case C-13/05, *Chacón Navas v Eurest Colectividades SA* EU:C:2006:456; judgment of 22 May 2014, C-356/12, *Glatzel v Freistaat Bayern* EU:C:2014:350; judgment of 18 December 2014 in Case C-354/13 *Kaltoft v Municipality of Billund* EU:C:2014:2463.

32 *Jurors* (n 27 above).

of the UNCRPD.[33] This view of disability is supported by concrete legislative initiatives. For example, the European Parliament has adopted a resolution calling for amendments to the Equality Directive to ensure the full integration of persons with disabilities and give further effect to the UNCRPD,[34] and the need for further legislative change has also been identified by the European Commission in its most recent report on Directive 2000/78/EC.[35]

This broader context not only confirms that there is a need to align with EU law on this issue because of the operation of the annex 1 Equality Directive, but also highlights the absence of legal certainty regarding the limits of the article 2 commitment. Rather than being neatly sectioned off from one another, the obligations of dynamic alignment on matters pertaining to the annex 1 directives and the broader obligation of non-diminution of standards in equality and human rights law relevant to the 1998 Agreement, more generally, often merge uncomfortably into one another. For example, identifying a change in the CJEU's position on the integration of persons with disabilities does not necessarily constitute a change to the terms or interpretation of the Equality Directive as such, but it is so closely related to it substantively that it would be overly formalistic not to view it as part of the dynamic alignment commitment. Similarly, it is unclear how dynamic alignment should be ensured in cases where an annexed directive is replaced with an instrument that is significantly broader in scope, either partially, eg through a much more expansive directive on the rights of persons with disabilities, or even fully, such as through

33 Articles 21 and 26 of the EU Charter of Fundamental Rights provide for the protection from discrimination on grounds of disability and for the integration of persons with disabilities, respectively. Article 5 of the UNCRPD goes further than these provisions, as it includes an explicit obligation of reasonable accommodation. It provides:

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

34 European Parliament Resolution of 10 March 2021 on the implementation of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in light of the UNCRPD (2021) OJ C 474/04.

35 European Commission (n 22 above).

a new horizontal directive on equal treatment.[36] This lack of clarity in respect of the contours of the legal obligations set out in article 2 could create a significant wave of litigation challenging employment practices in cases where a narrow view of alignment has been taken.

Gender discrimination in respect of pensions and social security

In the last couple of years, there have been notable developments in CJEU case law on part-time work and other non-standard employment arrangements, particularly in relation to gender equality in the field of pension entitlements. Here, the Court has provided clarifications regarding the breadth and evidential requirements of the non-discrimination obligation enshrined in Directives 2006/54/EC and 79/7/EEC.

In *Fogasa*, the Court considered a question of indirect discrimination on grounds of gender in the context of part-time work. The case concerned a question for a preliminary ruling on the interpretation of articles 2(1) and 4 of Directive 2006/54. Spanish courts sought guidance on whether these provisions should be interpreted as precluding national legislation which, as regards the payment by the liable national institution of the wages and compensation that had not been paid to workers due to the insolvency of their employer, provided for a ceiling to that payment for full-time workers, which was reduced *pro rata temporis* for part-time workers. The reduction placed female workers at a particular disadvantage because the majority of part-time workers in the sector are female. On the facts, the Court decided that the *pro rata temporis* rule constituted an objective and coherently applied ground, which justified a proportionate reduction of the rights and employment conditions of a part-time worker.[37]

Similarly, in *INSS v BT*, the Court was asked to consider whether article 4(1) of Directive 79/7 precludes national legislation which makes a worker's right to an early retirement pension subject to the condition that this pension be at least as much as the minimum pension amount to which that worker would be entitled at the age of 65 years. It was argued that such legislation puts female workers at a particular disadvantage compared to male workers because workers in

36 Reform of the Equality Directive has been a long-standing proposal by the European Commission. See, to this effect, the progress report prepared by the Presidency of the Council, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' 2008/0140(CNS), 23 November 2021, 14046/21 7.

37 Case C-841/19 *JL v Fogasa* EU:C:2021:159, para 43. See also, to that effect, Case C-395/08 and C-396/08 *Bruno and Others* EU:C:2010:329, para 65; and Case C-476/12 *Österreichischer Gewerkschaftsbund* EU:C:2014:2332, para 20.

the affected fields (domestic work) are mostly female. The reason for this question was that, in fields such as domestic work, the minimum pension entitlement at 65 years would often require a state supplement, as the level of contributions would not in itself have been sufficient. Thus, workers whose pensions at 65 years would have required a supplement were prevented from seeking early retirement. These workers were predominantly women. The Court affirmed that if, as it appeared from the evidence (which it was ultimately for the national court to assess), the body of workers to whom a supplement had to be paid was systematically female, then a measure that prevented those workers from voluntarily seeking early retirement under the same conditions as other workers would be indirectly discriminatory.[38] It would therefore require objective justification.[39] In the same vein as in *Fogasa*, though, such a justification was available in this context: the protection of the financial viability of the state pension system.[40]

By contrast, in a second judgment against INSS with respect to a prohibition on the cumulation of invalidity pensions under the same scheme (when cumulation was permitted for pensions from different pension schemes), the Court found that the possibility of adverse impact on women was sufficient to render it incompatible with Directive 79/7. That legislation permitted a significantly higher proportion of male workers to cumulate pensions compared with the corresponding proportion of female workers and, unlike the cases mentioned above, it was not justified by objective factors.[41] Similarly, in *CJ v TGSS*, the Court found that an exclusion from unemployment benefits for domestic workers in a social security scheme could not be considered 'coherent' and objectively justified merely on the basis that the pattern of pay and contributions in domestic work was not comparable to that of salaried workers.[42] Considering that the majority of domestic workers were women, that exclusion violated Directive 79/7. The same principles (albeit with a different outcome) were set out in *EB v BVAEB*. In this somewhat unusual case, male pensioners earning high pensions challenged the lack of proportionate inflationary adjustment to their pensions by arguing that this affected males more than females. In this case, though, the Court confirmed that the measure was coherently applied and therefore did not violate EU equality law

38 Case C 843/19 *Instituto Nacional de la Seguridad Social (INSS) v BT* EU:C:2021:55, para 31.

39 Ibid para 32.

40 Ibid para 40.

41 Case C-625/20, *KM v Instituto Nacional de la Seguridad Social (INSS)* EU:C:2022:508, para 66.

42 C-389/20, *CJ v Tesorería General de la Seguridad Social (TGSS) (Chômage des employés de maison)* EU:C:2022:120, para 64.

(in this case Directive 2006/54). The case for the first time recognised explicitly that statistical data can be used to establish the existence of indirect discrimination, thus placing the onus on the state to explain any apparent discrepancies by showing that the relevant measure was objectively and coherently justified and applied.[43]

While these cases seemingly reach contradictory findings, three important themes can be identified, which are likely to influence discrimination and social security law in Northern Ireland in the future. First, it is clear that the Court remains willing to accept coherent 'social justice' justifications for the restriction of pension entitlements and other occupational benefits. Secondly, though, it appears to scrutinise more closely such justifications for objectivity and coherence and is relatively quickly prepared to accept *prima facie* evidence of discrimination, thus placing a greater burden on the state to justify its policies. EU law now recognises that relatively simple statistical evidence is sufficient to establish discrimination, thereby triggering the duty to justify it coherently and systematically. This could be an important development in the adjudication and settling of pension disputes, as it clarifies the ways in which the relevant comparators under section 7 of the Sex Discrimination (Northern Ireland) Order 1976 may be established.[44] Last but not least, the Court appears to be more willing to treat equality questions contextually and, particularly, to address the effects of past discrimination. This is very strongly felt in *BVAEB*, albeit that it is still only implicit in that judgment: there, recognising perhaps that any indirect discriminatory impacts on male pensioners were the result of the long-standing inequality suffered by women in respect of pay, the Court appeared more willing to accept state justifications for their limitation in the social interest than it was in the very similar case of *KM v INSS*. While this case law can, therefore, be criticised for inconsistency and further case law is needed before a move towards a contextual interpretation of sex discrimination can be authoritatively established, it appears that the CJEU is – at least to an extent – alive to the complexity that questions of past or compounded discrimination raise and is starting to develop its case law accordingly. Such a development could be important for Northern Ireland, where the equal pay framework has been criticised by the Committee on the Elimination of Discrimination against Women for lacking redress for multiple discrimination.[45]

43 Case C-405/20, *EB, JS, DP v Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB)* EU:C:2021:159, paras 50–51.

44 1976 No 1042 (NI 15).

45 Committee on the Elimination of Discrimination against Women, 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (2013) CEDAW/C/GBR/CO/7*, paras 17–19.

The Rights of Migrants

Other case law developments which will be relevant to the obligation to keep pace with EU law under the Protocol include protections of the right to move and reside freely in other member states and the rights of migrants, more widely. These issues do not necessarily raise concerns from the perspective of annex 1, but they are central to the non-diminution commitment of article 2 more generally, as they relate to rights closely mapping onto the 1998 Agreement, including the right to establish one's residence freely, equal opportunity in all social and economic opportunity, and respect for linguistic diversity.

The more predictable implications for Northern Ireland in this field stem from classic EU law rights that may now be associated with the rights not to be discriminated against on grounds of nationality and to move freely, such as the need to recognise foreign certifications and qualifications. For example, in *Stolichna obshtina, rayon Pancharevo*,[46] the Court was asked to review the non-recognition in Bulgaria of a birth certificate issued in the UK, which listed two mothers as a child's parents (but did not indicate the biological mother). The CJEU found that this was incompatible with article 4(2) Treaty on European Union, articles 20 and 21 Treaty on the Functioning of the European Union and articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union, read in conjunction with article 4(3) of the Citizens' Rights Directive.[47] It can be expected that questions about the recognition of certification from EU member states will eventually arise in Northern Ireland, and it is important to highlight that such questions will have to be answered by reference to the EU standard of human rights protection enshrined in the Charter (albeit that it is no longer recognised as part of UK law) and not to national standards.

The broader implications of recent case law in the field of migration law are wider-ranging and could have significant budgetary ramifications. They include the need to ensure equality in respect of social security entitlements (again highlighting the difficulty of distinguishing annex 1 from non-annex 1 issues in practice), as well as obligations to improve the living conditions of migrants, so as to avoid destitution. The *VI* case illustrates this well. In this case, the CJEU ruled that the UK had wrongfully required EU citizens to obtain

46 Judgment of 14 December 2021 in Case C-490/20, *Stolichna obshtina, rayon Pancharevo* EU:C:2021:1008.

47 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158/77.

private comprehensive sickness insurance as part of its residence requirements under article 7(1)(b) of the Citizens' Rights Directive and had, by consequence, unjustifiably denied EU citizens who did not meet this condition associated tax deductions, such as Child Tax Credit, and social security benefits, such as Child Benefit.[48] The Court found that, given the nature of the NHS as a public health provider, 'the fact remains that, once a Union citizen is affiliated to such a public sickness insurance system in the host Member State, he or she has comprehensive sickness insurance within the meaning of Article 7(1)(b)'.[49] As a result of this ruling, it is evident that many EU citizens resident in the UK have been wrongfully obliged under the UK's Immigration Regulations 2006 to purchase private health insurance, potentially leading to claims for compensation.[50]

Indeed, while the case raises difficult and UK-wide legal questions about the application of CJEU case law under the Withdrawal Agreement and its relationship to now-obsolete remedies such as state liability in damages, the challenges that the case poses are compounded in respect of Northern Ireland. As Frantziou and Murray have argued in more detail elsewhere, rights regarding healthcare and benefits, such as those at stake in *VI*, fall within the 1998 Agreement's concept of a right to equal opportunity in all social and economic activity.[51] Since the requirement of comprehensive sickness insurance prevented EU migrants from being able to rely on these benefits on an equal footing as others in the community, the clauses limiting claims in damages under schedule 1 of the EU (Notification of Withdrawal) Act 2018 may be considered breaches of the Northern Ireland Protocol, as they result in a clear *remedial* diminution of rights falling within the scope of article 2 (since they preclude their reparation). Most importantly, perhaps, this case highlights the difficulty with viewing the non-diminution obligation as a static one: while article 2 only captures the interpretation of EU law that existed before the end of the transitional period, its application is prospective, putting Northern Ireland under an obligation to allow compensation claims for pre-transitional period failures to recognise their entitlement to the relevant benefits, as well as providing settled and pre-settled EU citizens in Northern Ireland and their family members (who have acquired that status on the basis

48 Case C 247/20 *VI v Commissioners for Her Majesty's Revenue & Customs* EU:C:2022:177.

49 Ibid para 69.

50 See Sylvia de Mars, 'Economically inactive EU migrants and the NHS: unreasonable burdens without real links?' (2014) 39 European Law Review 770.

51 Eleni Frantziou and Colin Murray, 'C-247/20 VI v The Commissioners for Her Majesty's Revenue & Customs and the implications of preliminary references during the transitional period: a case study in legal complexity' (*European Law Blog* 17 March 2022).

of article 7(1)(b) of the Citizens' Rights Directive), with a right to public comprehensive healthcare and certain tax deductions and social security benefits on the same terms as UK and Irish citizens.[52]

VI is not an isolated case. In *Land Oberösterreich v KV*,[53] the Court assessed the compatibility with Directive 2004/38/EC and article 21 of the Charter of Fundamental Rights of a requirement that third-country nationals prove basic language proficiency as a condition of eligibility for housing benefit, when this condition did not apply to EU citizens. The Court found that mastery of a language does not always relate to ethnicity or race, so that arguments about race/ethnicity discrimination were unsuccessful. However, the case weaves important links between the protection of linguistic diversity under article 22 of the Charter (and also present in the 1998 Agreement), which is used as a supporting ground in the analysis, and article 1 of the Charter. Thus, while the former provision may not be strong enough under EU law to form the basis of discrimination claims in its own right, it is starting to be used as an important supplementary basis for assessing the compatibility of social policy with EU law.[54] Further, and perhaps more significantly, the Court suggests that the right to human dignity itself is capable of shaping the assessment of compatibility of domestic social policy with EU law. More specifically, the Court accepted that housing benefit was likely to amount to a 'core benefit' within the meaning of article 11(4) of Directive 2003/109 concerning the status of third-country nationals who are long-term residents,[55] as housing benefit makes an essential contribution to the Directive's objective of social integration by ensuring a decent standard of living above the poverty line.[56] While the matter was ultimately left to domestic courts to decide in light of their assessment of the broader system of benefits offered to migrants, the Court agreed with the Advocate General that the disbursement of benefits enough to ensure a dignified standard of living, interpreted in line with article 1 of the Charter, was essential and any additional eligibility conditions based on language would therefore be incompatible with EU law.

Similarly, in its judgment on the Universal Credit benefit in *CG v The Department for Communities in Northern Ireland*, the Court found that the Northern Ireland authorities were under an obligation to disburse Universal Credit to a Croatian national who had already been

52 Ibid.

53 Judgment of 10 June 2021 in Case C-94/20, *Land Oberösterreich v KV* EU:C:2021:477.

54 Ibid para 49. See also Case C-64/20, *UH v An tAire Talmhaíochta, Bia agus Mara, Éire, An tArd-Aighne* EU:C:2021:207. See, particularly, para 81 of AG Bobek's Opinion in this case, delivered on 14 January 2021.

55 Judgment of 25 November 2003 (OJ 2004 L 16) 44.

56 *Land Oberösterreich* (n 53 above) para 42 (see also para 59 of the Opinion).

granted a temporary right to reside in the UK, despite the fact that they could have refused the application based on the absence of sufficient resources under article 7 of the Citizens' Rights Directive (Directive 2004/38/EC).[57] The Court held that the UK could not exclude from a subsistence benefit such as Universal Credit an EU citizen without sufficient resources to whom it had granted a right to reside, solely on the basis of her nationality.[58] It was also essential to ensure, in line with the right to human dignity enshrined in article 1 of the Charter, that the individual could benefit from a dignified standard of living.[59] Whereas, on the facts of the case, it was not clear whether the decision to refuse Universal Credit exposed the EU citizen in question to a serious risk of breaches of the right to human dignity, the Court emphasised that 'where that citizen does not have any resources to provide for his or her own needs and those of his or her children and is isolated, [the] authorities must ensure that, in the event of a refusal to grant social assistance, that citizen may nevertheless live with his or her children in dignified conditions'.[60]

The principle of human dignity is thus acquiring an important role in structuring minimum welfare standards at the EU level for migrants who do not have sufficient resources. This is further supported by the *KS and MHK* ruling, where the Court (following the Advocate General's Opinion) associated the concept of human dignity with the possibility of access to the labour market for individuals who are residing in the member state in question pending an application for asylum. During that time, it is essential that they are provided with the means of lawfully achieving a dignified living standard.[61] Thus, in what is a relatively novel use of dignity as an enforceable right within EU jurisprudence,[62] the CJEU has started cautiously to venture into questions of material injustice and redistribution. And while the implications of this case law may no longer bind other parts of the UK, they relate to the content of pre-transitional period obligations bearing close links with the equality protections of the 1998 Agreement, such that they need to be considered closely in future litigation in Northern Ireland.

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57 Case C-709/20, *CG v The Department for Communities in Northern Ireland* ECLI:EU:C:2021:602, para 78.

58 Ibid para 81.

59 Ibid para 89.

60 Ibid para 93.

61 Judgment of 14 January 2021 in Joined Cases C-322/19 and C-385/19, *KS, MHK v The International Protection Appeals Tribunal, The Minister for Justice and Equality, Ireland, The Attorney General* (C-322/19) and *RAT, DS v Minister for Justice and Equality* (C-385/19), EU:C:2021:11, para 69.

62 See further Eleni Frantziou, 'The binding charter ten years on: more than a "mere entreaty"?' (2019) 38 Yearbook of European Law 73–118.

BROADER REFLECTIONS ON THE MEANING OF NON-DIMINUTION FROM A EUROPEAN UNION PERSPECTIVE

The above analysis has identified certain key recent developments in the case law of the CJEU. But are there any principles that cut across these materially distinct areas which could influence the operation of the non-diminution obligation in a broader manner? In our view, these may be summarised as follows.

First, across each of the areas we have examined, we have seen a deepening commitment to strict proportionality scrutiny of justifications for indirect discrimination, combined in turn with a greater willingness to classify as unjustifiable direct discrimination differences in treatment that are not explicitly targeting particular groups, but which do so by necessary implication, as seen in respect of both religious symbols and discrimination against persons with a disability. The evidential requirements for proving discrimination are also weakening, as shown in particular in the field of social security. These developments heighten the need for coherent justifications across Northern Ireland's equality law.

Secondly, the CJEU's approach may be considered not to be simply more contextual but also much more clearly rights-based in recent years, having shown that minimum human rights standards can play a powerful role in situations where states may have otherwise acted justifiably under a plain reading of the secondary legislation. This is particularly evident as the Court begins to flesh out the implications of the commitment to human dignity under article 1 of the Charter of Fundamental Rights. Yet it is also underpinned by a conscious and public commitment on the part of the Court's President to allow judicial intervention in cases where the 'essence' of rights is compromised.[63] This is increasingly developing into an 'essence-of-rights test', which is additional to and separate from proportionality. It may be described as a threshold point for intervention in situations where the 'hard nucleus' of the right has been attacked.[64] There are now discernible examples of this approach in several areas of EU equality and human rights law, including discrimination law,[65] minimum employment standards,[66] and privacy.[67] It follows that, in addition to specific developments that will be identified from time to time, the non-diminution obligation

63 Koen Lenaerts, 'Limits on limitations: the essence of fundamental rights in the EU' (2019) 20 German Law Journal 779.

64 Ibid 781.

65 Judgment of 25 May 2018 in Case C-414/16 *Vera Egenberger* EU:C:2018:257.

66 Joined Cases 569 & 570/16, *Bauer and Willmeroth* ECLI:EU:C:2018:871; Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften v Shimizu* ECLI:EU:C:2018:874, Judgment of 6 November 2018.

67 Case C-362/14, *Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650.

entails, at least, a risk assessment based on the 'essence' of the rights protected in EU law across law and policy in Northern Ireland. While such an assessment is already in place for provisions of the Human Rights Act 1998 (HRA), non-diminution captures a broader set of rights, as reflected in the provisions of the EU Charter of Fundamental Rights that map onto the 1998 Agreement's guarantees relating to diversity, freedom of residence and equality of opportunity.

Last but certainly not least, the case law highlights a continuing emphasis on effective judicial protection as a core tenet of EU equality and human rights law. The clearest indication of this in recent case law stems again from discrimination law. In the *Braathens Regional Aviation* case, the Court considered the compatibility with the Race Equality Directive of a settlement under Swedish legislation that allowed an airline to pay compensation to a Chilean passenger whom it had subjected to additional controls. The passenger challenged this legislation on symbolic grounds because it did not stipulate the need for a formal acknowledgment that discrimination had occurred. The Court agreed, noting that articles 7(1) and (2) of the Race Equality Directive are specific expressions of article 47 of the Charter (the right to an effective remedy, which is also known in EU law as the general principle of effective judicial protection).[68] The Court went on to find that, while member states are free to choose the nature of national procedures and the corresponding remedies, they must ensure that these remedies result in 'real and effective judicial protection of the rights that are derived from [the Racial Equality Directive]'.[69]

Crucially, the Court's reasoning is not confined to this case, to this directive, or indeed to the area of law. Rather, similar findings have previously been made in diverse fields of EU human rights and equality law, such as in respect of the Equality Directive in *Egenberger*[70] and in rulings by the Court's Grand Chamber relating to judicial independence, such as the *Appointment of Judges* case.[71] Indeed, subsets of article 47 of the Charter, such as the rights to an effective remedy and to a fair trial, are routinely used as supplementary grounds in EU human rights litigation, such as to support free movement rights for dual citizens[72]

68 Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB* EU:C:2021:269, paras 33–34.

69 Ibid para 38.

70 Judgment of 25 May 2018 in *Vera Egenberger* (n 65 above).

71 Case C-824/18, A*B and Others v Krajowa Rada Sądownictwa and Others* EU:C:2021:153.

72 *Stolichna obshtina, rayon Pancharevo* (46 above).

and to challenge delays in a criminal trial process.[73] Thus, the CJEU has shown considerable willingness to affirm article 47, associating it with the 'full effectiveness' of EU law. As the Court put it in *Francovich*, this effectiveness 'would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible'.[74]

In addition to the specific issues of EU human rights and equality law identified above, therefore, as well as the emergence of stronger case law on proportionality and minimum 'essence' safeguards in various aspects of the case law in these fields, it is necessary to recognise and account for the fact that the EU interpretation of rights integrates procedural dimensions often treated separately in regional human rights litigation (eg in the European Convention On Human Rights system). This means that, beyond the alignment obligations stemming from the different areas of EU case law reviewed in this article, it is similarly essential to ensure that the application of UK-wide legislation, such as the Judicial Review and Courts Act 2022 and potential reform of the HRA,[75] does not compromise this specific protection for access to justice and effective judicial protection feeding into Northern Ireland law from article 2 of the Protocol.

CONCLUSION

This article has provided an analysis of areas in EU equality and human rights law where recent case law developments are likely to trigger the Protocol's commitments regarding non-diminution of human rights and equality standards. Overall, we have argued that the article 2 obligation operates in a complex manner, requiring careful consideration of the implications for Northern Ireland of ongoing case law developments by the CJEU in fields pertaining both to the six directives listed in annex 1, as well as to other fields that map onto the safeguards set out in Strand Three of the 1998 Agreement. Between 1 January 2021 and 1 September 2022, we identified relevant developments in four main substantive areas of EU case law (religion in the workplace; disability discrimination; discrimination in social security entitlements; and migration). We also found that there are cross-cutting themes in the interpretation of EU rights, which may become relevant in setting up

73 Case C-769/19 *Spetsializirana prokuratura (Vices de forme de l'acte d'accusation) v UC and TD* EU:C:2021:28. We note that, although the Court did not find a violation of the Charter in this case, it is crucial that the matter was considered admissible.

74 Case C-6/90 *Francovich and Bonifaci v Italy* EU:C:1991:428, para 33.

75 Judicial Review and Courts Act 2022 (UK), s 50.

overarching ways of responding to the need for alignment in the future, such as through risk assessments based on EU human rights and a heightened focus on procedural and remedial elements of those rights.

Is the task set out in article 2 feasible? While it is clear that the obligation of non-diminution is wide-ranging, Ireland's experience of adapting a comparable legal order to changes in these EU obligations, drawing in particular upon the 1998 Agreement's terms relating to cross-border rights and equality equivalence, shows that it is possible to deliver such a commitment successfully.[76] For this to happen, however, the breadth of the commitment needs to be appreciated and its execution needs to be based on regular review, in order to avoid gaps and unmanageable caseloads. Finally, there will also have to be an acceptance of potentially divergent interpretations of EU rights within the UK. Domestic case law, particularly through the case law of the UK Supreme Court, could effectively replicate and adapt some EU principles, such as access to court and proportionality, in its approach towards retained EU law. However, some of the suggestions made in the preceding section, such as the assessment of the 'essence' of human rights obligations, as well as the strong focus on remedies, could create incompatibilities with legislation on retained EU law in the rest of the UK, and are thus likely to require Northern Ireland to interpret certain rights and equality obligations differently, and potentially to legislate to account for this divergence, especially in respect of procedural and remedial aspects of EU human rights and equality standards.

76 See Aoife O'Donoghue, 'Non-discrimination: article 2 in Context' in Federico Fabbrini (ed), *The Law and Politics of Brexit: Volume IV The Protocol on Ireland/Northern Ireland* (Oxford University Press 2022) 89, 101.