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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MARTINA DILLON, JOHN McEVOY, AND LYNDA McMANUS FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY BRIGID HUGHES FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY TERESA JORDAN FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY GEMMA GILVARY FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY PATRICK FITZSIMMONS FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE NORTHERN IRELAND TROUBLES (LEGACY AND RECONCILIATION) ACT 2023

AND THE SECRETARY OF STATE FOR NORTHERN IRELAND

Respondent

POLICE OMBUDSMAN FOR NORTHERN IRELAND AND DEPARTMENT OF JUSTICE AND CORONERS SERVICE FOR NORTHERN IRELAND

Notice Parties

NORTHERN IRELAND HUMAN RIGHTS COMMISSION, EQUALITY COMMISSION FOR NORTHERN IRELAND, WAVE TRAUMA CENTRE AND AMNESTY INTERNATIONAL (UK)

Interveners

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Mr John Larkin KC with Mr Jude Bunting KC, Malachy McGowan and Laura King (instructed by Phoenix Law Solicitors) for the Applicants Dillon, McEvoy, McManus & Hughes
Ms Karen Quinlivan KC with Ms Lara Smyth (instructed by Madden Finucane Solicitors) for the Applicant Jordan
Mr Hugh Southey KC with Mr Malachy McGowan (instructed by KRW Law) for the Applicant Gilvary
Mr Donal Sayers KC with Mr Eugene McKenna (instructed by O'Muirigh Solicitors) for the Applicant Fitzsimmons
Mr Tony McGleenan KC with Mr Philip McAteer and Ms Laura Curran (instructed by the Departmental Solicitor's Office) for the Respondent
Mr Simon McKay (instructed by Legal Services Directive, PONI) for the Notice Party Police Ombudsman for Northern Ireland
Mr Peter Coll KC with Mr Terence McCleave (instructed by the Departmental Solicitor's Office) for the Notice Party Department of Justice and Coroners Service for NI
Mr Hugh Mercer KC with Ms Naomi Hart (instructed by a solicitor for the NI Human Rights Commission) for the Intervener the Northern Ireland Human Rights Commission
Mr Christopher McCrudden (instructed by a solicitor for the Equality Commission for NI) for the Intervener the Equality Commission for Northern Ireland
Mr David Heraghty (instructed by Higgins Holywood Deazley Solicitors) for the Intervener WAVE
Ms Moyne Anyadike-Danes KC with Mr Karl McGuckin (instructed by Phoenix Law Solicitors) for the Intervener Amnesty International (UK)

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COLTON J

Introduction

[1] According to the publication "Lost Lives" by McKittrick, Kelters, Feeney, Thornton and McVea (Mainstream Publishing Company, Edinburgh 2004), a total of 3,703 people were killed during what are commonly referred to as "The Troubles" in Northern Ireland dating from a period from the late 1960s to the signing of the Belfast/Good Friday Agreement ("B-GFA") on 10 April 1998.

[2] Overall, 2,129 civilians, 1,012 members of security forces and 562 paramilitaries died during the Troubles (Table 1, p. 1526).

[3] In addition, many more were severely injured.

[4] The B-GFA, entered into by a number of political parties in Northern Ireland endorsed by the British and Irish governments and by referenda in Northern Ireland and the Republic of Ireland, was widely seen as marking the end of the Troubles. By this Agreement a devolved Assembly and Executive was established in Northern Ireland based on power sharing. The Assembly was one of a number of inter-related institutions including a North-South Ministerial Council, implementation bodies, a British-Irish Council and a British-Irish Intergovernmental Conference. All the political parties involved committed to pursuing their political

objectives by exclusively peaceful means. The purpose of the Agreement and its outworkings was to ensure never again would the people of Northern Ireland be subject to loss of life on the scale experienced during the Troubles. The Agreement was forward looking. In its Declaration of Support, the parties describe it as "a truly historic opportunity for a new beginning."

[5] The parties acknowledged that the past had left "a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance and mutual trust, and to the protection and vindication of the human rights of all."

[6] Despite many initiatives, both political and legal, agreement as to how to address this legacy of suffering has proved elusive and controversial.

[7] By enacting the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the 2023 Act") which received Royal Assent on 18 September 2023, Parliament has set out how it now proposes to address the legacy of the Troubles.

[8] In summary, the 2023 Act brings to an end investigations of Troubles-related incidents through police investigations, the Police Ombudsman, new civil claims and inquests. It creates the Independent Commission for Reconciliation and Information Recovery ("the ICRIR") which will carry out "reviews" of deaths or other harmful conduct arising in respect of the Troubles. It must grant immunity to those involved in criminality in certain defined circumstances. It must provide a report at the end of any of its reviews. It has the power to refer matters to the prosecuting authorities in Northern Ireland, England & Wales and Scotland. It can only carry out reviews referred to it within five years. In short, it will be the sole body responsible for investigations into deaths and other harmful conduct caused during the Troubles in accordance with the provisions of the 2023 Act.

The applications

[9] The court received 20 applications challenging various provisions of the 2023 Act. By its Case Management Directions ("CMD") of 9 October 2023, leave was granted in respect of four applications which were heard together over the period from 20 November - 30 November 2023. The court's objective, in narrowing the number of applications, was to ensure that the legal issues that arise in relation to the 2023 Act were heard and determined as expeditiously as was reasonably possible. I reiterate the sentiment expressed in the CMD that the applicants whose cases were not chosen should not infer that their situation is weaker or that the losses of their loved ones which give rise to their applications are in any way of less value than the cases that have been chosen to be heard.

The applicants

(i) Lead case – Dillon, McEvoy, Hughes and McManus

[10] The lead case involves four applicants: Martina Dillon, John McEvoy, Lynda McManus and Brigid Hughes. Initially, Mrs Hughes was not granted leave as it was felt all the issues were covered by the first three applicants. However, after receiving valuable affidavit evidence from her, the court felt it was appropriate that she should be included as an applicant and was granted leave. This did not cause any prejudice to the respondent.

[11] Martina Dillon's husband, Seamus, was shot and killed on 27 December 1997 outside the Glengannon Hotel, near Dungannon, by the Loyalist Volunteer Force. In April 2023 the Coroner opened an inquest, compliant with article 2 of the European Convention on Human Rights ("ECHR"), into his killing on the basis that there was evidence of collusion by state authorities relating to the death. The inquest is currently paused due to an ongoing public immunity interest ("PII") application. It is unclear if this PII process will be resolved in sufficient time to allow the inquest to be completed before 1 May 2024, after which the 2023 Act will bring her inquest to an end.

[12] John McEvoy sustained serious injuries following an attack by loyalist gunmen at the Theirafurth Inn, Kilcoo, on 19 November 1992 in which one man, Peter McCormack, was also killed. In 2016, new material came to light revealing the possibility of state collusion in the attack. In 2022, this applicant brought judicial review proceedings challenging the alleged failure of the Chief Constable of the Police Service of Northern Ireland ("PSNI") to ensure an effective, prompt and independent investigation into the 1992 attack. Humphreys J ruled that the state failed to carry out an article 2 compliant investigation into the attack within reasonable time. The 2023 Act will bring an end to the investigation being conducted by the Police Ombudsman into this attack.

[13] Brigid Hughes' husband was killed during a security force operation at Loughall on 8 May 1987. In 2001, the European Court of Human Rights ("ECtHR") found that the investigations into Anthony Hughes' death breached the procedural limb of article 2 ECHR. The implementation of that judgment has been consistently monitored by the Committee of Ministers of the Council of Europe ("CoM") pursuant to article 46(2) ECHR. More recently, in *Brigid Hughes* [2020] NI 257, Sir Paul Girvan held that "the current systemic delay" fails to vindicate her article 2 rights (see Conclusions, (3), at p. 35). Counsel for the applicant informed the court that at a recent review of the inquest into her husband's death McAlinden J expressed the view that there is no prospect of it being heard before the cut-off date of 1 May 2024. The effect of the 2023 Act will be to bring that inquest to an end.

[14] Lynda McManus is the daughter of James McManus who was severely injured in a gun attack at the Sean Graham Bookmakers, Ormeau Road, Belfast on

5 February 1992. In February 2022, the Police Ombudsman found collusive behaviour by police in the 1992 attack. Ms McManus subsequently brought a civil claim for damages on 17 May 2022 which will be impacted by the 2023 Act.

[15] All of the applicants complain that as a result of the 2023 Act, any individuals identified as culpable for the deaths or injuries caused will not be the subject of any further police investigation but may instead seek and be granted immunity from prosecution.

(ii) Jordan

[16] Teresa Jordan is the mother of Pearse Jordan who was shot and killed on 25 November 1992 on the Falls Road, Belfast, by a member of the Royal Ulster Constabulary ("RUC") known as Sergeant A. There have been a series of inquests into his death. The first inquest commenced on 4 January 1995 and was adjourned, part heard, without a verdict. The second inquest was held between 24 September 2012 and 26 October 2012. On 31 January 2014, the High Court quashed the verdict of that inquest. In the third inquest, heard in November 2015 ([2016] NICoroner 1), Horner J was unable to reach a concluded view as to whether the use of lethal force was justified or not, but found that the PSNI failed to provide a satisfactory and convincing explanation of the circumstances of Mr Jordan's death. He found that one or two of the officers involved in the incident (Officers M and Q) had edited a contemporaneous document in order to conceal certain facts (para [144]) and that both officers had been untruthful in their testimonies (para [155]). These matters have been referred to the Director of Public Prosecutions ("DPP") with a view to considering the prosecution of Officers M and Q for the crimes of perjury and/or seeking to pervert the course of justice. When these proceedings were issued the DPP had made no decision as to whether the officers would be prosecuted. The failure to make such a decision was also included in the current challenge. Subsequently, the DPP has indicated that there is nothing for the PSNI to investigate. That decision is now being challenged in separate judicial review proceedings. The effect of the 2023 Act will be to prevent any potential prosecution in relation to the concealment of evidence of the documents taking place. The applicant also complains about the provision in the Act which prevents the use of certain material obtained by ICRIR from being used in civil proceedings.

(iii) Gilvary

[17] Gemma Gilvary is the sister of Maurice Gilvary who was "disappeared" by the Irish Republican Army ("IRA") in or around 12 January 1981. His body was later found on 19 January 1981. Evidence suggests that he was subjected to torture and was subsequently murdered because he was identified to the IRA as an informer by state agents, including a police officer. The applicant's case is currently part of Operation Kenova which was set up to investigate the alleged criminal activities of a state agent known as 'Stakeknife.' The applicant argues that the effect of the 2023

Act would be to end ongoing criminal investigations into her brother's death and the potential prosecution of those responsible for the torture and murder of her brother.

(iv) Fitzsimmons

[18] On 8 September 1975, Patrick Fitzsimmons was convicted of an offence of attempting to escape from detention, contrary to paragraph 38(a) of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973 and common law. He received a nine-month prison sentence. The applicant's initial detention was founded on an interim custody order ("ICO") which was signed by a Parliamentary Under Secretary of State. The decision of the Supreme Court in *R v Adams* [2020] 1 WLR 2077 held that an ICO had to be made by the Secretary of State personally. Accordingly, the applicant's conviction was quashed on 14 March 2022 by the Northern Ireland Court of Appeal. On 10 March 2022, the applicant issued proceedings seeking damages for false imprisonment and breach of article 5 ECHR. On 27 June 2023, he sought compensation for miscarriage of justice under section 133 of the Criminal Justice Act 1988. Both proceedings are yet to be determined. The effect of the 2023 Act will be to retrospectively deem the Order-making functions in relation to ICOs to be treated as having always been exercisable by authorised ministers of the Crown (as well as by the Secretary of State).

The notice parties

The Police Ombudsman for Northern Ireland

[19] Under the Police (Northern Ireland) Act 1998, the Police Ombudsman for Northern Ireland ("PONI") is responsible for the investigation of complaints from members of the public concerning the conduct of the RUC and the PSNI. The Ombudsman has been involved in investigating allegations concerning police misconduct in relation to deaths which occurred during the Troubles. The 2023 Act proposes to end all such investigations. The court heard both oral and written submissions on behalf of PONI.

The Department of Justice and Coroners Service for Northern Ireland

[20] The Department has responsibility for the Coroners Service for Northern Ireland who are currently conducting inquests into deaths which occurred during the Troubles ("legacy inquests"). The court received useful affidavit evidence on behalf of the Coroners Service in relation to the current situation regarding legacy inquests. The Department also submitted a note and made submissions in relation to the availability of legal aid funding for representation in the context of reviews by the proposed ICRIR.

Other notice parties

[21] Notices of the proceedings were also served on the PSNI, the DPP and the ICRIR. For various reasons neither of these parties opted to participate in the proceedings.

Interveners

The Northern Ireland Human Rights Commission ("NIHRC")

[22] The NIHRC is a statutory body with specific responsibilities for the promotion and protection of human rights in Northern Ireland. Pursuant to section 69(1) of the Northern Ireland Act 1998, the NIHRC "shall keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights." Further, under section 78A(1) the NIHRC "must monitor the implementation of article 2(1) of the Protocol in Ireland/Northern Ireland (now the Windsor Framework), in the EU Withdrawal Agreement (Rights of Individuals)." Section 71(2B) and 78C refer to the NIHRC intervening in cases concerning breaches of the Human Rights Act 1998 ("HRA") and/or the Windsor Framework ("WF"). The NIHRC was granted leave to intervene in these proceedings by way of written submissions and limited oral submissions.

The Equality Commission for Northern Ireland ("ECNI")

[23] The ECNI has similar responsibilities to those of the NIHRC. The ECNI was granted leave to intervene in these proceedings by way of written submission and limited oral submissions focusing on article 2 of the WF.

WAVE Trauma Centre

[24] WAVE was established in 1991. Amongst its primary purposes is the provision of support and therapeutic services to victims and survivors of the Troubles. It is presently the largest cross-community victims' group in Northern Ireland with five centres and fifteen satellite projects across the region.

[25] WAVE was granted leave to intervene by way of written submissions focusing on the potential impact of the 2023 Act on victims of the Troubles.

Amnesty International UK

[26] Amnesty International is the world's largest human rights organisation. Its mission is to undertake research and action focused on promoting respect for and protection of human rights principles. Amnesty International UK ("AIUK") is the UK section of the global Amnesty International movement. It is independent of government. AIUK has extensive experience in the work of truth commissions in many countries around the world. It has been involved in human rights issues

relating to the Troubles and has been actively engaged in the discussions concerning the 2023 Act throughout its passage through Parliament. The court granted AIUK leave to intervene by way of written submissions and limited oral submissions.

Summary of the statutory scheme

Part 1 of the 2023 Act – Definitions

[27] It will be necessary to return to certain provisions of the 2023 Act in more detail as the judgment progresses. However, an overview of the statutory scheme serves to place the various grounds of challenge in their overall context.

[28] Part 1, section 1(1) defines "the Troubles" as the events and conduct that related to Northern Ireland affairs and occurred during the period between 1 January 1966 and 10 April 1998. This includes any event or conduct connected to preventing, investigating, or otherwise dealing with the consequences of the Troubles (section 1(2)).

[29] Under section 1(4) "Other harmful conduct forming part of the Troubles" means any conduct forming part of the Troubles which caused a person to suffer physical or mental harm of any kind (excluding death).

[30] Section 1(5) describes an offence as being "Troubles-related" if it is an offence under the law of Northern Ireland, England and Wales or Scotland and the conduct which constitutes the offence was to any extent conduct forming part of the Troubles.

[31] Under section 1(5)(b), the threshold for a "serious" Troubles-related offence is met if the offence is (i) murder, manslaughter or culpable homicide, (ii) another offence committed by causing the death of a person, (iii) an offence committed by causing a person to suffer serious physical or mental harm. Serious physical or mental harm means:

> "(a) paraplegia;
> (b) quadriplegia;
> (c) severe brain injury or damage;
> (d) severe psychiatric damage;
> (e) total blindness;
> (f) total deafness;
> (g) loss of one or more limbs;
> (h) severe scarring or disfigurement."

[32] Under section 1(5)(c), a Troubles related offence is "connected" if it relates to, or is otherwise connected to, a serious Troubles-related offence but is not itself a serious Troubles-related offence, in particular, if both offences form part of the same event.

Part 2 of the 2023 Act – The Independent Commission for Reconciliation and Information Recovery

[33] Part 2 establishes an Independent Commission for Reconciliation and Information Recovery and sets out its functions, powers and responsibilities. The ICRIR consists of the Chief Commissioner, the Commissioner for Investigations ("CfI") and between one and five other Commissioners (section 2(3)(a)-(c)). Under Schedule 1, Part 2, Commissioners are to be appointed by the Secretary of State (paragraph 8(1)) for a term not exceeding five years (paragraph 10). The ICRIR's performance is reviewed by the Secretary of State in accordance with section 36 who may make regulations for the cessation of the ICRIR if satisfied that the need for the ICRIR to exercise its functions has ceased. (section 37(1)) This is subject to affirmative procedure (section 37(6)).

[34] Section 2(4) states that the principal objective of the ICRIR is to "promote reconciliation." Pursuant to section 2(5), the specific functions of the ICRIR are as follows:

> "(a) to carry out reviews of deaths that were caused by conduct forming part of the Troubles (see sections 9 and 11 to 13);
>
> (b) to carry out reviews of other harmful conduct forming part of the Troubles (see sections 10 to 13);
>
> (c) to produce reports ("final reports") on the findings of each of the reviews of deaths and other harmful conduct (see sections 15 to 18);
>
> (d) to determine whether to grant persons immunity from prosecution for serious or connected Troubles-related offences other than Troubles-related sexual offences (see sections 19 to 21);
>
> (e) to refer deaths that were caused by conduct forming part of the Troubles, and other harmful conduct forming part of the Troubles, to prosecutors if the CfI considers that relevant conduct constitutes an offence under the law of Northern Ireland by an individual whose identity is known to him (see section 25);

> (f) to produce a record (the "historical record") of deaths that were caused by conduct forming part of the Troubles (see sections 28 and 29)."

[35] In the exercise of these functions, the ICRIR must have regard to the "general interests of persons affected by Troubles-related deaths and serious injuries" (section 2(6)).

ICRIR reviews

[36] The 2023 Act makes provisions for three types of reviews: reviews of deaths (section 9); reviews of other harmful conduct forming part of the Troubles (section 10); and reviews in connection with requests for immunity (section 12). Section 9 specifies who can make a request to the ICRIR for a review into a death resulting from the Troubles. This includes a close family member of the deceased whose death was caused directly by conduct forming part of the Troubles or, if there are no close family members, any member of the family of the deceased, "but only if it is appropriate for that family member to make that request." (section 9(2)). Section 9(7) explains that it is for the CfI to decide whether it is appropriate for that family member to make a request under subsection (2).

[37] Section 9(3)-(6) list the office holders who may also make a request. Notably, the Secretary of State has the power to request a review into any death that was caused by conduct forming part of the Troubles whether or not it was caused directly by the conduct.

[38] Section 9(8) states that "a request under this section may not be made after the end of the fifth year of the period of operation of the ICRIR."

[39] Section 10 permits requests for reviews of other harmful conduct from the Secretary of State "whether or not it caused any person to suffer serious physical or mental harm" or directly from persons who suffered serious physical or mental harm as a result of the conduct forming part of the Troubles. The time-limit within which such a request may be made is likewise set at five years (section 10(3)).

[40] Section 12 clarifies that where a request for immunity is made by a person, pursuant to section 19, the ICRIR may still carry out a review both in relation to a death and other harmful conduct forming part of the Troubles.

[41] Section 13 prescribes how reviews are to be conducted by the ICRIR. The CfI, who has operational control over the conduct of reviews, is required, first and foremost, to comply with the obligations imposed by the HRA (section 13(1)). Moreover, under section 13(5), the CfI must ensure that every review, "looks into all the circumstances of the death or other harmful conduct to which it relates", regardless of whether a criminal investigation forms part of that review. The

question of whether a criminal investigation is to be included as part of a review is left to the discretion of the CfI (section 13(7)).

Powers of the ICRIR to obtain information

[42] To assist with the primary function of conducting reviews section 5 confers, upon the ICRIR, a broad power to require disclosure, by any relevant authority, of such information, documents and other material as the CfI may reasonably require for the purposes of, or in connection with, the exercise of the review function or the immunity function. According to section 60, a relevant authority means, the Chief Constable of the PSNI; the Chief Officer of a Police Force in Great Britain; the Police Ombudsman for Northern Ireland; the Director General of the Independent Office for Police Conduct; the Police Investigations and Review Commissioner; any Minister of the Crown (which has the same meaning as in the Ministers of the Crown Act 1975 — see section 8 of that Act); the Security Service; the Secret Intelligence Service; GCHQ; any other department of the United Kingdom government (including a non-ministerial department); a Northern Ireland department; the Scottish Ministers; any of His Majesty's forces. Section 5(8) states that it is not a breach of any obligation of confidence owed by a relevant authority, or any other restriction on the disclosure of information, for a relevant authority to make such information available to the ICRIR.

[43] Section 14 is an important provision in the exercise of the ICRIR's review function as it gives the CfI powers to require persons by notice to provide information or produce documents in the person's custody for the purposes of inspection, examination, or testing.

Operational powers of ICRIR officers

[44] ICRIR officers are prohibited from doing anything which would risk the life or safety of any person or would risk prejudicing, or would prejudice, national security or prospective criminal proceedings (section 4(1)). The prohibition on the latter does not apply to the granting of immunity by the ICRIR (section 4(3)). Section 6(1) provides that the CfI is designated as a person having the powers and privileges of a constable. The CfI may also designate any other ICRIR officer as a person having such powers (section 6(2)). These powers and privileges may be exercised for the purposes of, or in connection with, any function of the ICRIR except the function of producing the historical record. Schedule 2 contains further provisions about the operational powers of ICRIR officers.

Admissibility of material in criminal and civil proceedings

[45] Sections 7 and 8 concern the admissibility of material in criminal and civil proceedings. Section 7(2) specifies that "compelled material" obtained by ICRIR from a person in respect of whom criminal proceedings are brought, may not be used in evidence against that person save where the criminal proceedings relate to

the offence of providing a false statement to the ICRIR (section 27) or the distortion of evidence provided to the CfI (paragraph 8(1)(a) of Schedule 4). Compelled material means anything that has been obtained by the ICRIR from a person in the exercise of its section 14 powers (section 7(11)). Moreover, the information submitted in an immunity application cannot be used against that person as evidence (section 7(3)) except in relation to proceedings under section 27 (false statements) (section 7(4).

[46] Similarly, in accordance with section 8, no "protected material" (which means material provided to, or obtained by, the ICRIR for the purposes of, or in connection with, the exercise of any of its functions) or evidence relating to protected material is admissible in civil proceedings or inquests. It does not apply to any protected material which has been obtained by the ICRIR from a relevant authority under section 5 (section 8(4)).

Production of final reports

[47] Sections 15-18 make provision for the production and publication of reports on the findings of reviews into deaths and other harmful conduct forming part of the Troubles. Section 15(2) imposes a duty upon the Chief Commissioner to ensure that a final report is produced. This report must respond to the specific questions raised by the request to the extent that it is practicable to respond to those questions (section 15(3)). Sections 16(2)(b) and 16(3)(b) insert a statutory duty of consultation whereby persons who requested the review, relevant family members or any person who suffered serious physical or mental harm in the relevant event are to be furnished with copies of the draft final report and afforded the opportunity to make representations on its content. The ICRIR is then obliged to "take account of" those representations before it publishes the final report (section 16(8)).

[48] Under section 17(2), the ICRIR must publish reports made pursuant to a request under section 9 or 10 of the Act. An important caveat is found in section 16(7) which confers discretion upon the Chief Commissioner to exclude certain material from the final report where it would not be in the public interest to do so. Furthermore, if a decision is taken by the ICRIR under section 12 to conduct a review following a request for immunity then the ICRIR may decide not to publish it. The ICRIR has a duty, when exercising this discretion not to publish a final report, to take reasonable steps to obtain and take account of the views of "any relevant family members" of the person killed in the event of any person who suffered serious physical or mental harm, including relevant family members of persons who subsequently died from those injuries (section 17(4) and (5)).

[49] In addition to the final report of an ICRIR review, the ICRIR must produce and publish an historical record which is to consist of a single document providing an account of the circumstances in which each of the relevant deaths occurred (section 28(1) and 29(1)). The ICRIR must take all reasonable steps to identify all deaths that were caused by conduct forming part of the Troubles and obtain

information considered likely to be of use in producing the historical record (section 28(2)).

Disclosure of information

[50] Section 30 provides that the ICRIR may disclose information held by it to any other person unless it is prohibited under subsections (4)-(9). These prohibitions prevent disclosure of the following: sensitive information; protected international information; information that would prejudice national security interests, the life or safety of any person or prospective criminal proceedings (see section 4(1)); information contravening data protection legislation; and finally, information which would be in breach of Parts 1 to 7, and Chapter 1 of Part 9 of the Investigatory Powers Act 2016.

[51] Schedule 6 sets out disclosures which are permitted and makes provisions about decisions to prohibit disclosures of sensitive information in final reports by the ICRIR. In short, a disclosure of sensitive information by the ICRIR is permitted if the CfI notifies the Secretary of State that they intend to make the disclosure and the Secretary of State notifies the CfI that it is permitted within the "relevant decision period" (Schedule 6, paragraph 4). Schedule 8 sets out the provisions relating to the identification of sensitive, prejudicial or protected international information. Under paragraph 1, the CfI is required "from time to time" to identify sensitive or prejudicial information obtained by the ICRIR. Section 33(1)(a) permits the Secretary of State to issue guidance to the ICRIR on the identification of sensitive information. Additionally, paragraph 5 of Schedule 8 permits the Secretary of State to notify the CfI of any information held by the ICRIR, which in the Secretary of State's opinion, is protected international information.

Immunity from prosecution

[52] Pursuant to section 19, the ICRIR <u>must</u> grant immunity to "P" from prosecution if certain conditions are met. Section 21(2) places a positive duty upon the ICRIR to take reasonable steps to obtain any information which the CfI knows or believes is relevant to the veracity of P's account. Immunity may be revoked under section 26 where a person is subsequently convicted of an offence of making a false statement (section 27), a terrorist offence or an offence with a terrorist connection (section 26(2)). An exception for sexual offences or inchoate offences relating to a sexual offence is provided for in Schedule 5, paragraph 2. Under section 25(2), if the CfI may refer conduct "relevant" to a review request under sections 9 or 10 to the DPP if satisfied that the conduct constitutes an offence under the law of Northern Ireland by an individual whose identity is known to the Commissioner.

Part 3 of the 2023 Act – Criminal investigations and proceedings, civil proceedings, inquests, police complaints and interim custody orders

[53] Part 3 of the 2023 Act concerns criminal investigations and proceedings, civil proceedings, inquests, police complaints and interim custody orders. According to section 63(3), part 3, except for sections 43, 46 and 47, comes into force on 1 May 2024.

Criminal investigations and proceedings

[54] Section 38(1) specifies that on and after the day of commencement (1 May 2024), no criminal investigations of any Troubles-related offence may be continued or initiated save where the prosecution of a person for the offence has already begun prior to commencement and the investigation is being carried out as part of that prosecution (section 42(3)).

[55] Section 39(2) clarifies that no criminal enforcement action may be taken against someone for a serious or connected Troubles-related offence in relation to which they have been granted immunity. Section 40 provides that where an individual is not granted immunity, criminal enforcement action may be taken against that person if the relevant person's conduct is referred to a prosecutor, in accordance with section 25. Section 41 states that no criminal enforcement action may be taken against any person in relation to Troubles-related offences which are not serious or connected offences. Section 41 is subject to a saving provision for ongoing pre-commencement action (section 42(4)).

Civil proceedings

[56] Relevant Troubles-related civil claims that were brought on or after 17 May 2022 may not be continued on and after 18 November 2023 by reason of section 43(1) and section 63(2) of the 2023 Act. Sections 43(2) and 63(2) also prohibit new Troubles-related civil claims from being brought after 18 November 2023. Under section 43(3)-(6) an action is a relevant Troubles-related civil action if three conditions are met: (a) the action is to determine a claim arising out of conduct forming part of the Troubles; (b) it is founded on a cause of action under tort, delict, fatal accident legislation or equivalent foreign law grounds; and (c) the time limit for bringing the action was, or would be, given in the limitation legislation listed in subsection (6) which includes, inter alia, the Limitation (Northern Ireland) Order 1989 (S.I. 1989/1339 (N.I. 11)).

Inquests

[57] Section 44 of the 2023 Act amends section 16 of the Coroners Act (Northern Ireland) 1959 by inserting sections 16A-C which provide the following:

> "16A(1) This section applies to an inquest into a death that resulted directly from the Troubles that was initiated before 1 May 2024 unless, on that day, the only part of the inquest that remains to be carried out is the coroner or any jury making or giving the final determination, verdict or findings, or something subsequent to that.
>
> (2) On and after that day, a coroner must not progress the conduct of the inquest.
>
> (3) As soon as practicable on or after that day, the coroner responsible for the inquest must close the inquest (including by discharging any jury that has been summoned)."

[58] Section 16B also provides that on or after 1 May 2024, the coroner must not decide to hold an inquest into any death that resulted directly from the Troubles. This prohibition applies also to the power of the Attorney General or Advocate General for Northern Ireland to give a direction under section 14 of the Coroners Act (Northern Ireland 1959 to conduct an inquest into a death that resulted directly from the Troubles.

Police complaints

[59] The provision in section 45, amending section 50 of the Police (Northern Ireland) Act 1998, through the insertion of section 50A, requires the Chief Constable, the Board, the Director or the Department of Justice to cease dealing with a complaint referred before 1 May 2024 where the complaint relates to conduct forming part of the Troubles. Likewise, under subsection (3) the Police Ombudsman is not to commence any formal investigation and to cease any existing investigation with effect from 1 May 2024, unless a criminal investigation is carried out for the purposes of a prosecution which has already begun (section 50A(4)).

Interim custody orders

[60] As alluded to earlier, the backdrop to sections 46 and 47 is the decision of the Supreme Court in *R v Adams* [2020] which found that an ICO made under Article 4(1) of the Detention of Terrorists (Northern Ireland) Order 1972 was invalid because the power to make the order had not been exercised by the Secretary of State personally. Section 46 seeks to reverse that decision by providing that the order-making functions conferred by Article 4(1) of the Detention of Terrorists (Northern Ireland) Order 1972, or under paragraph 11 of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973, are to be treated as always having been exercisable by authorised Ministers of the Crown, as well as by the Secretary of State (section 46(2)). Section 46(3)-(4) provide that both an ICO and the detention of a person pursuant to an ICO are "not to be regarded as having ever

been unlawful" simply on the basis that an authorised Minister of the Crown exercised the order-making function.

[61] Section 47 places a prohibition on civil actions and applications for compensation for a miscarriage of justice in respect of allegations that a person was detained pursuant to an unlawfully made ICO. Similarly, criminal proceedings relating to the quashing of a conviction on the grounds that a person was detained on foot of an unlawfully made ICO may not be brought on or after 1 May 2024 save where such proceedings are in the pre-commencement phase (section 47(2)-(3)).

Part 4 of the 2023 Act – The memorialisation of the Troubles

[62] Although not the subject of any challenge it is important to acknowledge the part of the Act dedicated to the memorialisation of the Troubles. Thus, sections 49-51 make it incumbent upon relevant persons, designated by the Secretary of State, to secure the creation, collection and preservation of Troubles-related oral history records. Designated persons must ensure that an evaluation of memorialisation activities is conducted with a view to making recommendations for how such activities will continue to promote reconciliation (section 50(1)).

Grounds of challenge and relief sought

(a) Dillon and others

[63] The applicants in the lead case bring extensive challenges to the provisions of the 2023 Act. The challenges can be summarised in three broad grounds:

(i) The provisions challenged are unlawful insofar as they are incompatible with articles 2, 3, 6 and/or 14 ECHR pursuant to section 4 HRA. The applicants seek declarations of incompatibility.

(ii) The provisions challenged are in breach of the applicants' rights pursuant to article 2 WF. Specifically, their rights protected under Strand Three of the B-GFA and underpinned by EU law have been diminished as a result of the UK's withdrawal from the EU insofar as the UK would have been prohibited under EU law from introducing the impugned provisions of the 2023 Act prior to withdrawal. The relevant parts of EU law identified by the applicants are articles 1, 2 and 47(2) of the EU Charter of Fundamental Rights ("CFR"); and articles 1, 11 and 16 of the EU Victims' Directive 2012/29/EU. The applicants assert that, pursuant to section 7A of the EU (Withdrawal) Act 2018 ("EUWA 2018"), any breach of article 2(1) WF should result in disapplication of the relevant provisions with the result that they have no force or effect.

(iii) The impugned provisions amount to such a fundamentally unconstitutional interference in the role and function of the judiciary that they should be

disapplied under common law principles, with the result that they have no force or effect.

(b) Gilvary

[64] The core thread of the applicant's challenge in *Gilvary* is that Parts 2 and 3 of the 2023 Act will operate in such a way as to prevent criminal investigations into allegations of torture and potentially grant immunity to those who have committed such acts in direct contravention of article 3 ECHR. As such, the applicant seeks the same relief as in *Dillon and Ors*, namely, declarations of incompatibility in accordance with section 4 HRA.

[65] This applicant also seeks disapplication of the relevant provisions on the grounds that the provisions are unconstitutional (adopting the same position as *Dillon and ors*) and/or a breach of Article 2(1) of the WF. This applicant relies on articles 1 and 4 CFR and article 11 of the Victims' Directive.

[66] Finally, *Gilvary* raises a novel challenge arguing that the provisions of the 2023 Act are in breach of article 2(2) of the WF insofar as the Act frustrates the functions of the NIHRC.

(c) Jordan

[67] In *Jordan* the applicant is challenging the compatibility of sections 8 and 41 of the 2023 Act with articles 2, 6 and 8, read alone and in conjunction with article 14 ECHR, and seeks a declaration to that effect pursuant to section 4 of the HRA.

(d) Fitzsimmons

[68] The case of *Fitzsimmons* concerns a discrete challenge against sections 46 and 47. The applicant complains that these provisions have the effect of extinguishing his civil claim for false imprisonment and a breach of article 5 ECHR and his application for compensation for a miscarriage of justice. The applicant also submits that section 47 will prevent any further persons from applying to quash their conviction. The provisions relied upon are articles 6 and 7 ECHR and article 1 of the First Protocol to the ECHR ("A1P1"). The applicant seeks declarations of incompatibility under section 4 HRA.

(e) Notice parties/interveners

[69] With the exception of the Department of Justice and Coroners Service for Northern Ireland the remaining notice party and interveners broadly support the challenges brought in the lead case of *Dillon and others*. The PONI submits that as currently drafted the 2023 Act arguably fails to provide an article 2 compliant framework for the investigations of death or other serious harm; that the review function is inadequate; and that the ICRIR lacks independence. It further raised

issues about public scrutiny, accountability and participation of victims. The Commissions argued that the 2023 Act is incompatible with articles 2, 3, 6 and 14 ECHR and A1P1 and results in a diminution of rights contrary to the WF. WAVE has engaged with the government during the development of the impugned legislation, including giving evidence to the Northern Ireland Affairs Committee on the topic. WAVE supports the applications brought in the lead case. Through its submissions it has provided valuable insight into the perspective of victims and survivors to the proposals. Amnesty International strongly opposes the 2023 Act, arguing that it removes existing judicial and investigative processes and replaces them with a set of mechanisms that fail to discharge the UK's human rights obligations, falling far short of any comparable human rights compliant investigative process, within the wider international spectrum.

Development of the 2023 Act – How did we get here?

[70] The court returns to the B-GFA 1998, foreshadowed in the introduction to this judgment. As part of "A truly historic opportunity for a new beginning", the participants in the multi-party negotiations committed themselves to new political institutions based on the parties' absolute commitment to exclusively democratic and peaceful means of resolving differences on political and constitutional issues, which divided the people of Northern Ireland. In declaring their support for the Agreement, the parties acknowledged the legacy of suffering endured by those who died or were injured during the Troubles and recognised the importance of reconciliation. The Declaration of Support states:

> "We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.
>
> […]
>
> We acknowledge the substantial differences between our continuing, and equally legitimate, political aspirations. However, we will endeavour to strive in every practical way towards reconciliation and rapprochement within the framework of democratic and agreed arrangements …"

[71] Strand Three of the Agreement expands on the issue of human rights and contains the following paragraphs under the heading "Reconciliation and victims of violence":

> "11. The participants believe it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation …
>
> 12. It is recognised that victims have a right to remember as well as to contribute to a changed society."

[72] The B-GFA itself did not make any specific provision as to how the state would deal with legacy issues and their impact on victims. It was agreed that a Northern Ireland Victims' Commission would be established. As will be clear from the following, in the intervening 25 years it has not been possible for the political parties in Northern Ireland to achieve consensus on how the issue of legacy should be addressed.

[73] In the present case, the policy aim of the 2023 Act is fundamentally in dispute. At a basic level, the applicants each argue that the impugned provisions of the 2023 Act will obstruct reconciliation. They say the aim is, subversively, to "protect veterans" from ongoing effective investigations as to their, or other state agents, conduct during the Troubles and to ensure they are not subject to public scrutiny, criminal investigation and prosecution. The respondent argues that the 2023 Act is an appropriate outworking of the terms of the B-GFA and represents a nuanced approach to the legacy of the Troubles. In the respondent's view, the ICRIR provides the best opportunity for victims of the Troubles to obtain information about the circumstances of their loved one's deaths.

[74] Mr McGleenan charted a chronological course through a substantial amount of documentary evidence since the B-GFA. This material demonstrates how successive governments have attempted to deal with the legacy of the Troubles. It explains and reveals the thinking behind the provisions of the 2023 Act and the competing policy objectives which it seeks to balance. The court has reviewed this information in detail and sets out a summary of the key points below.

[75] The respondent refers to four statutory precedents which modified and limited the normal application of the criminal law. Three of these were justified in the context of resolving conflict in Northern Ireland.

[76] First, the Northern Ireland Arms Decommissioning Act 1997 which established a "decommissioning scheme" and introduced an amnesty for persons taking part in that scheme who otherwise would have been liable for prosecution in respect of terrorist offences.

[77] Second, the Northern Ireland (Sentences) Act 1998 which allowed for early release of serious offenders who met the qualifying criteria. This had the effect of releasing those who had been convicted of serious terrorist crimes during the Troubles before completion of their sentences.

[78] Third, the Northern Ireland (Location of Victims' Remains) Act 1999 which prohibited information provided by persons, complicit in the crime of enforced disappearance committed during the Troubles, from being admissible as evidence in "any criminal proceedings" (section 3). Section 4 also placed restrictions on the forensic testing of human remains or other items obtained as a result of the information provided by those persons.

[79] Fourth, although not related to the Troubles, section 71 of the Serious Organised Crime and Police Act 2005 permits the DPP, for the purposes of an investigation or prosecution of an offence, to issue a person an immunity notice specifying the conditions which must be complied with in order to avail of immunity from prosecution.

[80] The respondent argues that the first three statutes demonstrate how the strict requirements of retributive criminal justice have, over the years, yielded to the overarching objective of achieving reconciliation and providing information recovery to victims of the Troubles. It is argued that these provisions, which remain unchallenged in the courts, and which have been operating effectively, provide support for the concept of the "conditional immunity" scheme provided for in the 2023 Act and the creation of bespoke procedures to deal with unresolved aspects of the Troubles. In his reply, Mr Larkin, describes these as the respondent's four "false-friends."

[81] True it is, that there are differences between those Acts and the 2023 Act and they are not, of course, determinative of the decisions this court must make. Nonetheless, I consider that there is some force in Mr McGleenan's submission. They demonstrate the flexibility available to the state in seeking to establish mechanisms to deal with a society emerging from conflict.

The Northern Ireland (Offences) Bill

[82] An attempt to "draw a line under the past" and address the legacy issues related to the Troubles was made in 2005 with the introduction of the Northern Ireland (Offences) Bill. The purpose of the Bill was to deal with those suspected of having committed terrorist-related offences before 10 April 1998, in connection with the affairs of Northern Ireland, and who had fled the jurisdiction, thereby escaping trial or punishment. Persons eligible for the scheme could be granted a certificate which would exempt them from arrest. Those persons could still be prosecuted for the alleged offences in respect of which a certificate was granted but only before a Special Tribunal. The scheme also provided for a system, similar to the Early Release Scheme, whereby a person who was convicted before the Special Tribunal and sentenced to imprisonment, could be released on licence provided certain conditions were satisfied. The Bill was met with vehement opposition and was eventually withdrawn in 2006. The former Secretary of State for Northern Ireland ("SoSNI"), Peter Hain MP, remarked at the time:

> "When I introduced the Bill, I said I would not presume to tell any victims that they must draw a line under the past, but the Government still believes that the anomaly will need to be faced at some stage as part of the process of moving forward. It is regrettable that Northern Ireland is not yet ready to do that. We will reflect carefully over the coming months on how to make progress in the context of dealing with the legacy of the past." (House of Commons Hansard Debates, 11 January 2006).

The Eames/Bradley Report

[83] A key milestone in the legacy policy development process was the Eames/Bradley Report published on 23 January 2009. The Report was the culmination of a year-long consultation conducted by the Consultative Group on the Past, co-chaired by Lord Robin Eames and Dennis Bradley. The Report made several recommendations including the establishment of an independent Legacy Commission to deal with four strands of work: promoting reconciliation through a process of engagement with community issues arising from the conflict; reviewing and investigating historical cases; conducting a process of information recovery; and examining linked or thematic cases emerging from the conflict.

[84] This Legacy Commission would sit for a fixed period of five years. It was anticipated that after the five-year period the "need for special institutions to deal with the past will have much reduced … [and] the end of the five-year period should mark a significant transition from the past to the future." (p. 137) Importantly, the Report did not endorse an amnesty but recommended that the Legacy Commission would itself make recommendations "on how a line might be drawn at the end of its five-year mandate so that Northern Ireland might best move to a shared future." (p. 157). Outstanding inquests would also continue under the Eames-Bradley proposals. These proposals were not implemented, in large part, due to the recommendation in the Report to provide victims with a one-off compensation payment which was met with strong opposition as it was not possible to achieve agreement on the definition of a victim.

[85] Despite this lack of implementation, many of the seeds of the 2023 Act can be seen in the thinking behind the Eames/Bradley Report. A specific commission was envisaged to deal with the legacy of the past with an operational mandate of five years. It was anticipated that the Commission would continue to review and investigate historical cases, backed by police powers. The importance of recovering information to relatives was highlighted.

[86] The Report concluded that the available legal processes were not fully meeting society's need and that "a way should be found to draw a line, in the future, while preserving the requirements of truth and justice" (p. 35). One way, proposed in November 2013 by the then Northern Ireland Attorney General, John Larkin KC,

was to bring an end to prosecutions, inquests and other inquiries which, in his view, was "a logical consequence" of the B-GFA.

The Stormont House Agreement

[87] The next significant milestone occurred almost six years later in the form of the Stormont House Agreement ("SHA") on 23 December 2014. The SHA expressed a commitment by the British and Irish Governments and the main NI political parties to respect six principles (para [21]):

- "promoting reconciliation;
- upholding the rule of law;
- acknowledging and addressing the suffering of victims and survivors;
- facilitating the pursuit of justice and information recovery;
- is human rights compliant;
- and is balanced, proportionate, transparent, fair and equitable."

[88] The SHA proposed to establish, through legislation, four bodies, including the Historical Investigations Unit ("HIU"), the Independent Commission on Information Retrieval ("ICIR"), an Oral History Archive ("OHA") and an Implementation and Reconciliation Group ("IRG").

[89] The HIU was to be an independent body, with policing powers, dedicated to taking forward criminal investigations into outstanding Troubles-related deaths. This would replace the legacy work conducted by the PSNI (c.900 Troubles-related deaths) and PONI (c.400 Troubles-related incidents). For every case in the HIU's caseload, the Director of the HIU would determine the extent to which an investigation was necessary and how it would be carried out. The HIU Director would also take into account any investigation that had already taken place and would be prevented from conducting further investigation unless there was new evidence, or the Chief Constable was satisfied that further investigation was required. The HIU would aim to complete its work within five years although the Government would have the power to extend the period if deemed appropriate. Legacy inquests would continue as a separate process to the HIU.

[90] The ICIR would be set up to enable victims to seek and privately receive information about the Troubles-related deaths of their next of kin. It was proposed that this body would run for "no longer than five years" and be led by an independent chairperson appointed by members of the British and Irish government, in consultation with the Office of the First Minister and Deputy First Minister ("OFMDFM") (paras [44]-45]). Information disclosed to the ICIR would be inadmissible in criminal and civil proceedings (para [46]).

[91] The SHA was largely supported by all the major NI parties, excluding the Ulster Unionist Party ("UUP"). Despite this support, consensus on implementation of the SHA proposals could not be reached leading to a request by the OFMDFM for the proposals to be taken forward in the UK Parliament.

[92] In May 2018, the UK Government conducted a consultation on a draft SHA Bill, "Addressing the Legacy of Northern Ireland's Past: Analysis of the consultation responses" (July 2019). The consultation received 17,000 responses, the majority of which were in favour of reform and expressed broad support for the institutional framework proposed under the SHA. Some of the respondents to the consultation argued that it was time to draw "a line in the sand", end investigations and prosecutions and implement a general amnesty. Conversely, it was noted that the "clear majority of all respondents to the consultation argued that a Statute of Limitations or amnesty would not be appropriate for Troubles-related matters – many were clear that victims, survivors and families are entitled to pursue criminal justice outcomes and such a move could risk progress towards reconciliation." (p. 21).

[93] Following the conclusion of the SHA consultation, an Options paper was produced internally for ministerial consideration entitled "Reforming the Legacy System in Northern Ireland (November 2019)." The paper stated that the measures sought to "reorient legacy processes and the wider narrative in Northern Ireland to remind people that the SHA is not just about criminal justice outcomes but, critically, promoting and facilitating reconciliation." With this objective in mind, a range of options was presented including; beginning with a review of each case rather than a full criminal investigation; only cases recommended by the HIU for prosecution would be sent to the PPS; the prohibition of new civil litigation in legacy cases; existing inquests to continue but no scope for new inquests to be opened; and the implementation of a statutory bar on any further investigation following a review by the HIU.

[94] A renewed commitment to legislate for the SHA (optimistically within 100 days) was expressed in the "New Decade, New Approach Deal", following the Conservative Party's victory in the 2019 General Election. The Deal was the result of negotiations between the government and the parties here, to restore the functioning of the Assembly and Executive in Northern Ireland which had been suspended. It is significant that the Conservative Party Manifesto also included a pledge to tackle "vexatious legal claims" against veterans. The tension between delivering upon the SHA commitments and the pledge to protect veterans is readily apparent in an options paper entitled "New Decade New Approach – options for Addressing NI Legacy Issues" (9 January 2020). The paper recognises that "any way forward will require some very difficult choices about where the balance should lie between providing justice for victims and supporting wider reconciliation and healing – including through providing certainty for those potentially involved in investigations and prosecution ... veterans must not be subject to vexatious claims whoever they and wherever they serve … all of the proposals in this paper contain

mechanisms designed to ensure that only investigations which truly merit further investigation move forward." Accordingly, six options were presented and assessed against a range of criteria largely mirroring the six SHA principles. However, additional considerations were included such as whether the proposal is welcomed by victims' groups; provides certainty for veterans, police and other former participants; and, commands support from NI parties and Westminster.

[95] Option A was to retain the "current approach" whereby investigations would continue to be conducted by the PSNI, PONI and the Coroners Service. An assessment of this option concluded that public support could not be maintained in the absence of wider truth recovery and reconciliation measures. It was further considered that the "current" approach provides no certainty to veterans who were being exposed to multiple investigations and that this approach did not attract support from Northern Ireland or Westminster.

[96] Option B was to implement the SHA proposals without revision. This was considered more favourably, in large part because it was "designed to be balanced and fair" and would be accepted by all main NI parties (with the exception of the UUP). Moreover, the focus on criminal justice outcomes was offset by the time limit of five years for operation of the HIU and the introduction of specific truth-seeking bodies. However, it was noted that this option, whilst more victim-centred, would be unlikely to provide the "level of certainty which veterans are seeking."

[97] Option C was to introduce a revised SHA model, responding to recommendations that arose out of the 2019 consultation. This package would include the same measures under Option B. However, after initial review and triage by HIU, no further investigation would be permitted except where new evidence arises. This Option suffered from the same issue as Option B, insofar as cases considered by the HIU would be completed rather than closed and, therefore, the possibility of reinvestigation remained open. For this reason, it was considered unlikely to benefit from broad support in Westminster and amongst veterans.

[98] The more radical approaches are reflected in Options D, E and F.

[99] Option D proposed implementation of a "significantly revised" SHA model which included zero prison time for all Troubles-related offences (except where there is an ongoing risk to the public); closure of all cases after investigation with no prospect of reopening; an overall time limit in the investigative process (tentatively 4-5 years); no new inquests; and rules tightened to limit new civil cases. It was noted that this package whilst in principle reflecting the spirit of the SHA would "shift the emphasis away from judicial outcomes as the core focus and towards a much greater emphasis on reconciliation. In so doing, it would provide as much certainty as possible for participants, including veterans, by removing the possibility of criminal prosecution on a case-by-case basis." This proposal was expected to face strong challenge from the NI parties.

[100] Option E proposed the establishment of a Family Report Body ("FRB"), instead of the ICIR and HIU, to be focused on the task of information recovery rather than conducting investigations. The FRB could refer cases where there was a need for further criminal investigation to a separate investigative team subject to clear criteria relating to the presence of new evidence; no new inquests would be allowed, and rules would be tightened to limit new civil claims from being brought. It was considered that this model, "while majoring on reconciliation and truth recovery" left sufficient scope to facilitate justice in a proportionate and transparent manner and to provide certainty to those involved. It was, however, accepted that this marked a significant departure from the existing approach and that it was likely to attract criticism from NI parties, the Irish Government and victims' groups.

[101] Option F suggested a universal amnesty for all-Troubles related offences, thereby replacing the requirement for the HIU. Option F was admitted as being "a radical proposal" and one which "cannot be said to be based on the Stormont House Agreement in any way." It was further acknowledged that "in light of the responses to the NIO's legacy consultation – which clearly opposed anything akin to an amnesty – the public positions of the NI parties, and the recent statements by the Irish Government opposing any form of amnesty, it is unclear what evidence would demonstrate at this stage that an amnesty would – in the round – promote reconciliation in Northern Ireland …" A tentative assessment of the support for Option F projected that it "might attract a superficial degree of support in Westminster, although it would also face strong opposition given the unprecedented nature of erasing criminal guilt for crimes as serious as murder." It was further noted that an amnesty would be "expected to have exceptions for grave breaches of fundamental rights (such as allegations of torture)."

The move towards the 2023 Act

[102] On 18 March 2020, the UK Government released a Written Ministerial Statement ("WMS") which marked a watershed moment in the shift in focus away from criminal justice outcomes to information recovery:

> "It is clear that, while the principles underpinning the draft [SHA] Bill as consulted on in 2018 remain, significant changes will be needed to obtain a broad consensus for the implementation of any legislation …
>
> While there must always be a route to justice, experience suggests that the likelihood of justice in most cases may now be small and continues to decrease as time passes. Our view is that we should now therefore centre our attention on providing as much information as possible to families about what happened to their loved ones – while this is still possible.

> […]
>
> The Government believes that this approach would deliver a fair, balanced and proportionate system that is consistent with the principles of the Stormont house Agreement …"

[103] Key changes laid out in the WMS included the move to a single independent body to oversee the new legacy arrangements, as opposed to the separate HIU and ICIR institutions described in the SHA. This would, in the Secretary of State's own words, ensure "the most efficient and joined up approach." This Commission would investigate all UK Troubles-related deaths (approximately 3500 cases). Once cases were dealt by the Commission, they would be permanently closed, and no further investigation would be possible. Moreover, cases which did not meet an initial threshold for a full police investigation would be closed permanently, with a legal bar on future investigations. The WMS coincided with the Overseas Operations (Service Personnel and Veterans) Bill 2020, which received Royal Assent on 29 April 2021. It notably included a presumption against prosecution for allegations dating back more than five years, although the Government made clear that the Bill did not apply to events in Northern Ireland.

[104] In response to the WMS, the Northern Ireland Affairs Committee ("NIAC") issued a "Addressing the Legacy of NI's Past: The Government's New Proposals (Interim Report)" on 21 October 2020 in which it commented that the new proposals represent a "unilateral and unhelpful departure" from the SHA and stressed the need for the Government "as soon as possible, to introduce legislation that is consistent with the six principles of the SHA" (para 15).

[105] Despite opposition to the WMS, the Government expressed a new preference for a Statute of Limitations model in two Option papers drafted in September and October 2020. The "proposed new approach" went further than the WMS insofar as it suggested the implementation of a Statute of Limitations to prevent the future prosecution of any alleged Troubles-related offences, alongside a mechanism for truth recovery. The underlying rationale for such an approach was the high cost of maintaining a criminal justice element when weighed against the strikingly low prospect of successful convictions. It was further noted that although the NI parties and the Irish Government "consistently refuted" any talk of potential amnesties, "private discussions with key figures in wider civic society suggest there is some support for this approach" and that this approach "would be consistent with the UK Government's commitment to end vexatious claims against veterans."

[106] Importantly, it was recognised that this model would be "considered a breach of the commitments made at the time of the Stormont House Agreement in 2014." This was, however, rationalised in the same paragraph; "however, we have consistently and publicly been clear that we should not proceed according to the

letter of Stormont House if – as the experience of the past six years suggests – it is not what is right for Northern Ireland."

[107] The proposed new approach of a Statute of Limitations and Truth Recovery model was set out in a "Addressing the Legacy of Northern Ireland's Past", Command Paper published by the UK Government on 14 July 2021 and accompanied by an oral statement from SoSNI, Brandon Lewis. The Command Paper explains that the focus of the respondent is firmly on reconciliation, in line with the aims of the B-GFA. In the UK Government's view:

> "4. The need for criminal courts to consider the criminal evidence standard (beyond reasonable doubt) inevitably means that, in many cases where the criminal evidence standard is not met, criminal courts are not able to provide families with the answers they are seeking. More than two thirds of deaths from the Troubles occurred more than 40 years ago. The passage of time means that ultimately, for those cases that get as far as a trial, there is a high likelihood of 'not guilty' verdicts or trials collapsing. For both families of victims and those accused this can be a very distressing outcome following years of uncertainty. Furthermore, the criminal justice approach is in stark contrast to the wider aims envisaged in the Belfast/Good Friday Agreement and the Stormont House Agreement of promoting societal reconciliation …"

[108] The Command Paper set out three key proposals to, *inter alia*, establish a new independent body (ICRIR); to enable individuals to seek and receive information about Troubles-related deaths and serious injuries; set up a major oral history initiative; and to introduce a statute of limitations to apply equally to all Troubles-related incidents, bringing an immediate end to criminal investigations and prosecutions. It is clear that the UK Government, at this juncture, considered a way to end judicial activity in relation to Troubles-related conduct in inquests and civil cases. Thus, the Command Paper notes that there are over 1000 civil claims against the MoD, the NIO and other state agencies with very few having progressed to trial stage and the majority funded through legal aid. On the issue of a statute of limitations, the Command Paper continues:

> "The decreasing likelihood of successful prosecutions is supported by evidence, which shows that between 2015 and 2021 just nine people have been charged in connection with Troubles-related deaths. Whilst recognising that the prosecutorial process does not need to end in a conviction to be judged meaningful, it is worth noting that of these nine, just one person has been convicted." (para 33).

[109] Correspondence between the NIO and Mr Bob Stewart MP, dated 2 August 2021, further reveals that the Command paper proposals were also designed to deliver upon the UK Government's commitments to veterans who served in Northern Ireland.

[110] It was announced at the British and Irish Intergovernmental Conference on 24 June 2021 that a period of stakeholder engagement would take place. However, it quickly became clear that the UK Government's proposals, contained within the Command Paper, were unacceptable to the victims' representatives and had no support from the political parties in Northern Ireland. A Note to Cabinet Office on the Legacy Package, 2 August 2021, discloses the following:

> "2. … This rejection is nearly wholly directed against only one strand of our proposals – the Statute of Limitations. Criticism of a bar on judicial proceedings has been especially intense regarding the potential impact on live cases – in particular ongoing inquests and civil actions …
>
> 3. Given the strength of the reaction, anything short of a significant shift to allow the possibility of criminal justice outcomes to remain is highly unlikely to secure the public support … Yet privately, people from civic society, from within the NI legal system and those involved in securing the 1998 Belfast/Good Friday Agreement tell us that we are on the right track ..."

[111] On 2 August 2021, and following engagement with stakeholders, three options were presented to the Cabinet by the NIO. Option A: make no change; Option B: Increase judicial oversight of the information recovery body and/or leave existing cases to run; Option C: Move to a conditional and timebound Statute of Limitations approach (plus Option B changes). The former SoSNI, Brandon Lewis MP, indicated that he was minded to proceed with Option B. Notes were later prepared in October 2021 and sent to Ministers exploring how conditional immunity from prosecutions would operate as a model and also how such an approach would be responded to by veterans.

[112] In December 2021, several measures were agreed by the Government to be introduced to the new Legacy Bill. These included,

> a. A Statute of Limitations for all Troubles-related offences;
>
> b. Any ongoing inquests without a date set for the final inquest hearing at the point at which the new body becomes operational will be prevented from

continuing by the Statute of Limitations (though may be referred into the new body by the family or Coroner);

c. Continuation of existing civil claims;

d. The compilation of details of the remaining cases, with the aim of producing a historical record of what is known in relation to every death that occurred during the Troubles;

e. A major oral history initiative with the aim of providing a central place for people of all backgrounds to share their experiences and perspectives relating to the Troubles."

[113] However, in January 2022, following a meeting between the Prime Minister, SoSNI Lewis and the Defence Secretary, it was decided that the NIO would introduce a Bill in which the Statute of Limitations would be replaced by a "Conditional Immunity" model. The meeting readout records:

> "In the discussion, Ministers considered the issue from first principles, noting that despite their merits the proposals as they stood were almost universally unpopular, notwithstanding private support in certain quarters. This, and concerns about perceived equivalence, meant that it was worth switching to a conditional time-bound statute of limitations approach – ie one in which immunity had to be earned."

[114] From here, the conditional immunity model started to take shape. A note sent on the 24 January 2022 to SoSNI stated that:

> "1. The official readout of the PM meeting is clear that 'immunity had to be earned' and the Secretary of State interprets this to mean that individuals must meet a test which assesses cooperation, and engagement with the Body in itself is not sufficient to receive immunity.
>
> 2. The Secretary of State's view is that there should be a low bar for testing cooperation …"

[115] A number of proposals were suggested and approved between this period and the introduction of the Bill on 17 May 2022, including, on 3 February 2022, a recommendation that the test for conditional immunity include an assessment, by an immunity requests panel, of the "truthfulness" of the account. This reflected,

according to the affidavit filed on behalf of the respondent, "the primary policy intent of the Government, which was to try and obtain as much information as possible to pass on to families of the victims, but also leave the option of possible prosecutions if individuals fail to engage with the ICRIR." Additionally, in order to maximise the ICRIR's ability to obtain information, it was proposed to extend conditional immunity to "lesser offences." It was also accepted to include, in legislation, a duty on the SoSNI to consult the relevant head of judiciary before appointing a serving judge as Chief Commissioner for the ICRIR. Ministers further agreed to adjust the policy in the Bill so that any inquest which had not already started substantive hearing would end. The fixed date was proposed as one year after the introduction of the Bill (1 May 2023). Advice in late February also provided an option for a compensation scheme for bereaved families in lieu of civil claims being stopped and explored the precedent set by the Eames/Bradley proposals and the Troubles Permanent Disablement Scheme, which opened in August 2021.

[116] On 16 May 2022, a memorandum was produced on the Bill's compliance with the ECHR. A day later, on 17 May, the respondent introduced the Bill to Parliament, accompanied by a statement pursuant to section 19(1)(a) HRA. The statement from the SoSNI Brandon Lewis endorsed the view that the Bill, as introduced, was compatible with Convention rights.

[117] The Bill completed its stages in the House of Commons on 4 July 2022. The only change made to the Bill during its passage through the House of Commons as to exclude sexual offences from the scope of the immunity from prosecution provisions, although concerns were raised by the Labour party, NI political parties and other members across the political spectrum in relation to the lack of consensus on the conditions for granting immunity, the cessation of legal proceedings and compliance with the ECHR.

[118] On 5 July 2022, the Bill went before the House of Lords, where it was met with stronger opposition.

[119] Given the reaction to the Bill in Parliament, engagement with stakeholders, including the Committee of Ministers and from media commentary, the Government devised a package of proactive concessionary amendments ahead of the Committee Stage of the Bill in the Lords. In particular, "three buckets of issues" were identified: ECHR compliance; incentives to engage with the Commission; and making the Bill more victim centred. According to two pieces of advice dated 18 July 2022 and 17 August 2022, the following amendments were considered:

(i) ECHR compliance: an amendment clarifying in the legislation that a review may include a criminal investigation where necessary; an amendment requiring members of the Commission to have significant international experience; an amendment providing more detail about the appointments process in legislation, for example a requirement to consult with relevant stakeholders during the appointments process of Commissioners; an

amendment making provision for revocation of immunity from individuals who are found to have lied to the Commission; finally, to consider pushing back the date for stopping inquests which have not reached substantive hearing.

(ii) Incentives to engage with ICRIR: Disapplication of the NI (Sentences) Act 1998 for future convictions; an amendment to increase the fine for non-compliance with the ICRIR.

(iii) Making the Bill more victim-centred: an amendment providing for how families will be kept informed of the investigative and immunity processes; giving the ICRIR the power to deal with existing civil claims and refer cases to an in-house mediation function; placing a general duty on the ICRIR to have due regard to the needs of the victims; allowing families to submit victim impact statements; placing a requirement to publish the names of those who were granted immunity (where it would not pose a risk to life).

[120] A "red line" was drawn, however, in relation to accepting amendments on public hearings; instead, a non-legislative concession around encouraging the Chief Commissioner to read out the final report in public was contemplated.

[121] On 19 October 2022, the Joint Committee on Human Rights compiled a report concluding, in summary, that the Bill was not human rights compliant. The Government submitted a response defending its position on 2 March 2023.

[122] On 24 October 2022, officials provided advice to Ministers in relation to the stop dates for inquests, criminal investigations and civil claims. The advice notes that during the policy development process it was necessary to set out clear dates for the cessation of certain legal processes. The initial date was 1 May 2023, which was informed by early assessments, conducted before 17 May 2022, of when the ICRIR could feasibly be established. Accordingly, it was recommended that the stop date for inquests and criminal investigations be pushed back to 1 May 2024.

[123] The advice also included a recommendation to maintain the Government's policy position in respect of barring civil claims brought on or after the date of the Bill's First Reading (17 May 2022):

> "The rationale for the retrospective prohibition was to prevent a flood of new legacy civil claims. The numbers of legacy civil claims are hard to quantify. The rough estimate from the Crown Solicitor's Office is that there were around 700 legacy civil claims against state agencies that had Writs ahead of First reading which would be able to continue."

[124] On 7 November 2022, the proposal to introduce proactive amendments was agreed by the Government and announced by Lord Caine at Second Reading of the Bill in the Lords on 23 November 2022. In introducing the amendments, Lord Caine lamented the fact that the failure of the SHA had caused the Government to adopt a different approach in the Bill:

> "I know that some, including members of your Lordship's House, still regard the Stormont House Agreement as the best way forward. Yet as somebody who was there, it is clear to me that any broad consensus once held no longer exists, and it is easy with the benefit of hindsight to overplay the extent to which it ever did. Even in December 2014 it was not supported by all the parties, and in the months and years that followed what high-level support that had existed began to diminish as the Government and political parties sought to convert the paragraphs of that agreement into legislation.
>
> […]
>
> I am the first to acknowledge that some of the proposals outlined in the Bill have met with far from universal acclamation in Northern Ireland itself. I fully appreciate that, for many, this legislation, despite some significant changes since the publication of the Command Paper in July 2021, remains deeply challenging. In being completely candid with your Lordships, I count myself among that number …
>
> At the same time, I am as conscious as anyone, based on experience, that we will never solve the past or bring, to use that horrible word, closure in every case. Equally, I am clear that no Government can legislate to reconcile people, though we can strive to promote it. However, we can attempt to provide better and realistic outcomes."

[125] Despite the concessions made by the Government, further amendments were introduced. On 24 January Lord Caine moved a motion that the House of Lords resolve itself into Committee. On 22 March 2023 NIO officials sought approval from Ministers on proposed amendments to be introduced in the Lords at Report Stage. Interestingly, one of the factors which led to these further amendments being put forward in advance of Report Stage was the proposed amendment of Lord Hain during the Committee Stage. This would have inserted a requirement for the CfI to ensure that each review "is carried out to criminal justice standards as modelled on Operation Kenova." This amendment would, in effect, mean that every review had to be a criminal investigation. The ministerial submission reveals that while Lord

Hain accepted it was not practical to expect a criminal investigation as part of every ICRIR review during Committee Stage, he believed he had enough support for his amendment to win if compromise on certain language could not be found.

[126] In light of this, and to provide further clarification and assurance regarding the conduct of reviews, further proactive amendments were drafted by and approved by the SoSNI on 30 March 2023 for Report Stage. These proposed to:

> "(a) Push back the stop date for criminal investigations, inquests and reporting to May 2024;
>
> (b) Place the ICRIR under a duty to require it to have due regard to the needs of victims and families;
>
> (c) Place a duty on the ICRIR to take reasonable steps to secure information that might be relevant to the truthfulness of an immunity account;
>
> (d) Remove immunity for those who are convicted of terrorism-related offences after they have been granted immunity;
>
> (e) Allow family members to submit impact statements, and place the ICRIR under a duty to publish them;
>
> (f) Transfer the power to produce guidance relating to immunity from the Secretary of State to the Chief Commissioner;
>
> (g) Increase the maximum number of commissioners from 5 to 7;
>
> (h) Place a duty on the Commission to issue a statement setting out how it conducted any given review;
>
> (i) Provide an explicit reference to European Convention rights on the face of the Bill in respect of the conduct of reviews;
>
> (j) Place a duty on the Secretary of State to consult relevant organisations linked to peace building and reconciliation before designating the organisations to deliver the Part 4 initiatives;

(k) Enshrine reconciliation and anti-sectarianism as the primary objective of the memorialisation strategy and of the academic research work.

[127] On the final day of Committee Stage on 11 May 2023, Lord Faulks and Lord Godson brought an amendment seeking to prevent individuals whose internment may be considered unlawful following the Supreme Court ruling in *R v Adams* from claiming compensation or appealing against their convictions. Despite initial resistance from the Government this amendment was passed at Third Reading.

[128] On 21 June 2023, Lord Caine introduced further amendments at Report Stage that were designed to strengthen immunity provisions.

[129] Report Stage amendments brought forward by the Government were all passed. The Bill was returned to the Lords and back again to the Commons before receiving Royal Assent on 18 September 2023.

Interaction with the Committee of Ministers

[130] The developments leading to the enactment of the 2023 Act have been closely followed by the CoM. The CoM is responsible for monitoring the implementation of the judgment in the *McKerr* cases. By way of brief background, on 4 May 2001, the ECtHR delivered judgment in *Jordan v UK* [2001] 37 EHRR 2, *Kelly v UK* [2001] ECHR 328, *McKerr v UK* [2001] 34 EHRR 20 and *Shanaghan v UK* [2001] ECHR 330 ("the McKerr group of cases"). The CoM also oversees the implementation of the judgments in *McShane v UK* [2002] 35 EHRR 23, *Finucane v UK* 37 EHRR 29 and *McCaughey and Others v UK* [2014] 58 EHRR 13. In essence, the ECtHR stated that the essential purpose of investigations into deaths involving state agents or bodies is to secure the effective implementation of domestic laws which protected the right to life and to ensure their accountability for deaths for which they were responsible. The kind of investigation may vary according to the circumstances; however, the authorities must act once the matter has come to their attention.

[131] Pursuant to article 46(2) ECHR, the final judgment of the ECtHR, in each case, was transmitted to the Committee of Ministers to supervise its execution. The UK government set in train a "package of measures" to remedy the identified breaches of the procedural limb of Article 2, which included as a part of the obligation, an effective investigation and the requirement to secure the independence of the investigators. This led to the establishment of a number of investigative units the development of which is comprehensively set out in the Court of Appeal's decision in *Re McQuillan* [2020] NI 583. The package of measures continues to be overseen by the CoM.

[132] The various interactions between the CoM and the UK government in relation to the passage of the Legacy Bill have been relied on by the respondent to

demonstrate how the policy objectives were "candidly exposed" to the CoM and developed in line with ECtHR jurisprudence. Conversely, the applicants argue that these interactions reveal express dissatisfaction with the legacy proposals.

[133] On several occasions the respondent sent correspondence and information to the CoM updating it on the development of the Legacy Bill and providing justification for the introduction of certain measures. For example, in advance of the CoM meeting which took place from 30 November to 2 December 2021, SoSNI wrote to the CoM to allay concerns that the legacy proposals, as set out in the Command Paper, were inconsistent with the SHA and to reiterate the UK's "clear commitment" to the "principles" of the SHA.

[134] The following year, on 30 May 2022, the UK government provided an update to the CoM on the measures introduced by the Legacy Bill. The correspondence asserts that the Bill upholds and embraces the six principles outlined in the SHA and seeks to create a legal framework that is consistent with the UK's key focus on information recovery and reconciliation.

[135] Several months later, on 8 August 2022 , the respondent replied to a series of questions submitted by the CoM asking for information on how the ICRIR will operate in practice. This reply sets out in detail many of the respondent's arguments in relation to the ICRIR's independence, its review function, how it will ensure public scrutiny of its processes, next-of-kin participation, the conditional immunity scheme, the prohibition of requests before the Commission after five years and the proposal to terminate pending inquests. It will be necessary to return to many of these arguments in the analysis below and, therefore, they are not repeated here.

[136] Further correspondence was issued on 24 October 2022, 10 November 2022, 5 December 2022, 18 January 2023, 3 February, 4 May 2023, 23 June 2023 and 28 July 2023 explaining how the Bill was progressing and how the respondent was continuing to engage with stakeholders.

[137] Despite the UK's correspondence, the CoM maintained its strong concern over the proposals. The decision of the 1443rd meeting of the CoM (CM/Del/Dec(2022)1443/H46-32), 20-22 September 2022 identifies several issues with the continued passage of the Bill in Parliament. The CoM underlined its concern that the Bill represents "a fundamental change of approach from the Stormont House Agreement" (para 2) and cautioned that if it is progressed, it would be necessary to address the following key issues: "ensuring that the Secretary of State for Northern Ireland's role in the establishment and oversight of the ICRIR is more clearly circumscribed in law in a manner that ensures that the ICRIR is independent and seen to be independent; ensuring that the disclosure provisions unambiguously require full disclosure to be given to the ICRIR; ensuring that the Bill adequately provides for the participation of victims and families, transparency and public scrutiny; urged it to reconsider the conditional immunity scheme in light of concerns expressed around its compatibility with the European Convention." (para

8). The decision further notes concern regarding the approach to civil claims brought after the introduction of the Bill and the proposal to terminate pending inquests (para. 9). These issues were amplified in an interim resolution CM/ResDH(2023)148 adopted at the 1468th meeting on 7 June 2023, wherein the CoM identified the same key issues and "noted with serious concern the absence of tangible progress to sufficiently allay the concerns about the Bill's compatibility with the European Convention."

[138] A shift in tone is apparent from the more recent 1475th meeting (CM/Del/Dec(2023)1475/H46-44) held from 19-21 September 2023 (following the introduction of the 2023 Act). Despite recalling their concerns about the Bill's compatibility with the Convention, the CoM noted "with interest the amendments to the Bill tabled by the government since their last examination of the cases (June 2023) which, in particular strengthen the participation of the next-of-kin of victims and public scrutiny in the work of the ICRIR" (para. 8). Nevertheless, the CoM also highlighted that a number of issues relating to independence, disclosure and the initiation of review remain uncertain. The CoM, therefore, called upon the UK to provide additional information on the practical measures it intends to put in place to ensure the independence of the ICRIR appointment process, the strengthening of procedural safeguards for victims, the development of clear disclosure protocols and the referral to the ICRIR of all cases that might engage articles 2 and 3 ECHR (para. 9).

[139] The CoM, here, appears to leave the door open to a mechanism which is capable of conducting a review in compliance with articles 2 and 3 ECHR. Similarly, whilst the CoM "deeply regretted" the proposal to terminate pending inquests, it recommends the implementation of effective handover measures of inquests to the caseload of the ICRIR and urges the authorities to take additional practical measures to expedite inquests so as many as possible can conclude before 1 May 2024. Notwithstanding this potential route to Convention compatibility, the decision calls upon the authorities to, again, consider repealing the conditional immunity provisions which "risks breaching obligations" under the Convention to prosecute and punish serious grave breaches of human rights (para 12).

The Draft ICRIR guidance

[140] In the course of its preparatory work, the ICRIR has published a series of documents addressing some of the issues identified by the CoM and critics of the 2023 Act. Whilst these are described as "draft not agreed" policies, it is important to note that the ideas expressed are unfinished and subject to ratification by the Commissioners (once they are all appointed). The purpose of publication, therefore, is to set out publicly some of the early thinking about the approach the ICRIR could take to various issues and to seek feedback from interested parties on the various proposals. The ICRIR makes it very clear that it intends to develop these proposals in close dialogue with a range of groups including victims and survivors of the Troubles. In light of the concerns expressed by the opponents of the 2023 Act,

including the applicants and the CoM, these documents are clearly relevant to the overarching question of the ICRIR's potential to comply with the ECHR.

The court's consideration

[141] In analysing the parties' arguments I propose to consider the specific provisions under challenge and come to conclusions on their lawfulness based on the grounds relied upon by the applicants. Having analysed the provisions in the context of the applicants' arguments, which overlap to a significant degree, in the final section of the judgment I will set out the implications of any conclusions for each of the individual cases.

[142] In adopting this approach I am conscious that the 2023 Act should be read as a whole and that its provisions are meant to be part of an overall scheme focused on information recovery. That said, I do not consider that the entire provisions "stand or fall" together. It is important to analyse the specific provisions challenged, bearing in mind the relationship with other provisions in the statute, but recognising that the court may conclude that some of the provisions are unlawful. Findings to that effect do not necessarily undermine those provisions which withstand scrutiny.

[143] I have decided to consider the ECHR arguments first, before looking at the Windsor Framework ("WF") and the constitutional arguments.

The ECHR arguments

Immunity from prosecution [compliance with article 2 and 3 ECHR] (sections 7(3), 9(8), 10(3), 19, 20, 21, 22, 39, 41, 42(1))

- Section 7(3): If a person has made an application for immunity, material included within the application or obtained directly or indirectly from it is inadmissible in criminal proceedings.

- Section 9(8) and section 10(3): prohibit requests for reviews by the ICRIR after the end of the fifth year of its operation.

- Section 12: ICRIR may also carry out a review into a Troubles-related death or other harmful conduct where a person makes a request for immunity.

- Section 19: ICRIR must grant immunity subject to three conditions – main provision.

- Section 20: sets out the procedural matters in relation to a request for immunity. It provides, for example, that SoSNI may make rules for how to deal with immunity requests (section 20(2)). Subject to any rules made, the Chief Commissioner is to determine the relevant procedures (section 20(3)).

- Section 21: Inserts requirements for ICRIR to take reasonable steps to obtain any information relevant to the truth of the account provided by the person requesting immunity (section 21(2)). It also makes general provision for how immunity requests are to be determined by the ICRIR.

- Section 22: Establishes an Immunity Request Panel.

- Section 39: Provides that no criminal enforcement action may be taken against those granted immunity for serious or connected Troubles-related offences.

- Section 40(1)-(2): Allows criminal enforcement action to be taken for serious or connected offences where immunity has not been granted and conduct has been referred by the CfI to the DPP under section 25.

- Section 41: Prohibits criminal enforcement action in relation to a Troubles-related offence unless it is serious or connected to a Troubles-related offence.

- Section 42(1): Provides that any legislation which authorises or requires any person to do anything prohibited by sections 38-41 has no effect.

Section 19 – Immunity

[144] The immunity from prosecution provided for in section 19 is particularly controversial. The three conditions which must be satisfied are as follows:

> "(2) ***Condition A:*** P has requested the ICRIR to grant P immunity from prosecution.
>
> (3) ***Condition B:*** the immunity requests panel is satisfied that the ICRIR is in possession of an account ("P's account") that –
>
> (a) has been given by P,
>
> (b) describes conduct by P which is, or includes, conduct forming part of the Troubles ("P's disclosed conduct"), and
>
> (c) is true to the best of P's knowledge and belief.
>
> (4) P's account may consist of, or include, information which has previously been given by P (whether directly to the ICRIR or otherwise) if, or to the extent that, the immunity requests panel is satisfied that the information is true to the best of P's knowledge and belief.

(5) ***Condition C:*** the immunity requests panel is satisfied that P's disclosed conduct would tend to expose P –

(a) to a criminal investigation of, or

(b) to prosecution for, one or more particular serious or connected Troubles-related offences identified by the panel (the "identified possible offences")."

[145] It will be noted that the ICRIR must grant a person immunity from prosecution for one or more serious or connected Troubles-related offences if that person meets the conditions set out in section 19. In short, the key condition is that the person concerned must give a true account of his conduct to the best of his "knowledge and belief." The potential implications for the applicants are obvious. Those responsible for killing Seamus Dillon, Anthony Hughes, wounding James McManus or the torture and killing of Maurice Gilvary and those responsible for the shooting of John McEvoy would be entitled to immunity if they make such a request to the ICRIR and the ICRIR is satisfied that they are telling the truth about their involvement. Immunity will be granted irrespective of the views of the applicants. There is no requirement for contrition or acknowledgment of the impact of their actions on their victims. The request for immunity can be made at any stage in the process.

[146] By these applications the lead applicants seek declarations under section 4 HRA that section 19 and the related sections are incompatible with their rights under article 2 ECHR.

[147] Article 2 provides that everyone's right to life shall be protected by law. The right to life is one of the most fundamental provisions of the ECHR. There is no legal dispute that article 2 imposes an obligation on a state to ensure that there is an effective official investigation when individuals have been killed as a result of the use of force. In order to satisfy this obligation, the state must put in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the "prevention, suppression and sanctioning of breaches of such provisions" - *Osman v UK* [2000] 29 EHRR 245, para [115].

[148] The applicant, *Gilvary*, argues that this equally applies to the state's obligation under article 3 ECHR. Whilst Mr Southey ably referred the court to significant materials pointing to the law's particular abhorrence of torture, for the purposes of this analysis, I do not consider there is any significant difference between the obligations under articles 2/3 ECHR when analysing the provisions of the Act.

[149] In considering the compatibility challenges the court must bear in mind the *Ullah* principle, which was comprehensively dealt with by Lord Reed in *R (On the Application of AB) (Appellant) v Secretary of State for Justice (Respondent)* [2022] AC 487:

> "54. … The general approach to be adopted by domestic courts applying the Human Rights Act was explained by Lord Bingham of Cornhill in *R(Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, para 20 ("*Ullah*"), expressing the unanimous view of the House. As he said, the House had previously held that 'courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court.' That, as he explained, reflected the fact that the Human Rights Act was intended to give effect in domestic law to an international instrument, the Convention, which could only be authoritatively interpreted by the Strasbourg court. Accordingly, domestic courts were required 'to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'
>
> 55. Lord Bingham expanded on that rationale in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, para 29. Citing earlier statements to the same effect in earlier decisions of the House of Lords, he observed that 'the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies available to those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts and not only by recourse to Strasbourg.' There should therefore be a correspondence, in general, between the rights enforced domestically and those available in Strasbourg. Parliament can of course legislate to provide for rights more generous than those guaranteed by the Convention, but it did not do so when it enacted the Human Rights Act.
>
> 56. An important additional rationale, which follows from the objective of the Human Rights Act as explained in *Ullah* and *Denbigh High School*, was identified by Lord Brown of Eaton-under-Heywood in *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2008] AC 153, para 106. Referring to Lord Bingham's statement that domestic courts should

keep pace with the Strasbourg jurisprudence, "no more, but certainly no less", he commented:

> 'I would respectfully suggest that last sentence could as well have ended: 'no less, but certainly no more. There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual can have the decision corrected in Strasbourg.'

57. As Lord Brown explained, the intended aim of the Human Rights Act - to enable the rights and remedies available in Strasbourg also to be asserted and enforced by domestic courts - is particularly at risk of being undermined if domestic courts take the protection of Convention rights further than they can be fully confident that the European court would go. If domestic courts take a conservative approach, it is always open to the person concerned to make an application to the European court. If it is persuaded to modify its existing approach, then the individual will obtain a remedy, and the domestic courts are likely to follow the new approach when the issue next comes before them. But if domestic courts go further than they can be fully confident that the European court would go, and the European court would not, in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic courts will remain uncorrected …

58. The approach to this issue laid down in *Ullah*, *Denbigh High School* and *Al-Skeini* has been repeatedly endorsed at the highest level. For example, in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] AC 1312, Baroness Hale of Richmond stated at para 53:

> 'The Human Rights Act 1998 gives effect to the Convention rights in our domestic law. To that extent they are domestic rights for which domestic remedies are prescribed: *In Re McKerr*

> [2004] 1 WLR 807. But the rights are those defined in the Convention, the correct interpretation of which lies ultimately with Strasbourg: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20. Our task is to keep pace with the Strasbourg jurisprudence as it develops over time, no more and no less: *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2008] 1 AC 153, para 106.'

In *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2010] UKSC 45; [2011] 2 AC 104, a nine-member constitution of this court unanimously stated at para 48:

> 'Where, however, there is a clear and constant line of decisions [of the European court] whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.'

In *Smith v Ministry of Defence* [2013] UKSC 41; [2014] AC 52, Lord Hope, with whom Lord Walker, Lady Hale and Lord Kerr agreed, summarised the position at para 43:

> 'Lord Bingham's point [in *Ullah*, para 20] was that Parliament never intended by enacting the Human Rights Act 1998 to give the courts of this country the power to give a more generous scope to the Convention rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the Treaty obligation, into free-standing rights of the court's own creation.'

59. It follows from these authorities that it is not the function of our domestic courts to establish new principles of Convention law. But that is not to say that they are unable to develop the law in relation to

> Convention rights beyond the limits of the Strasbourg case law. In situations which have not yet come before the European court, they can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law. Indeed, that is the exercise which the High Court and the Court of Appeal undertook in the present case. The application of the Convention by our domestic courts, in such circumstances, will be based on the principles established by the European court, even if some incremental development may be involved. ..."

[150] Bearing these principles in mind I now turn to the Strasbourg jurisprudence on the granting of immunity from prosecution or amnesty in respect of the killing and treatment of civilians under articles 2 and 3 of the ECHR.

[151] The court has developed a line of authority addressing the specific issue of amnesties. The respondent referred to the case of *Dujardin and Others v France* (App. No. 16734/90) which was a Commission decision on the admissibility of an application on 2 September 1991. The court was dealing with the massacre of four disarmed Gendarme on the island of Ouvea in New Caledonia on 22 April 1988.

[152] Criminal proceedings were instituted against the suspected perpetrators of the murders.

[153] Following the murders the French government brought in a Bill introducing "statutory provisions in preparation for the granting of self-determination to New Caledonia in 1988." The Bill, adopted by referendum on 6 November 1988, established an amnesty for offences other than murder committed before 20 August 1988.

[154] Less than a year after the referendum, the French authorities acknowledged that they had already committed themselves to a general amnesty before the referendum.

[155] On 20 December 1989 the National Assembly adopted the Bill establishing a general amnesty. It was this Bill which the applicants sought to challenge. The Commission declared the application inadmissible. In a short ruling with little detailed reasoning, it concluded that

> "it is not for the Commission to assess the advisability of the measures taken by France to that end. The State is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between

> the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law. In the present case, the Commission considers that such a balance was maintained and that there has therefore been no breach of the above-mentioned provision" (p. 244).

[156] Since that admissibility decision there have been significant developments in the jurisprudence of the ECtHR on the issue of amnesties. In particular, as already explained, the cases involving killings in Northern Ireland were to the fore in developing caselaw on the obligations of the state to investigate.

[157] In *Tarbuk v Croatia* (App. No. 31360/10, 11 December 2012) the court adopted the same language as that of the admissibility decision in *Dujardin*. In *Tarbuk* the applicant claimed, that because he had not been convicted as a result of the amnesty in France, he was entitled to compensation for detention before trial. At para [50] the court said:

> "The court is ready to accept that this legal gap had to be resolved by enacting the amendments to Article 480 of the Code of Criminal Procedure that had the effect of extinguishing the right to compensation where an amnesty had been granted (see mutatis mutandis, *Unedic v France,* para 77, cited above), even if it meant, in concrete terms, the retroactive application of these amendments to cases such as the applicant's. Moreover, the Convention organs have already held that, even in such fundamental areas of the protection of human rights as the right to life, the state is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the state and the interests of individual members of the public (see *Dujardin and others v France* …)"

[158] By way of contrast with *Dujardin*, in *Yaman v Turkey* [2005] 40 EHRR 49 the court was dealing with an alleged violation of article 13 in that the applicant was denied an effective domestic remedy in respect of his complaint of ill-treatment or torture.

[159] In examining the investigative obligations of the state, at para [55] the court said:

> "The court further points out that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the

> purposes of an "effective remedy" that criminal proceedings and sentencing are not time barred and the granting of an amnesty or pardon should not be permissible."

[160] In *Nikolova v Bulgaria* [2009] 48 EHRR 40, the court reaffirmed at para 57(b):

> "(b) Article 2 imposes a duty on the State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.
>
> (c) Compliance with the State's positive obligations under Art 2 requires the domestic legal system to demonstrate its capacity to enforce criminal law against those who have unlawfully taken the life of another."

[161] In another admissibility decision, *Ould Dah v France* [2013] 56 EHRR SE17, in which the Commission's decision in *Dujardin* was not cited, the applicant was the beneficiary of an amnesty law in Mauritania which applied only to members of the armed forces and security services. He was convicted in France of torture and related crimes for having taken part in an "ethnic purge" authorised by the Mauritanian government. The French court disapplied the Mauritanian amnesty law on the basis that it would place France in breach of its obligations under the Torture Convention. The applicant complained of a breach of his rights under article 7 ECHR. The ECtHR stated at para [48] that "an amnesty is generally incompatible with the duty incumbent on the state to investigate such acts." It did, however, note at para [49] that:

> "A conflict arising between, on the one hand, the need to prosecute criminals and, on the other hand, a country's determination to promote reconciliation in society cannot, generally speaking, be ruled out. In any event, no reconciliation process of this type has been put in place in Mauritania."

[162] In *Jelic v Croatia* [2015] 61 EHRR 43 the European Court explained the importance of criminal sanctions in the context of a state's procedural obligations under article 2 at para [90]:

> "In this connection the court notes that among the main purposes of imposing criminal sanctions as retribution as a form of justice for victims and general deterrents aimed

> at prevention of new violations and upholding the rule of law. However, neither of these aims can be obtained without alleged perpetrators being brought to justice. Failure by the authorities to pursue the prosecution of the most probable direct perpetrators undermines the effectiveness of the criminal-law mechanism aimed at prevention, suppression and punishment of unlawful killings. Compliance with a State's procedural obligations under art 2 requires the domestic legal system to demonstrate its capacity and willingness to enforce criminal law against those who have unlawfully taken the life of another."

[163] In *Okkali v Turkey* [2010] 50 EHRR 43, the court was dealing with an allegation of a breach of article 3. It reaffirmed at para [76] of its judgment that:

> "… when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible."

[164] Significantly, the footnote at the end of this passage states:

> "See – mutatis mutandis *Yaman v Turkey* [2005] 40 EHRR 49 at [55]: compare *Dujardin v France* 16734/90 September 2, 1991."

[165] Importantly, there have been a number of Grand Chamber decisions which have addressed the issue of amnesties in the context of articles 2 and 3 of the Convention.

[166] In *Margus v Croatia* [2016] 62 EHRR 17 the Grand Chamber was dealing with an applicant who was a member of the Croatian army. He had been indicted on nine counts for murder and other serious offences committed in 1991 during the war in Croatia. In September 1996 the General Amnesty Act was enacted ("the Amnesty Act") which provided for a general amnesty in respect of all criminal offences committed in connection with the war in Croatia between 17 August 1990 and 23 August 1996, save in respect of those acts which amounted to grave breaches of international humanitarian law or war crimes.

[167] As a consequence the domestic court terminated the proceedings against the applicant pursuant to that Act.

[168] In April 2006 the applicant was indicted on charges of war crimes against the civilian population including relating to the deaths of two of those in respect of whom the charges had been terminated.

[169] The court had to deal with allegations of partiality on behalf of the judge and arguments concerning duplication of criminal proceedings allegedly in breach of Article 4 of Protocol No.7.

[170] Ultimately, the court concluded that by bringing a fresh indictment against the applicant and convicting him of war crimes, the Croatian authorities had acted in a manner consistent with the requirements of articles 2 and 3 and international mechanisms and instruments. Article 4 Protocol No.7 was not applicable in the circumstances of the case.

[171] In the course of a lengthy judgment the Grand Chamber reviewed international law authorities regarding amnesties.

[172] They quoted from the Inter-American court (which probably has the most developed jurisprudence on the legitimacy of amnesties) decision in the case of *Gelman v Uruguay*, Merits and Reparations, Judgment 24 February 2011, Serie C No. 221. At para [64] the court quoted from the *Gelman* case as follows:

> "189. The mentioned international obligation to prosecute, and if criminal responsibility is determined, punish the perpetrators of the human rights violations, is encompassed in the obligation to respect rights enshrined in Article 1(1) of the American Convention and implies the right of the States Parties to organize all of the governmental apparatus, and in general, all of the structures through which the exercise of public power is expressed, in a way such that they are capable of legally guaranteeing the free and full exercise of human rights.
>
> 190. As part of this obligation, the States must prevent, investigate, and punish all violations of the rights recognized in the Convention, and seek, in addition, the reestablishment, if possible, of the violated right and, where necessary, repair the damage caused by the violation of human rights.
>
> 191. If the State's apparatus functions in a way that assures the matter remains with impunity, and it does not restore, in as much as is possible, the victim's rights, it can be ascertained that the State has not complied with the obligation to guarantee the free and full exercise of those persons within its jurisdiction.
>
> ...

195. Amnesties or similar forms have been one of the obstacles alleged by some States in the investigation, and where applicable, punishment of those responsible for serious human rights violations. This court, the Inter-American Commission on Human Rights, the organs of the United Nations, and other universal and regional organs for the protection of human rights have ruled on the non-compatibility of amnesty laws related to serious human rights violations with international law and the international obligations of States.

196. As it has been decided prior, this court has ruled on the non-compatibility of amnesties with the American Convention in cases of serious human rights violations related to Peru (*Barrios Altos* and *La Cantuta*), Chile (*Almonacid Arellano et al*), and Brazil (*Gomes Lund et al*).

197. In the Inter-American System of Human Rights, of which Uruguay forms part by a sovereign decision, the rulings on the non-compatibility of amnesty laws with conventional obligations of States when dealing with serious human rights violations are many. In addition to the decisions noted by this court, the Inter-American Commission has concluded, in the present case and in others related to Argentina, Chile, El Salvador, Haití, Perú and Uruguay its contradiction with international law. The Inter-American Commission recalled that it:

> 'has ruled on numerous occasions in key cases wherein it has had the opportunity to express its point of view and crystallize its doctrine in regard to the application of amnesty laws, establishing that said laws violate various provisions of both the American Declaration as well as the Convention' and that '[t]hese decisions which coincide with the standards of other international bodies on human rights regarding amnesties, have declared in a uniform manner that both the amnesty laws as well as other comparable legislative measures that impede or finalize the investigation and judgment of agents of a State that could be responsible for serious violations of the American Declaration or Convention, violate multiple provisions of said instruments.'

198. In the Universal forum, in its report to the Security Council, entitled **The rule of law and transitional justice in societies that suffer or have suffered conflicts**, the Secretary General of the United Nations noted that:

> '[…] the peace agreements approved by the United Nations cannot promise amnesty for crimes of genocide, war, or crimes against humanity, or serious infractions of human rights […].'

199. In the same sense, the United Nations High Commissioner for Human Rights concluded that amnesties and other analogous measures contribute to impunity and constitute an obstacle to the right to the truth in that they block an investigation of the facts on the merits and that they are, therefore, incompatible with the obligations incumbent on States given various sources of international law. More so, in regards to the false dilemma, between peace and reconciliation, on the one hand, and justice on the other, it stated that:

> '[t]he amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes. Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict.'

200. In line with the aforementioned, the Special Rapporteur of the United Nations on the issue of impunity, stated that:

> '[t]he perpetrators of the violations cannot benefit from the amnesty while the victims are unable to obtain justice by means of an effective remedy. This would lack legal effect in regard to the actions of the victims relating to the right to reparation.'"

[173] The Grand Chamber summarised the arguments of the parties, including that of the third-party interveners, who argued that no multilateral treaty expressly prohibited the granting of amnesties for international crimes. They argued that since the Second World War, states had increasingly relied on amnesty laws, most frequently used as a form of transitional justice.

[174] They argued that "even though several international regional courts had adopted the view that amnesties granted for international crimes were prohibited by international law, their authority was weakened by inconsistencies in those judicial pronouncements as to the extent of the prohibition on the crimes it covered." They argued for a more nuanced approach and that "the requirement to prosecute was not absolute and had to be balanced against the requirements of peace and reconciliation in post war situations" (para [111]). However, the Grand Chamber notes in summarising the interveners' argument that:

> "112. Furthermore, a number of national Supreme Courts had upheld their countries' amnesty laws because such laws contributed to the achievement of peace, democracy and reconciliation. The interveners cited the following examples: the finding of the Spanish Supreme Court in the trial of Judge Garzón in February 2012; the ruling of the Ugandan Constitutional Court upholding the constitutionality of the 2000 Amnesty Act; the Brazilian Supreme Court's ruling of April 2010 refusing to revoke the 1979 Amnesty Law; and the ruling of the South African Constitutional Court in the AZAPO case upholding the constitutionality of the Promotion of National Unity and Reconciliation Act of 1995 which provided for a broad application of amnesty.
>
> 113. The interveners accepted that the granting of amnesties might in certain instances lead to impunity for those responsible for the violation of fundamental human rights and thus undermine attempts to safeguard such rights. However, strong policy reasons supported acknowledging the possibility of the granting of amnesties where they represented the only way out of violent dictatorships and interminable conflicts. The interveners pleaded against a total ban on amnesties and for a more nuanced approach in addressing the issue of granting amnesties."

[175] In its assessment of the arguments, the Grand Chamber considered the position under the ECHR and stated:

"124. The court notes that the allegations in the criminal proceedings against the applicant included the killing and serious wounding of civilians and thus involved their right to life protected under Article 2 of the Convention and, arguably, their rights under Article 3 of the Convention. In this connection the Court reiterates that Articles 2 and 3 rank as the most fundamental provisions in the Convention. They enshrine some of the basic values of the democratic societies making up the Council of Europe.

125. The obligations to protect the right to life under Article 2 of the Convention and to ensure protection against ill-treatment under Article 3 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', also require by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force or ill-treated. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and to ensure the accountability of the perpetrators.

126. The court has already held that, where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible. It has considered in particular that the national authorities should not give the impression that they are willing to allow such treatment to go unpunished. In its decision in the case of *Ould Dah v France* the court held, referring also to the United Nations Human Rights Committee and the International Criminal Tribunal, that an amnesty was generally incompatible with the duty incumbent on States to investigate acts such as torture and that the obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that might be considered contrary to international law.

127. The obligation of States to prosecute acts such as torture and intentional killings is thus well established in

> the court's case-law. The court's case-law affirms that granting amnesty in respect of the killing and ill-treatment of civilians would run contrary to the State's obligations under Articles 2 and 3 of the Convention since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible. Such a result would diminish the purpose of the protection guaranteed under Articles 2 and 3 of the Convention and render illusory the guarantees in respect of an individual's right to life and the right not to be ill-treated. The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective."

[176] The court concluded as follows:

> "139. In the present case the applicant was granted amnesty for acts which amounted to grave breaches of fundamental human rights such as the intentional killing of civilians and inflicting grave bodily injury on a child, and the county court's reasoning referred to the applicant's merits as a military officer. A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances."

[177] Mr McGleenan argues that the Grand Chamber in *Margus* did not rule out the possibility of amnesty being lawful. He refers to the joint concurring opinion of Judges Sikuta, Wojtczek and Vehabovic which noted that international law commentators are divided on the issue of amnesties. They say at paras [8]-[9]:

> "… There is no doubt that international law is evolving rapidly and imposes ever tighter regulations on States' freedom with regard to amnesties. States have considerably less freedom of manoeuvre nowadays (in 2014) than in 2006 and, *a fortiori*, 1996. At the same time, stating that international law in 2014 completely prohibits

> amnesties in cases of grave breaches of human rights does not reflect the current state of international law. A study of the international instruments, decisions and documents referred to by the majority demonstrates that the view expressed by the Head of the ICRC Legal Division in the letter cited above has retained its relevance in 2014.
>
> 9. We share fully the majority's concern to ensure the highest possible standard of human rights protection, and agree that violations of human rights must not go unpunished. We are equally aware of the potentially perverse effects of amnesty laws that are passed in order to guarantee impunity to the perpetrators of such violations. Nevertheless, we also note that world history teaches us the need to observe the utmost caution and humility in this sphere. Different countries have devised widely varying approaches enabling them to put grave human rights violations behind them and restore democracy and the rule of law.
>
> The adoption of international rules imposing a blanket ban on amnesties in cases of grave violations of human rights is liable, in some circumstances, to reduce the effectiveness of human rights protection. The third-party intervener submitted solid arguments against recognising the existence of a rule of international law prohibiting amnesties completely in cases of human rights violations. We must acknowledge that in certain circumstances there may be practical arguments in favour of an amnesty that encompasses some grave human rights violations. We cannot rule out the possibility that such an amnesty might in some instances serve as a tool enabling an armed conflict or a political regime that violates human rights to be brought to an end more swiftly, thereby preventing further violations in the future. In any event, as we see it, the concern to ensure effective protection of human rights points in favour of allowing the States concerned a certain margin of manoeuvre in this sphere, in order to allow the different parties to conflicts engendering grave human rights violations to find the most appropriate solutions."

[178] The Grand Chamber also considered the issue of amnesties in the case of *Mocanu v Romania* [2015] 60 EHRR 19. *Mocanu* involved criminal investigations which had been stopped after 10 years due to a statutory limitation on criminal liability.

[179] The court, again, confirmed its conclusion in relation to amnesties at para [326]:

> "The court has also held that in cases concerning torture or ill-treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of the limitation period, and also that amnesties and pardons should not be tolerated in such cases. Furthermore, the manner in which the limitation period is applied must be compatible with the requirement of the Convention. It is therefore difficult to accept inflexible limitation periods admitting of no exceptions."

[180] Interestingly, in a partly dissenting opinion, Judge Wojtycek referred to the cases of *Margus* and *Jaonwiec* in which he suggested the court had taken a highly nuanced position. At para [11] he said:

> "The majority emphasised the fact that 'in cases concerning torture or ill-treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a limitation period, and also that amnesties and pardons should not be tolerated in such cases.' I would note here a certain incoherence with the positions taken in the judgments in the cases of *Jaonwiec* and *Margus v Croatia*."

[181] This strongly suggests what the Grand Chamber intended to do in *Mocanu* was to confirm that granting immunity to those responsible for breaches of articles 2 and 3 was clearly incompatible with those articles.

[182] These principles have been repeatedly followed in cases such as *Kavaklioglu and others v Turkey* App. No. 15397/02, 6 October 2015, para [275]; *Hasan Köse v Turkey* App. No. 15014/11, 18 December 2018, paras [37] and [39]; *Vazagashvili and Sahanva v Georgia* App. No. 50375/07, 18 July 2019, para [92] and *Makuchyan and Miasyan v Azerbaijan and Hungry* App. No. 17247/13, 12 October 2020, para [160].

[183] From an extensive review of the authorities, it is clear that the ECtHR has articulated strong opposition to the granting of amnesties in the context of articles 2/3. True it is, that the Grand Chamber contemplates the possibility of exceptions although the scope and limits of any such exceptions have not been defined in the case law. The reticence to endorse the concept of amnesties in this context can be seen from the judgment in *Margus* where the Grand Chamber says at para [39]:

> "Even if it were to be accepted that <u>amnesties are possible</u>, (emphasis added) where there are some

> particular circumstances, such as a reconciliation process and/or a form of compensation to the victims …"

[184] As Mr Bunting submits, this comment has to be seen in the context of a reference back to the interveners' arguments which advocated for the possibility of the granting of amnesties "where they represented the only way out of violent dictatorships and interminable conflicts" (para [113]). In doing so, they rejected the arguments of the interveners. The reference to the minority opinion in *Margus*, only reinforces the strong conclusion of the majority, confirmed in the *Mocanu* decision.

[185] It is argued on behalf of the respondent that the challenged provisions are part of such a reconciliation process. Part of that process involves parallel mechanisms for investigation and information recovery. The respondent also emphasises the fact that the amnesty involved in this case is not a blanket or general one, it is a conditional one. In the words of the then Prime Minister "immunity had to be earned".

[186] The prohibition on such amnesties is particularly strong when there is evidence that agents of the state are complicit in the taking of life or acts of torture. However, it is important to emphasise that the prohibition also extends to those victims of the Troubles who have suffered at the hands of paramilitaries. They too, are entitled to the benefit of the procedural obligations under articles 2 and 3 which are clearly undermined by the prospect of immunity from prosecution under the 2023 Act.

[187] I am satisfied that the immunity from prosecution provisions under section 19 and those related provisions under sections 7(3), 12, 19, 20, 21, 22, 39, 42(1) of the 2023 Act are in breach of the lead applicant's rights pursuant to article 2 of the ECHR. I am also satisfied that they are in breach of article 3 of the ECHR. I do not consider section 40, as it relates to criminal enforcement action being taken against those not granted immunity, to be incompatible with articles 2 and 3 ECHR. They have not been introduced in the context of "a violent dictatorship or an interminable conflict." They are not "a tool enabling an armed conflict or a political regime that violates human rights to be brought to an end more swiftly." The conflict or "Troubles" ended, in effect, in 1998. The immunity contemplated under the 2023 Act does not provide for any exceptions for grave breaches of fundamental rights including allegations of torture. If an applicant for immunity meets the criteria the ICRIR must grant immunity. The victims have no role or say in these decisions. Victims may be confronted with a situation where an applicant for immunity does so at the last minute, in circumstances where a recommendation for prosecution is imminent or inevitable. I accept that the provision of information as to the circumstances in which victims of the Troubles died or were seriously injured is clearly important and valuable. It is arguable that the provision of such information could contribute to reconciliation. However, there is no evidence that the granting of immunity under the 2023 Act will in any way contribute to reconciliation in Northern Ireland, indeed, the evidence is to the contrary. It may well be that a

system whereby victims could initiate the request for immunity in exchange for information would be compliant with articles 2 and 3 ECHR, but this is not what is contemplated here.

Section 41 – Prohibition of criminal enforcement action in respect of other Troubles-related offences

[188] Section 41 of the 2023 Act provides that no criminal enforcement action may be taken against any person in respect of a Troubles-related offence, unless it is a serious or connected Troubles-related offence.

[189] The definition of "serious" Troubles-related offences and "connected" Troubles-related offences for the purposes of section 41 are set out in section 1(5)(b) and (c) of the 2023 Act as follows:

> "(b) a Troubles-related offence is "serious" if the offence—
>
> (i) is murder, manslaughter or culpable homicide,
>
> (ii) is another offence that was committed by causing the death of a person, or
>
> (iii) was committed by causing a person to suffer serious physical or mental harm.
>
> (c) a Troubles-related offence is "connected" if the offence—
>
> (i) relates to, or is otherwise connected with, a serious Troubles-related offence (whether it and the serious offence were committed by the same person or different persons), but
>
> (ii) is not itself a serious Troubles-related offence;
>
> and for this purpose, one offence is to be regarded as connected with another offence, in particular, if both offences formed part of the same event."

[190] I recognise that section 41 is linked to the conditional immunity scheme introduced under section 19, which the court has declared to be unlawful.

[191] The policy position underlying the enactment of section 41 is set out in the affidavit of Mr Chris Flatt, the Legacy Director within the Northern Ireland Office, at paras 186-188 as follows:

> "186. The policy position in relation to 'serious' and 'connected' offences was developed following the policy move away from a statute of limitations generally to a conditional immunity model. Officials recognised that there was a need for consistency between the investigations undertaken by the ICRIR and the conditional immunity available to secure information recovery. As recorded in advices on 14 February 2022:
>
> > 'Under option 1, individuals who would be subject to conditional immunity provisions might therefore include (but not be limited to); the killer, the person who gave the order, the getaway driver, a look-out, the disposer of the body, an individual who provided/stored a firearm before/following the murder, the bomb creator, or other conspirators.'
>
> An approach which allows all individuals implicated in a Troubles-related death or serious injury to be able to avail of immunity in exchange for information ensures that we are maximising possibilities for information recovery, recognising that, in many cases, individuals other than those who 'pulled the trigger' will hold valuable information, and might be more persuaded to come forward given the incentive of immunity on offer.
>
> Individuals not granted immunity (as a result of the decision by the body) would in theory, be liable for prosecution …
>
> Under option 1, the ICRIR would not have the remit to investigate (or refer for prosecution) any Troubles-related conduct that is not linked to a death/serious injury, and these cases could not be investigated by any other body. Conditional immunity provisions would also not be available in cases not linked to a death or serious injury. This, in effect, would be subject to a de facto statute of limitations (as they could not be subject to investigation therefore potential prosecution) …

> By ruling out investigations and offers of immunity for any Troubles-related offences that are not directly related to a death or serious injury (and so will not be valuable in terms of information recovery), the ICRIR will be able to focus resources on investigations and immunity to cases that are intended to provide information to families. Officials view this as strongly consistent with the overall aims of our legislation. In any case we believe that in reality, the likelihood of individuals wishing to come forward to seek immunity for incidents not related to a death or serious injury to be sufficiently low to exclude them from the remit of the body and allow it to focus on investigating lesser offences that are connected to death and serious injuries."

[192] This is consistent with the respondent's European Convention on Human Rights Memorandum published on 16 May 2022 prepared for the Joint Committee on Human Rights.

[193] The Memorandum explains the decision to distinguish between offences deemed to be "serious" or "connected" to the Troubles and those "less serious offences." Thus, at para 40 the Memorandum says:

> "The Department considers that, given the passage of time, it is only these [serious] events in which there is now real value in gathering information and finding answers for the surviving victims and family members. As the conditional immunity scheme is designed as a tool to generate information recovery, the availability of immunity should logically be linked to the investigation of those events."

[194] It is clear that the focus of the respondent was on the value of information that might be gathered rather than the prosecution of those involved in Troubles-related offences. This, of course, is consistent with the focus on conditional immunity. That said, the court notes that there is an inherent contradiction in the policy rationale underpinning section 41. It is recognised that individuals other than those who "pulled the trigger" are in a position to assist the ICRIR by providing valuable information. Section 41, however, would provide no incentive for perpetrators of non-serious Troubles-related offences to come forward with information as they already have been given immunity.

[195] Leaving that aside, the applicants in the lead cases make a general attack on section 41 based on a breach of articles 2/3 of the ECHR, article 2(1) of the WF and general constitutional principles in relation to the rule of law in line with their arguments on the conditional immunity under section 19.

[196] The respondents argue that the prohibition does not engage articles 2 or 3 of the Convention and that, in any case, it is likely to protect only a very narrow category of non-serious offenders.

[197] I accept that a statute of limitations *per se* is not unlawful under the ECHR. However, having already analysed the issue of amnesties in the context of section 19 of the 2023 Act it seems to me that the European Court has set its face against statutes of limitation/amnesties in respect of offences which engage articles 2 and 3 ECHR.

[198] In *Oneryildiz v Turkey* [2005] 41 EHRR 20. The Grand Chamber observed:

> "95. That said, the requirements of Article 2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law.
>
> 96. It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence …
>
> On the other hand, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts (emphasis added) (see, mutatis mutandis, *Hugh Jordan*, cited above, para 108 and 136-40)."

[199] The factual context was somewhat different to what is being considered here. The applicants lived in a slum in Istanbul which was bordered by a rubbish tip. An expert report drew the authority's attention to the fact that the tip posed a number of dangers to inhabitants of the slum and that no measures had been taken to prevent an explosion of the gases generated by the decomposing refuse. A methane explosion subsequently occurred which engulfed several houses, including those of the applicants. The ECtHR found that under article 2, the authorities had an obligation to take preventative operational measures. The court further held that the state was required to ensure an "adequate" judicial response through criminal law to the deaths caused by the dangerous activity in question (see para [91]). The judicial response was held to be insufficient because the sole purpose of the criminal

proceedings was to establish whether the authorities could be held liable for "negligence in the performance of their duties" and did not address responsibility for failing to protect the right to life. Accordingly, the state failed to provide adequate protection "by law" safeguarding the right to life and "deterring similar life endangering conduct" (para [118]). Notwithstanding the distinct factual context, the applicable legal principle was expressed in emphatic terms.

[200] It was referred to in the case of *Armani Da Silva v the United Kingdom* [2016] 63 EHRR 12. The applicant in this case was a relative of Mr de Menezes, who was mistakenly identified as a terrorist suspect and shot dead on 22 July 2005 by two special firearms officers in London. The essential backdrop to this case was that two weeks prior to the shooting, the security forces had been put on maximum alert after more than 50 died in a suicide bombing detonated on the London Transport Network. Furthermore, a failed bomb attack which occurred the day prior to the shooting had triggered a police manhunt to find those responsible. Following an inquest, the jury, in a verdict endorsed by the judge, excluded unlawful killing from the range of possible verdicts. The applicant challenged the subsequent decision not to prosecute any individuals in relation to Mr de Menezes' death. The Grand Chamber repeated the principles in *Oneryildiz*:

> "239. Where the official investigation leads to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect the right to life through the law. In this regard, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished (see, for example, *Öneryıldız*, cited above, para 95, and *Giuliani* and *Gaggio*, cited above, para 306). The court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined."

The court continued at para [284]:

> "284. As the Government have pointed out, sometimes lives are lost as a result of failures in the overall system rather than individual error entailing criminal or disciplinary liability. Indeed, in *McCann and Others* the Court implicitly recognised that in complex police operations failings could be institutional, individual or

> both. In the present case, both the institutional responsibility of the police and the individual responsibility of all the relevant officers were considered in depth by the IPCC, the CPS, the criminal court, the coroner and the inquest jury. The decision to prosecute the OCPM as an employer of police officers did not have the consequence, either in law or in practice, of excluding the prosecution of individual police officers as well. Neither was the decision not to prosecute any individual officer due to any failings in the investigation or the State's tolerance of or collusion in unlawful acts; rather, it was due to the fact that, following a thorough investigation, a prosecutor considered all the facts of the case and concluded that there was insufficient evidence against any individual officer to meet the threshold evidential test in respect of any criminal offence." (emphasis added) Nevertheless, institutional and operational failings were identified and detailed recommendations were made to ensure that the mistakes leading to the death of Mr de Menezes were not repeated. In its Review Note the CPS clearly stated that Operation THESEUS 2 had been badly handled from the moment it passed from Commander McDowall to Commander Dick; that a lack of planning had led to the death of Jean Charles de Menezes; and that the institutional and operational failures were "serious, avoidable, and led to the death of an innocent man."

[201] Although no breach of the ECHR was found based on the evidence, the approach taken by the court in *Armani Da Silva* lends weight to the applicant's argument. The court's starting premise was that life-endangering offences should not go unpunished. It seems to the court that the applicants are right when they argue that "life endangering offences" are encompassed by the section 41 prohibition. It would, in effect, extend unconditional immunity, to life endangering offences, where no actual harm is caused, such as attempted murder, conspiracy to murder, possessing firearms or explosives with intent to endanger life, causing explosions so long as no death or serious injury results. The state has a responsibility under the Convention to deter and punish such conduct.

[202] I consider that there is force in the advice of the Joint Committee on Human Rights, Sixth Report - Legislative Scrutiny: Northern Ireland Troubles (Legacy and Reconciliation) Bill, 26 October 2022 when it said at para [73] in relation to the proposed restrictions:

> "73. These restrictions on investigations and prosecutions may result in seemingly arbitrary outcomes.

> For example, consider that there are two similar cases concerning torture but resulting in differing harms. The first case results in severe brain injury–this type of harm falls under the definition of a "serious offence." Where immunity is not granted, the case may be prosecuted. The second case of torture results in severe damage to one or more organs–this type of harm does not fall under the definition of a "serious" offence - there is, therefore, no possibility of a prosecution. It is not clear why these cases ought to be treated differently."

[203] In line with authorities such as *Mocanu and others v Romania* [2015] 60 EHRR 19:

> "346. The court notes that this branch of the investigation was terminated essentially on account of the statutory limitation of criminal liability. In this connection, it reiterates that the procedural obligations arising under Articles 2 and 3 of the Convention can hardly be considered to have been met where an investigation is terminated, as in the present case, through statutory limitation of criminal liability resulting from the authorities' inactivity."

[204] The applicant, *Jordan*, however, provides a particular concrete focus on the impact of section 41. As set out earlier, for the purposes of this application, there is evidence that either one or two officers may have been guilty of perverting the course of justice by editing the original RUC log book made after her son was shot by removing entries. Should the prosecutorial test be met, under section 41 no such prosecution could take place in relation to this allegation.

[205] I do not consider that the issue of the alleged perjury of police officers at the inquest hearing is relevant as if such an offence was committed it is not a Troubles-related offence within the meaning of the 2023 Act.

[206] Given the history of the *Jordan* case, it can safely be said that the applicant's rights under article 2 ECHR are engaged. Understandably, the applicant, *Jordan*, is concerned about the impact of section 41. As she put it in her affidavit at para [7]:

> "Those findings are significant in that I believe that had the log book been available in its entirety, a contemporaneous record of events leading up to the shooting of my son, it may have assisted the coroner in reaching a concluded view as to whether Officer A was justified in shooting my unarmed son. Further, had the police officers told the truth, the truth as to justification

> for shooting my son might have emerged. I believe that the conduct of these officers adversely impacted on the coroner's ability to reach the truth and was designed to protect Officer A."

[207] It may well be that the number of actual cases impacted by section 41 will be very small.

[208] However, in light of the analysis above, the court concludes that the bar on the criminal investigation, prosecution, and the punishment of offenders under section 41 contravenes articles 2 and 3 ECHR.

[209] Specifically, it amounts to a breach of the applicant, *Jordan's*, rights under article 2 ECHR.

[210] I recognise that in reaching this conclusion a potential lacuna arises. Section 38 provides that there may be no criminal investigations in relation to the Troubles-related offences except through ICRIR reviews. The problem which appears in the foregoing is that under sections 9 and 10 of the 2023 Act, a review request may only be initiated into a Troubles-related death (section 9) or other harmful conduct forming part of the Troubles "if that conduct causes that person to suffer serious physical or mental harm" (section 10(1)). Although the SoSNI may request a review of other harmful conduct forming part of the Troubles "*whether or not* it caused any person to suffer serious physical or mental harm", according to section 1(4), the harmful conduct in question must have caused a person to have at least suffered "physical or mental harm of any kind." It follows that a review may not be requested in respect of some types of less serious Troubles-related offences which fall within the scope of section 41. In this respect, several points should be made.

[211] Where individuals are identified as having committed "non-serious" Troubles-related offences, which did not result in any physical or mental harm, in the course of a section 9 or 10 review, the CfI may refer the conduct to the DPP under section 25.

[212] Section 25 refers to the referral of conduct "relevant" to a section 9 or 10 review. Subsection 7 states that "relevant conduct" means:

> "(a) The conduct which caused the death, or the other harmful conduct, to which the review relates "the main conduct"; and
>
> (b) <u>any other conduct that relates to, or is otherwise connected with, the main conduct</u>."
>
> [emphasis added]

Accordingly, where a non-serious offence is connected to a section 9 or 10 review, the individual may still be liable to prosecution. This would occur, for example, in situations similar to the applicant, *Jordan*, where in the context of the inquest into her son's death, two individuals were identified as having allegedly distorted inculpatory evidence.

[213] Similarly, under section 13(5), the CfI must ensure that the circumstances of the death or other harmful conduct, "including any Troubles-related offences" (whether serious or not) which relate to, or are otherwise connected with, the death or other harmful conduct "are looked into."

[214] Furthermore, it follows from the court's analysis that immunity for offences in which articles 2 and 3 ECHR are engaged is unlawful and, therefore, any conduct exposed, to that effect, by the ICRIR should be referred to the DPP subject to section 25(2). In this respect the court notes also that the CfI must comply with the obligations imposed by the HRA when carrying out reviews – see section 13(1).

[215] Consequently, the concerns raised in relation to a lacuna may not manifest in practice. As I have already accepted, the actual number of cases involved will be very small in number. The bottom line for the court is that immunity for offences which breach articles 2 and 3 ECHR is unlawful. Findings of unlawfulness have, accordingly, been made in respect of the immunity provisions, including section 41, which is deemed to be an extension of unconditional immunity.

Jordan - Section 41 of the 2023 Act - Article 8 ECHR

[216] Are the applicants' article 8 rights engaged in respect of her challenge to section 41 of the 2023 Act?

[217] In support of this contention the applicant makes the following points:

(i) The concept of "private life" in article 8 ECHR is a broad term, not susceptible to exhaustive definition.

(ii) Dealing appropriately with the dead, out of respect for the feelings of the deceased's relatives falls within the scope of the concepts of both "private life" and "family life", thus the concept may extend to certain situations after death.

(iii) Such situations are not confined to cases where, had the deceased been alive, their article 8 rights would have been engaged, but also extend to circumstances where their article 2/3 rights are engaged.

(iv) Fundamentally, the question is whether the behaviour, in relation to the treatment of the deceased, which is complained of, adversely impacts on the

human dignity of the living relatives, given their close relationship, and, thus, whether it impacts on their private or family life.

[218] Ms Quinlivan argues that the effect of section 41 will be to grant an unconditional amnesty to state agents, who destroyed evidence relating to the applicant's son's death. It is argued that this demeans her family life, her private life and is an afront to human dignity.

[219] The court challenged whether article 8 was engaged in the context of this case. Ms Quinlivan provided supplemental authorities which she contended supported her submission.

[220] Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[221] It is well settled that the notion of family and private life should be defined broadly.

[222] The applicant's challenge is grounded on the concept of human dignity. As recognised in *Pretty v United Kingdom* [2002] 35 EHRR 1 at para [65]:

> "The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the court considers that it is under Article 8 that notions of the quality of life take on significance."

[223] In *Abdul Said v Secretary of State for the Home Department* [2023] NICA 49, McCloskey LJ reviewed the jurisprudence on article 8 and summarised its scope:

> "The themes and concepts which have habitually featured in the article 8 jurisprudence: the person's inner circle; one's inner sanctum; how to live one's personal life; establishing and developing relationships with others;

> freedom from unjustified State intrusion; unjustified prohibitions on working; protection of the physical and moral integrity of the person; one's personal sexuality; personal identity; and social life."

[224] I turn now to the jurisprudence relied upon by Ms Quinlivan.

[225] In *ML v Slovakia* App. No. 341597/17, 14 October 2021, on the question of admissibility the court said at para [23]:

> "that dealing appropriately with the dead out of respect for the feelings of the deceased's relatives falls within the scope of Article 8 of the Convention."

[226] Whilst this comment may at first glance support the applicant's submission it is important to consider the specific factual matrix of the case. The applicant's son had previously been a catholic priest who was convicted, *inter alia*, of the sexual abuse of minors. The convictions were both spent by 2003 and he died in 2006. Two years later tabloid newspapers reported on the applicant's son's convictions drawing links to his alleged suicide. The applicant relied on article 8 alleging that the dismissal of her claim against the publishers by the domestic courts amounted to a violation of her Convention rights. The court held at para [24]:

> "… the effect of the statements made in the articles in question about the applicant's son rose above the 'threshold of severity' required by the court's case-law (see *Denisov v Ukraine [GC]*, no. 76639/11, para 112, 25 September 2018); thus the applicant's private life has been affected to a degree attracting the application of Article 8. That provision is therefore applicable in the circumstances arising in the present case."

[227] It is worth noting that at para [34] the court considered:

> "… at the outset that the applicant can be regarded as having been directly affected by the articles in question."

[228] At para [48] the court went on to say:

> "48. Lastly, the court is ready to accept that the distorted facts and the expressions used must have been upsetting for the applicant and that they were of such a nature as to be capable of considerably and directly affecting her feelings as a mother of a deceased son as well as her private life and identity, the reputation of her deceased son being a part and parcel thereof."

[229] In *Sargsyan v Azerbaijan* [2017] 64 EHRR 4, the applicant was an ethnic Armenian who had been prevented from returning to his family home in Gulistan, within the border of Azerbaijan, which resulted in him being denied access to the graves of his family members. The court found that this constituted an unlawful interference of his right to private and family life.

[230] In the court's assessment as to whether article 8 applied, it said:

> "252. The court notes that the applicant's complaint encompasses two aspects: lack of access to his home in Gulistan and lack of access to the graves of his relatives. The government contested the applicant's victim status insofar as his complaint concerned the graves of his relatives."

[231] In relation to access to the graves of his relatives the court continued:

> "255. Furthermore, the court reiterates that the concept of 'private life' is a broad term not susceptible to exhaustive definition. Among other things, it includes the right to establish and develop relationships with other human beings and the outside world. While it has been said that the exercise of article 8 rights, including private and family life, pertains predominantly to relationships between living human beings, it is not excluded that these notions may extend to certain situations after death. In a recent case, the court had found that the authority's refusal to return the bodies of the applicant's relatives and the order of their burial in an unknown location, thus depriving the applicants of the opportunity to know the location of the grave site and to visit it subsequently, constituted an interference with their private and family life."

[232] The "recent case" to which the court referred was *Sabanchiyeva v Russia* [2014] 58 EHRR 14 at [122]-[123].

[233] In *Petrova v Latvia* [2014] 6 WLUK 704, the court was dealing with a complaint by the mother of Mr Olegs Petrov who died in hospital after sustaining very serious injuries in a car accident. The hospital made arrangements for the removal of his kidneys and spleen for organ transplantation purposes. Domestic law at the material time explicitly provided for the right on the part of, not only the person concerned, but also his or her closest relatives, to express their wishes in relation to the removal of organs after the person's death. In the instant case the applicant was not asked whether her son had consented to being an organ donor or, in the absence

of any wishes expressed by her son, whether she would consent to organ transplantation.

[234] In the court's assessment it said:

> "55. The court reiterates the need to distinguish cases in which the applicant died in the course of the proceedings from cases where the application was lodged with the court by the applicant's heirs after the death of the victim … In cases where the applicant died before an application was lodged with the court, the court has emphasised that Article 8 rights are eminently personal and non-transferable … Therefore, in principle article 8 cannot be relied on by relatives or next-of-kin unless they are personally affected by the interference at issue.
>
> 56. In the present case the rights of the deceased, Mr Petrovs, and his mother, the applicant in the present case, are closely related. The domestic law at the material time explicitly provided that the right to express one's wishes in relation to removal of organs or body tissue after death pertained not only to the person concerned but also to his or her closest relatives, including parents (see paragraphs 36 and 37 above). The court considers, however, that there is no need to examine the issue of transferability of rights in more detail in the present case since the applicant complains of a violation of her own rights in connection with the removal of her son's organs after his death. Contrary to what has been argued by the Government, the court finds that on the application form the applicant expressly indicated her wish to complain in her name and she maintained that position in her observations on the admissibility and merits of the case."

[235] The main authority relied upon by Ms Quinlivan is *Zorica Jovanovic v Serbia* [2015] 61 EHRR 3 in which the court held that article 8 may encompass additional obligations relating to the effectiveness of any investigative proceedings which impact on one's family life:

> "68. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of 'family life' within the meaning of Article 8 of the Convention …
>
> 69. The essential object of Article 8 is to protect the individual against arbitrary interference by public

authorities. There may, however, be additional positive obligations inherent in this provision extending to, *inter alia*, the effectiveness of any investigating procedures relating to one's family life (see, *mutatis mutandis*, and in the context of 'private life', *MC v Bulgaria*, No. 39272/98, paras 152-53, ECHR 2003-XII).

70. In *Varnava and Others* (cited above) the Grand Chamber, albeit in the context of Article 3, held as follows:

> '200. The phenomenon of disappearances imposes a particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty. ... The essence of the violation is not that there has been a serious human rights violation concerning the missing person; it lies in the authorities' reactions and attitudes to the situation when it has been brought to their attention ... Other relevant factors include ... the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person ... The finding of such a violation is not limited to cases where the respondent State has been held responsible for the disappearance ... but can arise where the failure of the authorities to respond to the quest for information by the relatives or the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts, may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the whereabouts and fate of a missing person.'

The court deems these considerations broadly applicable, *mutatis mutandis*, to the very specific context of positive obligations under Article 8 in the present case.

71. With this in mind and turning to the present case, it is noted that the body of the applicant's son was never released to the applicant or her family, and that the cause of death was never determined (see paragraphs 22 and 14

> above, in that order). Furthermore, the applicant was never provided with an autopsy report or informed of when and where her son had allegedly been buried, and his death was never officially recorded (see paragraphs 22 and 15 above, in that order). The criminal complaint lodged by the applicant's husband would also appear to have been rejected without adequate consideration (see paragraph 17 above), and the applicant herself still has no credible information as to what happened to her son."

[236] There are two domestic cases of relevance to the applicant's submission in respect of article 8. The first is that of *Re Hughes* [2020] NI 257. This is the same applicant, Brigid Hughes, involved in these applications. This was a case concerning systemic delay in the coronial system which had undermined determination of legacy inquests in respect of the death of, among others, the applicant's husband. In his conclusion, Sir Paul Girvan determined that:

> "The current systemic delay is impacting on the applicant as the widow of the deceased in respect of the inquest directed by the Advocate General. Her article 2 rights are not being vindicated and the delay engages her rights under articles 2 and 8." (p. 35, at (3)).

[237] The judgment does not contain any analysis in relation to the engagement of article 8, focusing as it did on article 2 and the issue of delays and resource allocations for a legacy inquest. The second domestic case of *Jordan and others v PSNI* [2014] NIQB 71 dealt with the question of damages in relation to delays in inquests. Stephens J found that "the investigation into the death of a close relative, impacts on the next of kin at a fundamental level of human dignity" (para [27]). However, the awards made in that case were in the context of the rights under article 2 and there was no discussion on whether article 8 was engaged.

[238] Having analysed the case law, I agree with Mr McGleenan's submissions that the factual context of the Strasbourg cases to which I have been referred are a "world away" from the circumstances of this application. In each of the cases to which I have been referred one can identify the direct effect on the applicant's private and family life. *Pretty*, involved the applicant's personal medical condition; *Sargysan* involved the applicant's personal lack of access to the graves of his relatives; *Jovanovic* expressly refers to the very specific context of positive obligations under article 8 in that case where the court was dealing with the particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones; the publications in *ML* directly affected the applicant's feelings as the mother of the deceased as well as her private life and identity; the applicant *Petrova* had a right under domestic law to express her wishes in relation to the removal of organs or body tissue of her closest relative.

[239] In my view, the features identified in the case law are not present in this application. The essential ingredient of family life is the right to live together so that family relationships may develop normally, and members of the family may enjoy each other's company. Although, admittedly, a broad right, the positive obligations arising under article 8 so far have not concerned the prosecution of alleged perpetrators of crimes. I do not consider that the applicant's complaint in relation to section 41 comes within the themes and concepts featured in the article 8 jurisprudence. The ECtHR has indicated that the scope of article 8 rights does not exclude the possibility that they may extend to situations after death. The particular facts of this case do not, in my view, bring the applicant within the ambit of her private and family life as envisaged by article 8.

[240] The authorities to which I have been referred do not provide the platform for what is being advanced by the applicant. To hold that her article 8 rights were engaged would, in the court's view, constitute an unduly expansive view of the rights protected by article 8.

[241] At its very height any article 8 entitlement can only be parasitic to the article 2 right in play in this application. This explains the comment of Sir Paul Girvan in *Brigid Hughes*. It is, of course, important to remember that the applicant's article 2 rights in terms of the procedural obligation on the state to carry out an effective investigation into her son's death are engaged. In my view, that is the proper prism through which to view this challenge. The right which it is said has been interfered with by section 41 is that of article 2 which establishes the procedural obligation on the state. To expand the scope to include article 8 would, in my view, be artificial and mistaken.

Sections 9(8), 10(3) and 38 - The five year time limit on requests for reviews

[242] Section 38 provides that there may be no criminal investigations in relation to Troubles-related offences except through ICRIR reviews. Sections 9(8) and 10(3) impose a five-year time limit in relation to requests for such reviews.

[243] The applicants contend that these provisions are in breach of the state's article 2/3 investigative obligations. This is compounded by the restrictions on all other legal proceedings including civil actions and inquests in relation to Troubles-related deaths.

[244] The European Court has held in the seminal case of *Brecknell v United Kingdom* [2008] 46 EHRR 42 that in certain circumstances the duty to investigate under the procedural limb of article 2 ECHR may be revived:

> "71. …, the court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an

> unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence. The court would further underline that, in light of the primary purpose of any renewed investigative efforts (see paragraph 65 above), the authorities are entitled to take into account the prospects of success of any prosecution. The importance of the right under Article 2 does not justify the lodging, willy-nilly, of proceedings. As it has had occasion to hold previously, the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals and they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would not in fact have produced concrete results."

[245] What, then, would the position be if a plausible, or credible, allegation, piece of evidence, relevant information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing comes to the attention of the authorities after 1 May 2029?

[246] Should such material relate to an existing review before the ICRIR then it would certainly be open to the Commission to deal with the matter beyond the five-year period. I note that in the draft ICRIR documents referred to in this judgment, it is anticipated that their activities will necessarily extend to 10 years. Of course, this will be of no avail to new material in respect of which no review has been requested within the five year period.

[247] The court is not dealing with a concrete scenario. Should such a scenario arise it will not do so until after 1 May 2029. The section is unlikely to have any impact on any of the applicants whose cases are under various stages of investigation/review. Any relevant death will have occurred between 31 and 63 years previously. The prospects of a successful criminal investigation and prosecution would be extremely low at that stage. Mr McGleenan makes the point that whilst there may be hard cases, there is no legally significant number of persons likely to be affected sufficient to engage the court in analysing Convention incompatibility.

[248] The concept of a time limited investigation into legacy deaths is not novel. As seen earlier in the judgment, the Eames/Bradley Report in 2009 recommended the establishment of a legacy commission with a prescribed five-year operational mandate. The SHA envisaged that the HIU would aim to complete its work within five years. Running through all of the approaches to legacy it has been the ambition to deal with the past but to look to the future. As per the affidavit from Mr Flatt, the rationale behind the concept of a limited operational mandate was to ensure that "the past does not become a preoccupation without limit."

[249] The court considers that the lack of flexibility to deal with cases where new evidence comes to light which could trigger the need for an investigation is a matter of concern. The drawing of "bright line rules" must be problematic when dealing with fundamental rights under articles 2 and 3 which are not qualified rights. Whilst the state is afforded a broad discretion as to how it should meet its investigative obligations under articles 2 and 3, at a minimum, there must be some mechanism capable of doing so.

[250] In the event that a *Brecknell* type scenario arises post-2029 the state will be under an obligation to deal with the matter at that stage. Mr McGleenan has suggested that the possibility of a public inquiry remains open, but the court notes the high threshold required before such an inquiry could be called.

[251] Having considered the matter the court concludes that it is not possible, at this stage, to make a declaration to the effect that the five-year time limit on review requests is incompatible with the Convention. These provisions may be subject to further amendment between now and 1 May 2029. The legal and political landscape may be very different then. Should the scenario arise in the future then the state will then be obliged to find some mechanism to deal with the issue.

[252] The court, therefore, does not propose to grant any declarations or relief in relation to the five-year time limit in respect of reviews.

The duty to investigate under articles 2 and 3 ECHR – can the ICRIR discharge the state's obligations? (sections 9, 10, 11, 13, 15, 16, 17 and 18)

[253] What is required for compliance with the state's procedural obligations under articles 2 and 3 ECHR has been the subject matter of extensive jurisprudence, much of which emanates from killings in this jurisdiction. The principles can be found in the judgments in cases, most of which have been referred to earlier in this judgment, including *McCann v United Kingdom* [1995] 21 EHRR 97, ; *McKerr and others* [2001] 34 EHRR 20; *Jordan v United Kingdom* [2001] 37 EHRR 2; *Jordan v Lord Chancellor* [2007] UKHL 14; R (*Middleton*) *v West Somerset Coroner* [2004] 2 AC 182; *R(Amin) v Home Secretary* [2004] 1 AC 653; *Tunc v Turkey* [2015] WLUK 150; *McQuillan* [2022] AC 1063; and *In Re Dalton* [2023] UKSC 36.

[254] The latter two Supreme Court cases focused on the issue as to when the procedural obligations under articles 2 and 3 of the ECHR as given effect in domestic law are triggered.

[255] The judgment in *McQuillan* sets out the obligations comprehensively at para [109] and onwards as follows:

> "**7. The obligation to investigate under articles 2 and 3 of the Convention**
>
> 109. The jurisprudence of the Strasbourg Court which underpins the obligation on the State to investigate a death, or allegation of torture or inhuman and degrading treatment under articles 2 and 3 of the Convention is well established. (In this judgment, when convenient to do so, we will refer to this investigative obligation as "the article 2/3 investigative obligation"):
>
> (i) Articles 2 and 3 of the Convention enshrine two of the basic values of democratic societies making up the Council of Europe. Article 2, which safeguards the right to life and sets out the circumstances in which deprivation of life may be justified, ranks as one of the most fundamental provisions of the Convention: *Anguelova v Bulgaria* (2004) 38 EHRR 31, para 109; *Jordan v United Kingdom* (2003) 37 EHRR 2, para 102. Article 3, which provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment", is also one of the core provisions of the Convention from which no derogation is permitted even in time of war or other public emergency.
>
> (ii) As the State has a general duty under article 1 of the Convention to secure to everyone the rights and freedoms defined in the Convention, the combination of articles 1 and 2 requires by implication that there be some form of official investigation when individuals have been killed by the use of force: *McCann v United Kingdom* (1996) 21 EHRR 97, para 161; *Nachova v Bulgaria* (2006) 42 EHRR 43, para 110 (Grand Chamber); *Tunç v Turkey (Application No 24014/05)* [2016] Inquest LR 1, para 169 (Grand Chamber). The essential purpose of such an investigation is two-fold. It is to secure the effective implementation of the

domestic laws that protect the right to life; and, in cases involving State agents or bodies, it is to ensure their accountability for deaths occurring under their responsibility: *Nachova* (above) para 110; Jordan (above), para 105.

(iii) A similar duty of investigation arises under article 3 of the Convention where there is a reasonable suspicion that a person has been subjected to torture or inhuman or degrading treatment: *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25, para 182; *Al Nashiri v Romania* (2019) 68 EHHR 3, para 638; *R (Mousa) v Secretary of State for Defence (No 2)* [2013] EWHC 1412 (Admin); [2013] HRLR 32.

(iv) An adequate and prompt investigation is essential to maintain public confidence in the adherence of the State authorities to the rule of law and in preventing any appearance of complicity or collusion in or tolerance of unlawful acts: *McKerr v United Kingdom* (2002) 34 EHRR 20, para 114; *Brecknell*, para 65; *Al Nashiri v Romania* (above), para 641. Victims, their families and the general public have a right to the truth, which necessitates public scrutiny and accountability in practice: *El-Masri v Former Yugoslav Republic of Macedonia* (above), para 191; *Al-Nashiri v Romania* (above), para 641. The authorities must act of their own motion, once the matter is brought to their attention: *McKerr v United Kingdom* (above), para 111.

(v) There must be a sufficient element of public scrutiny of the investigation or its results in order to secure accountability in practice. The degree of public scrutiny that is required will vary from case to case but the next of kin or victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests: *McKerr v United Kingdom* (above), para 115; *Anguelova v Bulgaria* (above), para 140; *Jordan* (above), para 109.

(vi) There is an obligation to ensure that the investigation is effective; this is an obligation of means rather than result. The investigation must

be effective in the sense that it is capable of leading to a determination of whether the force used by an agent of the State was or was not justified in the circumstances and to the identification and punishment of those responsible: *Jordan* (above), para 107; *Nachova* (above), para 113; *Ramsahai v Netherlands* (2008) 46 EHRR 43, para 324. For the investigation to meet this criterion, the authorities must take whatever reasonable steps they can to secure the evidence and reach their conclusions on thorough, objective and impartial analysis of all relevant elements: *Giuliani and Gaggio v Italy* (2012) 54 EHRR 10, paras 301-302.

(vii) Another aspect of an effective investigation, which is the focus of one of the central issues in these appeals, is that the persons responsible for carrying out the investigation must be independent of those implicated in the events. The Strasbourg Court has emphasised, as we discuss more fully below, that this requires not only a lack of hierarchical or institutional connection but also practical independence. See *McKerr v United Kingdom* (above), para 112; *Jordan* (above), para 106; *Ramsahai* (above), para 325. In *Nachova* (above), para 112, the Grand Chamber stated:

> 'For an investigation into alleged unlawful killing by state agents to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice.'

In support of that proposition the Grand Chamber cited *Güleç v Turkey* (1999) 28 EHRR 121, paras 81-82; *Őgur v Turkey* (2001) 31 EHRR 40, paras 91-92; and *Ergi v Turkey* (2001) 32 EHRR 18, paras 83-84.7."

[256] The question for the court is whether the ICRIR is capable of carrying out an effective investigation into deaths or allegations of torture occurring during the Troubles in compliance with the procedural requirements of articles 2 and 3. Does it have the independence, structures and powers necessary to thoroughly investigate deaths occurring during the Troubles including those involving allegations of state involvement or collusion?

[257] The applicants identify multiple issues which they say mean the answer to this question is a definitive "No."

[258] In considering the elements of the obligations set out in *McQuillan* it is important to understand that they should not be analysed in isolation. Each of the criteria are inter-related. In assessing the effectiveness of an investigation, the elements identified in *McQuillan* need to be analysed together. That said, it is convenient to consider the criticisms raised by the applicant under individual headings.

Is the ICRIR sufficiently independent? (Sections 2(7)-(9), 2(11), 9(3), 10(2), 30, 31, 33, 34, 36, 37(1); Schedule 1 para 6, 7, 8, 10; Schedule 6 para 4)

- Section 2(7): ICRIR must produce and publish a workplan and give a copy to the SoSNI at least three months before the start of financial year.

- Section 2(9): ICRIR must produce and publish an annual report and give a copy to the SoSNI no later than six months after the end of financial year.

- Section 2(11): SoSNI may make payments or provide other resources to ICRIR in connection with the exercise of ICRIR's functions.

- Section 9(3): SoSNI may request a review into a Troubles-related death.

- Section 10(2): SoSNI may request a review into other harmful conduct related to the Troubles.

- Section 30: Sets out the prohibitions on disclosure of information, for example, where material has been identified as sensitive or protected international information etc.

- Section 31: Provides how certain information obtained by the ICRIR pursuant to its various powers is to be used.

- Section 33(1)(a)-(2): SoSNI may give guidance to the ICRIR about the identification of sensitive information or agree an information disclosure protocol with the ICRIR on the identification of sensitive information; ICRIR must have regard to any guidance given.

- Section 34(1): SoSNI may, by regulations, make provision about the holding and handling of information by ICRIR.

- Section 36(1)-(2): SoSNI must carry out a review of the performance of the ICRIR by the end of the third year of its operation.

- Section 37(1): SoSNI may make provision for winding up the ICRIR if SOSNI is satisfied that the need for ICRIR has ceased. This is subject to affirmative procedure and mandatory consultation with ICRIR.

- Schedule 1, paragraph 6(3): A statement of accounts in respect of each financial year must be sent to SoSNI.

- Schedule 1, paragraph 7: SoSNI is from time to time to determine how many other Commissioners there are to be under section 2(3)(c).

- Schedule 1, paragraph 8(1): Commissioners are to be appointed by the SoSNI.

- Schedule 1, paragraph 10(1)-(2): Terms of appointment of Commissioners are set at a period not exceeding five years to be determined by SoSNI. Other terms of appointment also to be determined by SoSNI.

- Schedule 6 paragraphs 4, 5, 9-11: Disclosure of sensitive information by ICRIR permitted if CfI notifies SoSNI of proposed disclosure. Disclosure is prohibited only if SOSNI satisfied that disclosure of sensitive information would risk prejudicing or would prejudice the national security interests of the UK. Disclosure of protected international information is prohibited if it would damage international relations. A person entitled to make a review request may appeal a decision of the SoSNI not to permit disclosure by way of judicial review.

[259] The ICRIR is a new bespoke institution specifically designed to carry out reviews of deaths and other harmful conduct that were caused by conduct forming part of the Troubles. It is not part of the existing court structure in Northern Ireland which includes the criminal, civil and coronial courts. It is the applicants' case that the ICRIR lacks institutional and hierarchical independence; it is, in effect, a creature created by the respondent, controlled by the respondent in significant ways, and lacking in the necessary independence to comply with Convention obligations.

[260] In support of this submission the applicants point to the following:

(a) The respondent appoints the Commissioners (Schedule 1, paragraph 8), determines how many are appointed (Schedule 1, paragraph 7) and how long and on what terms they are appointed (Schedule 1, paragraph 10).

(b) The ICRIR must produce and publish a plan of work on a yearly basis and give a copy to the respondent. It must produce and publish an annual report which must deal with matters set out in the Act including finances, administration, the volume of information received, the number of requests for reviews, the number of final reports that have been provided, the number of applications for immunity, the number of applications that have been decided, the number of persons who have been granted or refused immunity,

progress made in producing the historical record and such other matters as the ICRIR considers appropriate: sections 2(7)-(10). It must report on its expenditure under Schedule 1, paragraph 6.

(c) The respondent has the power to wind up the ICRIR if he "is satisfied that the need for the ICRIR to exercise the functions conferred by section 2(5) has ceased" (section 37(1)).

(d) Issues have arisen in relation to the appointment of Mr Peter Sheridan as CfI, given his previous role in the PSNI/RUC.

(e) The applicants complain about the respondent's role in relation to the disclosure of information by the ICRIR.

(f) The applicants also complain that the respondent can request reviews (sections 9(3) and 10(2)).

[261] In relation to the respondent requesting reviews, it seems to the court that this is entirely appropriate. It is essential to ensure that the ICRIR investigates so far as is possible all cases in which articles 2/3 obligations arise. As per the jurisprudence there is an obligation on the authorities to act on their own accord once an article 2/3 issue is brought to their attention. The Act, in the court's view, properly ensures that the question of reviews is not left solely to victims or their next of kin. Thus, in addition to the power of the respondent to request reviews, express provision is made for requests for reviews into a relevant death by the Attorney General for Northern Ireland, the Advocate General for Northern Ireland, the coroner in Northern Ireland who was responsible for an inquest into a death which has been closed in accordance with section 16A(3) of the Coroner's Act (Northern Ireland) 1959 and similar provisions in respect of coroners in England & Wales, the Sherrif in Scotland, the Prosecutor Fiscal of Scotland and the Lord Advocate.

[262] In relation to the question of disclosure of documents, this is an important aspect of independence but recognising the inter-relationship between the various elements for an article 2/3 compliant procedural investigation the court will analyse this below in the context of whether the ICRIR could carry out effective investigations.

[263] In relation to the other matters raised, the respondent argues that the ICRIR will have full operational independence in all aspects of its work. The respondent points out that it is not unusual for Secretaries of State to appoint individuals to roles in independent bodies. By way of example, the Secretary of State appoints the NIHRC Commissioners and the Equality Commission Commissioners who are both creatures of the B-GFA. It is not suggested that this compromises their independence in any way.

[264] It is argued that reviews of the performance of independent bodies such as those set up by the lead Department which brought the legislation forward establishing it, is standard practice and desirable. One such example is the Accident Investigation Branches. Other examples include the Troubles Permanent Disablement Payment Scheme (see section 52 and schedule 1, paragraph 14 of the Victims' Payments Regulations 2020) and the Historical Institutional Redress Board (Schedule 1, paragraph 11 of Historical Institutional Abuse (Northern Ireland) Act 2019).

[265] In relation to the power of the Secretary of State to wind up the ICRIR, this is only available if he is satisfied that the need to exercise its functions has ceased. No such situation could arise if ongoing reviews are being carried out. Use of this power is in any event subject to Parliamentary approval (the Affirmative Procedure).

[266] Ultimately, any decision of the Secretary of State in relation to the ICRIR is subject to the jurisdiction of the courts by way of judicial review. Courts are not excluded from their supervisory role in this regard.

[267] One of the difficulties in analysing the ICRIR's compliance with Convention obligations is that, unlike the article 2/3 jurisprudence which established the relevant principles, the court is not dealing with an actual investigation or a concrete example. The court must make an assessment of whether the ICRIR can, in effect, meet the requirements when it commences its work.

[268] In relation to independence it seems to the court that the key issue is the operational independence of the ICRIR.

[269] As per *McQuillan* and the Strasbourg jurisprudence, the issue is whether the persons responsible for carrying out the investigation are independent of those implicated in any events they are investigating. The court looks to practical independence.

[270] As the Grand Chamber stated in *Nachova v Bulgaria* (2006) 42 EHRR 43 at para [112]:

> "112. For an investigation into alleged unlawful killing by State agents to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice."

[271] Importantly, at para [111] the UK Supreme Court judgment in *McQuillan* is as follows:

> "Nonetheless, the degree of independence that is required depends on the circumstances of the specific case. In *Tunc v Turkey* (above) the Strasbourg Court stated:

> 'Moreover, Article 2 does not require that the persons and bodies responsible for the investigation enjoy absolute independence, but rather that they are sufficiently independent of the persons and structures whose responsibility is likely to be engaged (see *Ramsahai* cited above, paras 343 and 344). The adequacy of the degree of independence is assessed in the light of all the circumstances, which are necessarily specific to each case.'

In this regard, we agree with the Court of Appeal in para [146] of its judgment in the McQuillan case which states that it does not discern the Strasbourg Court as dictating that there should be complete hierarchical or institutional disconnection as there are ways in which a state can inject independence into the structure of hierarchies and institutions."

[272] The Chief Commissioner appointed by the Secretary of State is a person of huge judicial experience, including 12 years as Lord Chief Justice in this jurisdiction.

[273] The fact that the CfI is a former RUC/PSNI officer does not mean that he lacks the necessary independence to carry out investigations into legacy issues, a principle which has been confirmed by the Supreme Court in the *McQuillan* case (see paras [206]-[207]). Self-evidently, he must recuse himself from any review involving an incident in which he was involved as a former RUC/PSNI officer, or in respect of which there is a personal conflict of interest.

[274] In assessing the issue of independence it is important to note that section 13(2) provides that the CfI has operational control over the conduct of reviews by the ICRIR.

[275] Importantly, the preparatory work for the ICRIR, referred to earlier, demonstrates, in my view, that it is focused on ensuring its operational independence.

[276] The ICRIR has produced a draft Code of Conduct, a set of draft principles and a Framework Document on governance issues. Accordingly, the ICRIR's conduct is to be guided by core values such as integrity, impartiality, openness, accountability and respect. Furthermore, the following draft principles apply to all investigations conducted by the ICRIR:

1. The Commission will investigate each case referred to it independently, thoroughly and fairly.

2. The Commission will undertake investigations promptly and proportionately.

3. The Commission will ensure those making a request are appropriately involved in the investigative process in order to protect their legitimate interests.

4. The Commission will make such factual determinations as are supported by the available material.

5. Findings expressed will always be at least to the civil standard of proof.

6. The Commission will compile and produce a report of its findings in relation to each investigation (p. 4).

[277] These draft principles are clearly designed to align with, and are informed by, articles 2 and 3 ECHR and the requirements of the Human Rights Act 1998.

[278] The Framework Document outlines the proposed relationship between the ICRIR and NIO. Stressing the fundamental importance of the independence of its investigations to its effectiveness, it imposes an undertaking on the NIO to refrain from acting in any way which undermines the operational independence of the ICRIR, or its Commissioners. It further places a positive obligation upon the NIO to take steps where necessary to actively defend and uphold the independence of the Commission and its operational decision-making (para 3.2). The NIO is also charged with ensuring that the ICRIR has funding to fulfil its statutory duties and requires the bodies to liaise with one another regularly on matters concerning corporate services, funding, the ICRIR's progress against its published workplan and the management of public resources. However, such engagement is not to relate to the conduct of any cases on which the ICRIR is undertaking work (para 3.4). It is envisaged that the ICRIR will have a Board consisting of up to seven Commissioners all bearing collective responsibility for setting the strategic direction of the ICRIR to enable it to deliver its functions (para 8.3).

[279] Whilst the ICRIR is to be operationally independent, the Framework Document sets out the statutory powers which may be exercised by the SoSNI and NIO Ministers in respect of the ICRIR. These include appointing the Chief Commissioner, CfI and other Commissioners as specified in the Act; overseeing the policy and resources framework within which the ICRIR is required to operate; and paying the ICRIR such sums as considered necessary for meeting the ICRIR's expenditure and securing Parliamentary approval (para 14.2). In addition to the above, the Principal Accounting Officer designates the Chief Executive Officer of the ICRIR as the organisation's Accounting Officer responsible for ensuring propriety in

the handling of public funding granted by NIO (paras 10.2-10.4). The Principal Accounting Officer also has responsibility for advising the SoSNI on how the ICRIR is delivering against its workplan, "whether it is delivering value for money" and the exercise of the SoSNI's statutory responsibilities concerning the ICRIR which includes ensuring "that the stewardship relationship is tailored and proportionate to maintain operational independence" (paras 15.4-15.5).

[280] The Framework Document refers to a dispute settlement mechanism. Accordingly, where disputes between the ICRIR and the NIO arise, the bodies are to resolve the dispute through informal channels in the first instance, and if this is not possible, through a formal process overseen by the senior sponsor (from the NIO) and ICRIR Chief Operating Officer (para 17.1).

[281] The ICRIR's performance is to be formally reviewed bi-annually by the Chief Commissioner, in consultation with the NIO. Moreover, the SoSNI will, unless other arrangements have been agreed, meet the Chief Commissioner at least once a year to discuss the ICRIR's performance. However, "no individual ICRIR case review or immunity decisions or other operational matters relating to cases" are to be discussed in those meetings (para 34.3). In line with the SOSNI's statutory duty, a review of the performance by the ICRIR of its functions is to be carried out by the third year of its operation with a view to assessing, *inter alia*, the likely remaining time and resources required to complete its functions. A copy of this review must be laid before Parliament (para 39.1).

[282] A further review is to take place after five years, when the window for making review request closes, and again after seven years of operation. The latter review will consider, "progress to date and potential requirements for winding up of the ICRIR (currently assumed as the conclusion of year 10 of operation), providing clarity on the likely point for this" (para 39.4).

[283] Thus, it is anticipated in the Framework Document that the ICRIR will necessarily operate past the initial five-year period. However, after five years, the Chief Commissioner is responsible for writing to the SoSNI on an annual basis estimating the likely length of time to complete the current caseload and providing any views on whether the ICRIR should be wound up. Where the SoSNI proposes that the ICRIR should be wound up, the SoSNI must consult with the ICRIR and an Affirmative Statutory instrument laid before Parliament (para 40.2).

[284] Whilst the court is not dealing with a "specific case" it concludes that the proposed statutory arrangements, taken together with the policy documents published by the Commission inject the necessary and structural independence into the ICRIR. At this remove the court concludes that the ICRIR is sufficiently independent to comply with the requirement for independence to meet the procedural obligations under articles 2/3 ECHR.

Has the Commission sufficient powers to carry out an effective investigation?

[285] This is a key issue for determination by the court. Currently investigations into legacy deaths, including those alleged to have been caused by state agents, are conducted by means of police investigation where appropriate evidence exists by way of criminal prosecution and, importantly, by way of inquests.

[286] It is the latter investigation which is the primary means by which the state currently complies with its article 2 obligations in respect of deaths allegedly involving state agents. It is important to remember that inquests conducted under the Coroners Act (Northern Ireland) 1959 and the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 only satisfied the requirements of article 2 as a result of developments in case law.

[287] Rule 15 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 governs the matters to which inquests shall be directed. This rule provides as follows:

> "15. The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely:
>
> (a) who the deceased was;
>
> (b) how, when and where the deceased came by his death;
>
> (c) the particulars for the time being required by the Births and Deaths Registration Acts (Northern Ireland) 1863 to 1956 to be registered concerning the death."

[288] Rule 16 goes on to provide:

> "16. Neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability or on any matters other than those referred to in the last foregoing Rule."

[289] The seminal case of *R(Middleton) v West Somerset Coroner* [2004] 2 AC 182 resulted in a marked change of approach in how inquests were conducted when an article 2 obligation arose.

[290] In that case the House of Lords was considering an inquest into the death of a prisoner who had taken his own life having previously threatened suicide. The coroner directed the jury not to return a verdict referring to neglect and refused to

append a jury's note to inquisition including the Prison Service's failure in its duty of care to the prisoner.

[291] The court had to consider whether the inquest met the state's procedural duty to investigate deaths under the equivalent legislation in England.

[292] The key passages of the judgment are contained in paras [16] and [17] of Lord Bingham's judgment:

> "16. It seems safe to infer that the state's procedural obligation to investigate is unlikely to be met if it is plausibly alleged that agents of the state have used lethal force without justification, if an effectively unchallengeable decision has been taken not to prosecute and if the fact-finding body cannot express its conclusion on whether unjustifiable force has been used or not, so as to prompt reconsideration of the decision not to prosecute. Where, in such a case, an inquest is the instrument by which the state seeks to discharge its investigative obligation, it seems that an explicit statement, however brief, of the jury's conclusion on the central issue is required.
>
> 17. Does that requirement apply only to the very limited category of cases just defined, or does it apply to other cases as well? The decision in *Keenan* 33 EHRR 913 shows that it does apply to a broader category of cases, since although in that case no breach of the state's investigative obligation was alleged or found, the court based its conclusion that article 13 had been violated in part on its opinion (para 121) that the inquest, which did not permit any determination of liability, did not furnish the applicant with the possibility of establishing the responsibility of the prison authorities nor did it (para 122) constitute an investigation capable of leading to the identification and punishment of those responsible for the deprivation of life. A statement of the inquest jury's conclusions on the main facts leading to the suicide of Mark Keenan would have precluded that comment."

[293] The difficulty was that prior to *Middleton* coroners interpreted "how" narrowly to read "by what means." In *Middleton* the House of Lords concluded that the scheme required a change of interpretation to comply with the state's obligations under article 2 of the Convention. That change required a broader interpretation of "how" in the equivalent legislation to connote "by what means and in what circumstances?"

[294] In coming to this conclusion the court, in effect, followed the decision in *Jordan v United Kingdom* 37 EHRR 52 which arose from the fatal shooting of Pearse Jordan by a police officer in Northern Ireland. The inquest into his death has resulted in significant jurisprudence on this issue and, indeed, his death is the subject matter of one of the applications in respect of this Act. The key passage of the court's judgment was para [107] as follows:

> "The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of inquiry and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard."

[295] It was this change of approach which has led to the series of inquests currently being conducted in this jurisdiction in respect of legacy killings allegedly involving state agents. In doing so, the state is complying with its article 2 obligations, subject to specific challenges in specific cases.

[296] Notwithstanding this change of approach, it is settled law that an inquest cannot attribute blame or make findings of civil or criminal liability. Nor can an inquest in Northern Ireland return a verdict of unlawful killing. An inquest is an inquisitorial fact-finding exercise and not a method of apportioning guilt.

[297] However, as Stephens J made clear in another *Jordan* case – *Re Jordan* [2014] NIQB 11 at para [121]:

> "[121] An inquest which does not have the capacity to reach a verdict 'leading to a determination of whether the force used … was or was not justified' would not comply with the requirement of Article 2."

[298] The practice of coroners conducting such inquests in this jurisdiction demonstrates that the requirements set out by Stephens J are being met. In considering "the broad circumstances in which the death occurred" an inquest must

be capable of leading to a determination of whether the use of lethal force was justified.

[299] Returning to the key question, can the ICRIR carry out an article 2/3 compliant investigation? As is the case with the issue of independence the court is not dealing with a concrete case. The ICRIR has not yet carried out any reviews. Its obligations in this regard are set out in section 13(5) of the Act.

[300] Under section 13 the CfI is obliged to conduct "reviews." Section 13(5) provides that:

> "(5) The Commissioner for Investigations must ensure that each review, whether or not a criminal investigation forms part of the review, looks into all the circumstances of the death or other harmful conduct to which it relates, including any Troubles-related offences (whether serious or not) which relate to, or are otherwise connected with, that death or other harmful conduct."

[301] Having conducted such a review, the Chief Commissioner under section 15(2) must "produce a final report on the findings of the review in accordance with this section."

[302] The applicants argue that such a review falls well short of what is required of an article 2/3 compliant investigation into deaths or torture allegedly involving state agents.

[303] Before turning to some specific issues raised by the applicants, I remind myself that it is for the state to determine the actual means by which it carries out a compliant investigation. Inquests are not mandated as a means by which article 2 obligations are met. It is also important to recognise that not all reviews will concern allegations of involvement by state agencies which are the focus of inquests currently being dealt with by the Legacy Unit of the Coroners Service.

[304] In terms of investigation, the Act provides that the CfI will have all the powers and privileges of a police constable, as will any other ICRIR officer designated by the Commissioner. The respondent contends that this includes access to the same powers and investigative measures as the police when investigating criminal offences such as, the power to arrest and detain suspects for the purposes of questioning, obtaining search warrants or other court orders requiring the production of evidence and obtaining samples for forensic testing. The Commissioner will have the power to compel evidence from witnesses, including oral or written testimony or physical evidence and documents (subject to safeguards to protect the right against self-incrimination, which also applies to inquests).

[305] It is clear that all investigations, when initiated, will be capable of leading to prosecutions should sufficient evidence of a criminal offence exist. This is subject, of course, to the discussion on the issue of immunity.

Powers of disclosure

[306] Under section 5 of the 2023 Act a "relevant authority", which includes state bodies, must make available to the Commission such information, documents and other material as the CfI may reasonably require for the purposes of, or in connection with the exercise of the review function. A relevant authority may also make available to the ICRIR any information, documents or other material which, in the view of that authority, may be needed for the purposes of, or in connection with, the exercise of the review function.

[307] Section 5 is augmented by section 14 which deals with supply of information. Under section 14(2) the CfI may by notice require a person to attend at a time and place stated in the notice:

> "(a) to provide information;
>
> (b) to produce any documents in the person's custody or under the person's control;
>
> (c) to produce any other thing in the person's custody or power under the person's control for inspection, examination or testing."

Sub-section (3) provides that:

> "(3) The Commissioner may by notice require a person, within such period as appears to that Commissioner to be reasonable:
>
> (a) to provide evidence in the form of written statements;
>
> (b) to provide any documents in the person's custody or power under the person's control;
>
> (c) to produce any other thing in the person's custody or under the person's control for inspection, examination or testing."

[308] This is strengthened by Schedule 4 to the 2023 Act which makes provision for enforcement of notices under section 14. This provides for the offence of

suppression of evidence in paragraph 9 and for specific penalties in paragraph 11 which Mr McGleenan points out exceed those available to a coroner.

[309] In terms of material, Mr McGleenan points to section 35 which provides for biometric material in designated collections not to be destroyed if destruction of the material would otherwise be required by any of the "destruction provisions": see section 35(4). The effect of this is to preserve evidence which would otherwise be unavailable. This would be an important factor in the ICRIR's ability to carry out its reviews.

[310] Inevitably, the Act deals with the question of sensitive information. An important starting point is that the CfI will see all relevant material in unredacted form.

[311] The SoSNI does have the power to prohibit the disclosure by the CfI of sensitive material. The procedure for the exercise of this power is set out in Schedule 6, paragraph 4.

[312] In essence, disclosure of sensitive information by the Commission requires the CfI to notify the SoSNI of the proposed disclosure. The SoSNI must respond to such a notification by notifying the Commissioner that the proposed disclosure either is permitted or is prohibited.

[313] The SoSNI may notify the CfI that the proposed disclosure is prohibited only if, in the Secretary of State's view, the disclosure of the sensitive information risks prejudicing or would prejudice the national security interests of the United Kingdom.

[314] If the SoSNI notifies the CfI accordingly:

> "(a) The Secretary of State must consider whether the reasons for prohibiting can be given without disclosing information which would risk prejudicing or would prejudice the national security interests of the United Kingdom; and
>
> (b) if they can be given, the Secretary of State must give the proposed reasons to the Commissioner for investigation."

[315] In addition, the legislation provides that when a decision prohibiting disclosure relates to information which the Commission had proposed to include in a final report, the report must contain a statement indicating the SoSNI prohibited disclosure, including any reasons given.

[316] Schedule 6, paragraphs 9-11 also provide for an appeals process which outlines that decisions by the SoSNI against release of certain information by the Commission can be appealed to the court and, if successful, the court can quash the decision and order the SoSNI to remake it within 60 days.

[317] The respondent points out that the process is the same as had been proposed for public disclosure by the HIU within the SHA.

[318] In any event, any decision by the SoSNI prohibiting disclosure remains subject to oversight by the courts in this jurisdiction by way of judicial review.

[319] Having considered the disclosure powers of the Commission and the obligations of the state, in particular, it seems to me this is article 2/3 compliant and, an improvement on the situation in relation to inquests. Indeed, it has been limitations in terms of disclosure issues which have been the primary reason for delays in the conduct of inquests.

Victim participation

[320] As per *McQuillan*, the degree of public scrutiny as required will vary from case to case "<u>but the next of kin or victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests</u> …" The Act itself says little about the role of the next of kin in any reviews to be carried out by the Commission.

[321] The starting point is that a close family member of a deceased may request a review of a death that was caused directly by conduct forming part of the Troubles under section 9.

[322] Section 10 provides any person may request a review of other harmful conduct forming part of the Troubles if that conduct caused that person to suffer serious physical or mental harm.

[323] Under section 11 a person making a request for a review may include in that request particular questions about the death, or other harmful conduct, to which the review will relate.

[324] Under section 11 it will be for the CfI to decide the form and manner in which a request for a review is to be made and to decline or reject the request.

[325] In completing a final report on the findings of a review the report must include the ICRIR's response to questions raised in the review request "to the extent that it has been practicable to respond to them in carrying out the review in accordance with section 13" and "for each question to which it has not been practical to respond, a statement of that outcome" (section 15(3)).

[326] Under section 16:

> "(1) In the case of a review of a death or of other harmful conduct carried out following a request made under section 9 or 10, the Chief Commissioner must, before producing the final report—
>
> (a) give a draft of the report to the person who requested the review; and
>
> (b) allow the person to make representations about the report during the applicable response period."

[327] In similar vein, under sub-section (2), in the case of a review of a death carried out following a request made under section 9 or for a decision made by the ICRIR under section 12(2), the Chief Commissioner must, before producing the final report:

> "(a) give a draft of the report to—
>
> (i) any relevant family members of the person to whose death the review relates,
>
> (ii) any relevant family members of any other persons killed in the relevant event, and
>
> (iii) any person who suffered serious physical or mental harm in the relevant event or, where such a person has subsequently died, any relevant family members of the person, and
>
> (b) allow those persons to make representations about the report during the applicable response period."

[328] There are similar provisions in relation to requests made under section 10 or section 12(3).

[329] However, the Act makes no specific provision for providing disclosure to a victim or next of kin during a review or to any formal role of a victim or next of kin in suggesting questions during a review (after the initial request).

[330] The applicants say that it is obvious that this limited involvement is inconsistent with an article 2/3 investigation.

[331] Clearly, *McQuillan* envisages a degree of flexibility as to what is required to involve the next of kin in the relevant procedure "to the extent necessary." What is required will be fact specific.

[332] In the case of *Amin v Home Secretary* [2004] 1 AC 653, in the context of an investigation into a prison death, Lord Hope said as follows:

> "63. The court has made it clear that a fatal accident inquiry according to the Scottish model is not the only option. The choice of method is essentially a matter for decision by each contracting state within its own domestic legal order. The court also accepts that the form of investigation which will achieve the purposes of the Convention may vary in different circumstances: *Edwards v United Kingdom*, 35 EHRR 487, 511, para 69. …"

[333] In *Edwards* the court was dealing with the death of a prisoner after being attacked by a fellow prisoner.

[334] The Inquiry into the death published on 15 June 1998 found "a systemic collapse of the protective mechanisms that ought to have operated to protect the vulnerable prisoner."

[335] The applicants contended that the non-statutory Inquiry did not provide a thorough and effective investigation. It was privately commissioned by the agencies which were themselves the subject of investigation. They fixed the terms of reference and appointed the Inquiry Chairman, panel and counsel. The proceedings were held in private, and the applicants were only able to attend to give evidence. Nor were the applicants legally represented or able to have witnesses cross-examined. The Inquiry had no power to compel witnesses and a number did not attend.

[336] The court rejected the alleged lack of independence. The Chairman was, as is often the case in public inquiries, a senior member of the Bar with judicial experience, the other members were eminent or experienced in the prison, police or medical fields. None had any hierarchical link to the agencies in question. The court concluded that they had acted in an independent capacity. As to alleged lack of public scrutiny and, specifically on the issue of victim participation, the court concluded at para [84]:

> "The applicants, parents of the deceased, were only able to attend three days of the inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to witnesses, whether through their own counsel or, for example, through the inquiry panel. They had to wait until the publication of the final version of the inquiry report to discover the substance of the evidence about what had occurred. Given their close and personal concern with the subject

> matter of the inquiry, the court finds that they cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests."

[337] The court found a breach of article 2 on the grounds of the Inquiry's lack of power to compel witnesses and the private carriage of the proceedings from which the applicants were excluded, save when they were giving evidence.

[338] The ability of next of kin or victims to request a review, to request questions, the obligation of the CfI to deal with those questions and the obligation to be consulted on prior to publication of the final report, all point to a degree of involvement by victims. Whether these alone would be sufficient to meet the requirements of article 2/3 is problematic. The difficulty for the court is that much is left unsaid in the Act. Clearly, the CfI enjoys a very wide discretion as to the conduct of the review itself. The CfI has operational control over the conduct of the reviews (section 13(2)). Under section 13(6) the CfI is to decide how and when different reviews are to be carried out. He must decide whether different reviews should be carried out in conjunction with each other, what steps are necessary in carrying out any review and, in particular, to decide whether a criminal investigation is to form part of a review.

[339] The fundamental obligation remains to ensure that the CfI "looks into all the circumstances of the death or other harmful conduct to which it relates." In doing so, he is obliged to comply with the obligations imposed by the Human Rights Act 1998 which includes the requirement to ensure adequate victim participation in each review. From the court's standpoint, it cannot say that an article 2/3 compliant investigation in the context of victim participation is prohibited. All will depend on how the CfI conducts his reviews based on the wide powers and discretion available to him.

[340] Again, the court looks to the proposed policy documents published by the ICRIR which give a clear insight into its thinking on how it will conduct reviews.

[341] The first document entitled 'Ideas for how the Commission could approach its work to provide information recovery for families' sets out the operational model envisaged by the ICRIR. The approaches reflected therein have been informed by stakeholder engagement and a recent *Have Your Say* survey in which 218 respondents took part. A second survey will ask respondents about the elements discussed in this paper, as well as about future areas of work.

[342] At this juncture, the Commission foresees its work being divided into three phases: Phase One, Engagement; Phase Two, Information Recovery; Phase Three, Findings and Futures. The document notes, "At every stage within these phases, victims, survivors and families must be able to understand what progress is being made and input to the work of shaping the Commission" (para 2.8).

[343] Within Phase Two, the ICRIR has identified five steps it will undertake. Step 1 involves determining the scope of the request. Step 2 concerns the development of the terms of reference for each review which should be drafted in consultation with the requester (para 4.10). Step 3 is when the CfI, or a Commission Officer on his behalf, would determine which type of examination is to be conducted (triage decision). The ICRIR intends to publish a policy on the criteria relevant to this determination which would include, *inter alia*, "the wishes and views of requesters." Step 4 involves deciding which cases are to be prioritised. Finally, Step 5 refers to the substantive examination of the case.

[344] Three types of examination are suggested under the proposed framework. First, a "Family answer-focused examination." This examination prioritises providing answers to the questions raised in the request. It is noted that this may be most appropriate where work has already been undertaken to "look into" circumstances of a death/serious injury, or where a successful prosecution has already been obtained and there remains outstanding fact-finding work to be carried out. Under this option, any findings would not be used to support a subsequent prosecution (paras 4.16-4.20).

[345] Second, a "Liability-focused examination" would aim to establish all the circumstances of the death and collect evidence to a standard that would support prosecution, as well as answer any specific questions raised by requesters. This approach is considered to be most appropriate where a right under the ECHR is engaged, "especially where there is a realistic possibility of state involvement, or where it is likely that examination could lead to a successful prosecution, and this is in the interests of reconciliation." The ICRIR foresees that in some cases there would be a need for an inquisitorial process, to be determined through formal assessment, in order to carry out further examination of the material gathered and to make findings (para 4.25).

[346] Importantly, it is suggested that "as a transitional measure, inquests where evidence has started to be prepared or heard, but the current process has not finished by 1 May 2024, may be continued through this process (where a request is made). This could involve transferring material obtained so far to the Commission and, where possible, the engagement or secondment of inquest staff as officers of the Commission to complete the work." The draft policy continues that through its engagement with victims, survivors and families, the Commission is alive to the very real concerns about the desire to complete inquests "and the Commission will be keen to work with those affected to ensure as smooth a transition as possible" (para 4.26).

[347] Finally, a "Culpability-focused examination" would be focused on establishing the identity(ies) of the perpetrator(s) of the death or other harmful conduct on the balance of probabilities. As such, it would not be considered appropriate to pursue a prosecution through this examination. It is stated that this examination would be most appropriate where little previous investigative work has

been carried out or "where it is considered that there are grounds to duplicate work (as set out in policy)." Updates will be provided to the requester who will be given the opportunity to input on further work to be undertaken (para 4.28).

[348] The final phase of the ICRIR's review work is to produce a report setting out the findings of the information recovery work and, where practicable, address the requesters' specific questions. Here, the ICRIR has a responsibility to balance a number of competing duties and requirements, such as ensuring that information in final reports does not risk prejudicing the national security interests of the UK. If the SoSNI prohibits the disclosure of information under Schedule 6, the draft policy indicates that the ICRIR would "need to robustly consider any decision by the SoSNI, and whether it wishes to challenge this publicly, setting out its view of the decision, including in the final report." Accordingly, it would be open for the ICRIR, as well as certain individuals, to challenge a non-disclosure decision of the SoSNI in the courts, if necessary (para 5.15).

[349] The court was taken to a second document which sets out "Ideas for how the ICRIR could approach investigations linked to advanced stage inquests." This includes a comparison of the core elements between an inquest and an investigation conducted by the Commission. It is quite clear from this document that the Commission considers its powers of review to be broader in many respects when compared to those of a coronial inquest. For instance, a coroner has the power to require evidence to be produced under section 17A of the Coroner's Act and can impose a fine not exceeding £1000 on a person who fails without reasonable excuse to do anything required by a notice under subsections 17A(1) or 17A(6). By contrast, section 5 of the 2023 Act provides that a relevant authority must make any information available which the CfI reasonably requires to conduct the investigation. Additionally, section 14(2)(a) allows the CfI to require a person to attend for the purposes of providing information and can impose a penalty of up to £5000 if a person fails to attend and does not have a reasonable excuse (Schedule 4, Part 1, paragraph 1(2)).

[350] Furthermore, in determining the scope of the investigation, an ICRIR review appears to allow for more involvement of an interested person to frame the scope of an investigation by submitting specific questions in the request for a review (section 11(1)).

[351] Whilst the Commission lacks the specific power to summon any person to attend a hearing or give evidence under section 17A of the Coroners Act, it possesses a similar power to compel witnesses to be examined under section 14. This is consolidated by Schedule 4, Part 2, paragraphs 8 and 9 which establish offences of distorting or suppressing the production of evidence to the ICRIR.

[352] However, where oral evidence is concerned, the inquest procedure allows any properly interested person to examine any witnesses at an inquest either in person or by counsel. The ICRIR's powers are more limited in that respect. Thus, the Chief

Commissioner may share written evidence and permit other persons, including the requester and relatives, to ask the Commissioner to put questions to the person who supplied evidence.

[353] Further consideration is, however, being given to the possibility of conducting oral hearings and the examination of those providing information:

> "How findings are made following an investigation is a matter for the Chief Commissioner's discretion. As part of this enhanced process, the Commission will seek to design its approach so that it reflects the core elements that the inquest process has. There are some key decisions to be made on how that could operate within the framework of the legislation." (para 6.1).

[354] In particular, one outstanding question which has been recognised by the ICRIR is how much of the information recovery process should be done either in the presence of individuals who are not officers of the ICRIR, or in public more widely. The ICRIR consider that while it is not necessary to conduct all aspects of the investigation in public, "what is required is a sufficient element of public scrutiny of the investigations or the results to secure accountability in practice" (para 6.4). Several factors are identified as relevant to whether the powers contained in section 14(2) and (3) of the 2023 Act may be exercised for the purposes of receiving oral information in the presence of individuals who are not officers of the Commission or in public. These include (see para 6.5):

(a) The ICRIR's duties under section 4.

(b) The risk of revealing sensitive information during questioning.

(c) Section 30 prohibitions on disclosure.

(d) The fact that the ICRIR cannot take information under oath. However, pursuant to Schedule 4 to the 2023 Act it is an offence to distort or otherwise alter evidence produced to the CfI and therefore, in the Commission's view, "the consequences of lying in response to questions would be materially the same."

(e) Witnesses may be more candid when providing their information in private.

(f) Unlike an adversarial court or coronial proceedings, the Commission has no statutory power to order reporting restrictions. This means that if a hearing was open to the public at large, there would be no mechanism for preventing reporting of what was said in the press and on social media.

(g) The protections afforded to persons giving oral evidence would not be available to persons undergoing public questioning by the Commission. For example, under Rule 9 of the Northern Ireland Coroner's Rules, no person shall be obliged to answer any question which might incriminate them. Additionally, a suspect cannot be compelled to give evidence at an inquest.

(h) The Commission may be able to mitigate certain risks by holding hearings confined to identified parties or their representatives. It is further contemplated that hearings could be convened to allow a person to give information in public or for submissions to be made by counsel to whom evidence had been disclosed.

[355] The ICRIR has also proposed to explore the possibility of using section 3 of the 2023 Act, which grants the power to either employ or second persons to be its officers, to improve involvement of the next of kin in an investigation. One example provided is to second counsel from current inquests to act as officers of the ICRIR for the purposes of putting questions to individuals giving oral information (para 6.8).

[356] If these policies are adopted and implemented, the ICRIR will be seen to do all that it can to ensure transparency and victim participation.

[357] It is apparent from the policy documents that the public consultation process is ongoing. It is open to all next of kin and, indeed, these applicants to engage with the ICRIR so that they can have a direct input to the design of the scheme and how reviews are conducted.

Legal Aid

[358] It is correct that the absence of legal aid was deemed to be a procedural deficiency in the case of *Jordan v UK* (see para [142). However, it is wrong to read this case to say that legal aid is mandated for all article 2/3 investigations. In that case, the court was faced with a concrete factual scenario of an inquest in which the victims could not secure legal aid for representation at the inquest hearing. In that scenario the state had already decided that the proceedings required the participation of the victim's family by way of legal representation. The next of kin involved in any review will be able to avail of the Green Form Scheme for advice and assistance which has been used by families to engage with the LIB. What is envisaged under this process is an inquisitorial procedure under which there will be an obligation on the ICRIR to ensure adequate victim participation. As set out above, this is an issue that is being addressed by the ICRIR, including a suggestion that lawyers involved in inquests could be seconded for the purposes of specific review.

Public Hearings

[359] Public scrutiny and transparency is related to the involvement of the next of kin or victim. There must be a sufficient element of public scrutiny. This is an essential element of ensuring victims and the public have a right to truth and that those responsible for deaths are accountable. Public hearings are not the only means by which the requirement for public scrutiny under the article 2/3 procedural duty can be fulfilled. Under the statute, publication of reports into reviews is clearly an element of public transparency. These reports will sit alongside the historical record which is anticipated under the legislation.

[360] As is the case with victims' participation, whether this would be sufficient to meet the requirements of public scrutiny is problematic. However, much depends on how the reviews will be conducted. Public hearings are not precluded under the statute. Elements of public hearings may be appropriate in certain situations. This issue remains open. One can understand the scepticism of the applicants in response to suggested amendments whilst the Bill made its way through Parliament to the effect that "we have identified as a red line, accepting amendments on public hearings. However, we may wish to consider a non-legislative concession around encouraging the Chief Commissioner to read out the final report in public (there is nothing currently in the legislation to preclude this)." Again, the proposed policy documents published by the ICRIR are relevant in considering this issue.

Conclusions on effectiveness

[361] The court can well understand the applicants' opposition to the proposed reviews as a substitute for the existing scheme of criminal investigations, investigations into police complaints, civil actions and inquests as a means of dealing with investigations into killings during the Troubles.
[364] Focusing on the question of the reviews, they stand in contrast to the current inquest system where hearings are conducted in public, in the context of full legal representation of all those involved, including the next of kin, who have access to materials, who can engage expert evidence, who can call and cross-examine witnesses and who ultimately obtain a detailed narrative verdict from a coroner.

[362] The value of inquests is encapsulated in the second affidavit of Martina Dillon, where under the heading "Public Scrutiny", she avers:

> "27. The need for accountability includes the need for public scrutiny of what happened to Seamus. We think it is very important that the investigation that happens into his death is open and transparent. This investigation must be carried out in a serious manner. It should be conducted publicly so that it is part of the public record. It is important for us, as Seamus' family to know what happened to Seamus and why it happened and for other

> people in the general population to know what has happened and that what happened to him will not be allowed to happen again. This means that evidence should be given in public.
>
> 28. To see witnesses give evidence will help to make the investigation real to us. It will help us to understand what actually happened from each witnesses' perspective. To look the individual witnesses, including the suspects and those who may have colluded with them, in the eye and to be confronted by their evidence would help us to heal. There is a profound human value that comes from having to look at a person in the face.
>
> 29. I also consider that the witnesses are more likely to tell the truth if they are giving evidence in front of us and any interested members of the public. I hope that officers of the state would be honest under oath, and we would get closer to the truth, but I am worried that witnesses would feel it easier to avoid responsibility if interviewed behind closed doors. I know that it is more difficult for a witness to lie when they have to look the family of the deceased in the eye when they give their evidence.
>
> 30. A public investigation would ultimately bring us a form of relief and the satisfaction of at least knowing that every angle of the possible collusion and criminality in Seamus' case has been delved deeply into and brought to public attention."

[363] I personally have sat as a coroner in two legacy inquests and can attest to the value the next of kin placed on each of those inquests (Manus Deery and Daniel Carson). I am also sensitive to the fact that many families have been promised inquests as a means to an article 2 compliant investigation into the death of their loved ones. For many that promise will be broken. Their much sought after opportunity, in the form of an inquest, will be denied.

[364] Instead, the state has provided, through primary legislation in Parliament, an alternative means by which to carry out its article 2/3 obligations.

[365] I recognise the concerns in relation to the lack of effective handover processes for outstanding police complaints. It is striking that whilst under section 38(3), there is an obligation on the Chief Constable of the PSNI to notify the Secretary of State of any outstanding criminal investigations before 1 May 2024, no such similar obligation is made for police complaints which will be brought to an end under section 45. It is the court's view that in order for the Act to be read compatibly with

the Convention and to satisfy the state's "own motion" obligations under articles 2 and 3 ECHR (see *Jordan v UK* at para [105]) the Secretary of State must inform himself of all outstanding Troubles-related police complaints and submit them to the ICRIR pursuant to its powers under sections 9 and 10 of the 2023 Act.

[366] I fully understand the opposition to the new scheme and the reasons for it.

[367] That said, I cannot at this remove say that the system established under the Act cannot provide an article 2/3 compliant investigation. The Commission is obliged to do so. It has wide powers and a wide range of discretion/flexibility to carry out its reviews. Should it fall short of its obligations under article 2/3 then I have no doubt that they will be subject to the scrutiny of the court, as were the coroners and PSNI in the cases of *Middleton*, *Jordan*, *McQuillan* and *Dalton*. As Ms Quinlivan pointed out this may be a highly undesirable consequence, in circumstances where article 2/3 compliant investigations and inquests are being conducted.

[368] The Commission has the benefit of clear judicial direction from the highest courts as to what is required for an article 2/3 compliant investigation.

[369] Just as the courts mandated a change of approach by interpreting "how" in the coronial Rules in a broad way to ensure article 2 compliance, so must the Commission do the same when carrying out its obligations under section 13 of the Act to "look into <u>all the circumstances</u> of the death or harmful conduct to which it relates." The policy documents which it has published demonstrates it is clearly alive to this obligation and is seeking ways to ensure compliance with the Convention.

[370] The court is satisfied that the provisions of the Act leave sufficient scope for the ICRIR to conduct an effective investigation as required under articles 2 and 3 ECHR. The court declines, therefore, to make an order in respect sections 2(7)-(9), 2(11), 9(3), 10(2), 11, 13, 15, 16, 17, 18, 30, 31, 33, 34, 36, 37(1); Schedule 1, paras 6, 7, 8, 10; Schedule 6, para 4.

Section 43 of the 2023 Act – Civil proceedings

[371] Where relevant, section 43 provides:

> "Tort, delict and fatal accident actions
>
> (1) A relevant Troubles-related civil action that was brought on or after the day of the First Reading in the House of Commons of the Bill for this Act may not be continued on and after the day on which this section comes into force.

(2) A relevant Troubles-related civil action may not be brought on or after the day on which this section comes into force.

(3) For the purposes of this section an action is a "relevant Troubles-related civil action" if conditions A, B and C are met.

(4) *Condition A*: the action is to determine a claim arising out of conduct forming part of the Troubles.

(5) *Condition B*: the action is founded on—

(a) tort or delict,

(b) a cause of action arising under fatal accidents legislation, or
(c) a cause of action arising under the law of any other jurisdiction that corresponds to—

(i) tort or delict, or

(ii) a cause of action arising under fatal accidents legislation.

(6) *Condition* C: the time limit for bringing the action was, or would be (in the absence of this section), given in—

(a) the Limitation (Northern Ireland) Order 1989 …,

(b) the Foreign Limitation Periods (Northern Ireland) Order 1985 …,

(c) the Limitation Act 1980,

(d) the Foreign Limitation Periods Act 1984,

(e) the Prescription and Limitation (Scotland) Act 1973, or

(f) section 190 of the Merchant Shipping Act 1995;

(including where a court has permitted the action to be brought outside such a time limit).
…

> (11) Schedule 9 makes provision for courts to determine whether the prohibitions in this section apply to a civil action.
> …"

As per para [56] above, the effect of this provision will be that Troubles-related civil actions that were brought on or after 17 May 2022 may not be continued on and after 18 November 2023, and new Troubles-related civil claims brought after 18 November 2023 will be prohibited.

[372] Article 13 ECHR requires the state to put in place mechanisms which are capable of providing redress to victims where their article 2/3 ECHR rights have been breached, including the payment of compensation. Thus, in *Jordan v UK*, the court held at para [160]:

> "In cases of the use of lethal force or suspicious deaths, the Court has also stated that, given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, …"

[373] Article 16 of the Victims' Directive 2012/29/EU provides that:

> "1. Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings.
>
> 2. Member States shall promote measures to encourage offenders to provide adequate compensation to victims."

[374] This obligation has primarily been achieved in this jurisdiction by means of civil litigation founded in accidents on tort, delict and fatal accident actions.

[375] That said, the individual state is entitled to put in place procedural rules in relation to the conduct of such litigation. In this context there are already in place limitation provisions in relation to such actions which are compliant with the state's obligations under ECHR.

[376] By enacting section 43 the state has, in effect, put in place a strict limitation period in respect of such actions.

[377] Importantly, the 2023 Act does not prohibit claims against public authorities under section 8 of the HRA. However, Mr Bunting points out that , damages in respect of claims for substantive breaches under section 8 of the HRA may only be brought after entry into force of the HRA which occurred in October 2000 (see para [8] of *Dalton*). Moreover, claims in respect of breaches of the procedural obligations under article 2/3 may be brought if the *Dalton* test in relation to "genuine connection" and "Convention values" is met.

[378] A further limitation on section 8 HRA claims is that they are confined to claims against public bodies, so would exclude, for example, a claim against individual paramilitaries.

[379] Section 43 is undoubtedly an interference with the rights protected by Article 6 ECHR.

[380] Article 6(1) ECHR provides:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair … hearing … by [a] … tribunal …"

[381] Article 6 is not an absolute right. As a qualified right it may be restricted in certain circumstances. Relevant general principles, entrenched in Convention law, and confirmed by the Grand Chamber in *Nait-Liman v Switzerland* [2018] 3 WLUK 861, at paras [102]-[105]) are as follows:

> "102. The Court further notes its case-law to the effect that the right to a court is not absolute; it is subject to limitations permitted by implication, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see *Yabansu and Others v Turkey*, no. 43903/09, § 58, 12 November 2013, and *Howald Moor and Others*, cited above, § 71).
>
> 103. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired (see *Stanev v Bulgaria* [GC], no. 36760/06, § 230, ECHR 2012, and *Howald Moor and Others*, cited above, § 71).
>
> 104. The Court further reiterates that such limitations will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among many other examples, *Stubbings and Others v United Kingdom*,

> 22 October 1996, § 50, Reports of Judgments and Decisions 1996-IV; *Stagno v Belgium*, no. 1062/07, § 25, 7 July 2009; and *Howald Moor and Others*, cited above, § 71)."

[382] Can the respondent, in this context, establish the legality of the interference? The European court has expressly considered the issue of strict limitation periods in the seminal case of *Stubbings and others v United Kingdom* [1997] 1 FLR 105.

[383] In *Stubbings* the court was dealing with an applicant who was sexually abused by members of her foster family before and after her adoption by the family. The defendants successfully applied to have the claim dismissed as time barred. The House of Lords held that the limitation period commenced from the applicant's 18th birthday and the claim became statute barred within six years by operation of the Limitation Act 1980. Other applicants who had civil claims for damages for sexual abuse joined in the proceedings before the ECtHR. It was argued that the strict limitation in play was in violation of article 6 of the Convention, and that the difference in the rules applied to themselves and other types of claimant was discriminatory, contrary to article 14 of the Convention. The government denied that the very essence of the applicants' right of access to court was impaired because they each had six years from their 18th birthdays in which to commence proceedings.

[384] The court held that:

> "(i) The limitations applied must not restrict or reduce the access of the individual in such a way or such an extent that the very essence of the right was impaired. The English law of limitation allowed the applicants six years from their 18th birthdays in which to initiate civil proceedings. A criminal prosecution could be brought at any time and if successful a compensation order could be made. Therefore, the essence of the applicants' right of access to a court was not impaired.
>
> (ii) The time-bar in the applicants' case commenced from the age of majority and could not be waived or extended. There was no uniformity amongst Member States with regard to the length of limitation periods or the date from which such periods were reckoned. The contracting states properly enjoyed a margin of appreciation in deciding how the right of access to court should be circumscribed.
>
> (iii) There was a developing awareness of the range of problems caused by child abuse and the

psychological effects on victims, and the rules of limitation of actions applied by member states might have to be amended to make special provision for this group of claimants in the future. However, taking into account the legitimate aim served by the rules of limitation in question and the margin of appreciation afforded to states in regulating the right of access to a court, there was no violation of article 6(1).

…

(v) Not every difference in treatment will amount to a violation of article 14. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that there is no reasonable or objective justification for this distinction. Contracting states enjoyed a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify the different treatment in law. The victims of intentionally and negligently inflicted harm could not be said to be in analogous situations for the purposes of Article 14" (see headnote at p. 105).

[385] Applying *Stubbings and others* to the circumstances of this case, in my view, it could not be said that the very essence of the right is impaired by section 43. Victims of the Troubles have had the opportunity to issue civil proceedings over a period ranging from 25-57 years, depending on when the cause of action accrued. Indeed, it appears that in the region of 700-1,000 people have already done so. A criminal prosecution can still be brought if sufficient evidence is obtained through the ICRIR and if successful a compensation order could be made. In this regard, I recognise that the conventional method by which victims obtain compensation in respect of intentional crimes is by way of civil proceedings, but the courts do have a power to grant compensation orders. Pursuant to section 14(1) of the Criminal Justice (Northern Ireland) Order 1994:

> "… a court by or before which a person is convicted of an offence, instead of or in addition to dealing with him in any other way, may, on application or otherwise, make an order (in this Article and Articles 15 to 17 referred to as "a compensation order") requiring him to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence ..."

A Crown Court can award unlimited compensation.

[386] That being so, the task for the court is to determine whether the limitations under section 43 pursue a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

[387] The level of scrutiny required in this context has been set out by Lord Sumption in *Bank Mellat (No.2)* [2014] 1 AC 700:

> "20. … The question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine: (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. …"

[388] In applying the *Bank Mellat* principles Mr McGleenan draws the court's attention to the emphasis placed by the jurisprudence on the margin of appreciation to be afforded to the state in this context.

[389] The proportionality principles have been recently reviewed in this jurisdiction in *Department of Justice v JR123* [2023] NICA 30 by McCloskey LJ:

> "[37] Lord Sumption next referred with approval to the exposition of the doctrine of proportionality contained in the dissenting judgment of Lord Reed, at paras [68]–[76]. The following passage, at para [71] is of particular note:
>
> > 'An assessment of proportionality inevitably involves a value judgement at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon. The principle however does not entitle the courts simply to substitute their own assessment for that of the decision maker. As I have already noted, the intensity of review under EU law and the Convention varies according to the nature of the right at stake and the context in which the interference occurs. These are not however the only relevant factors. One important factor in relation to the Convention is that the

> Strasbourg Court recognises that it may be less well placed than a national court to decide whether an appropriate balance has been struck in the particular national context. For that reason, in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation.'

Having next highlighted that, faithful to the common law tradition, domestic UK courts (specifically the Supreme Court) had developed a more structured approach to the question of proportionality, Lord Reed added at paras [74] and [76] that the fourth of the criteria (or tests) formulated by Lord Sumption in essence involves the question of whether the impact of the Convention rights infringement under consideration is disproportionate to the likely benefit of the impugned measure. This test, as further explained at para [76], is distinct from the question of whether a particular objective is in principle sufficiently important to justify limiting a particular right (the first of the four tests).

[38] It is necessary to acknowledge a later passage of significance in *Bank Mellat (No 2)* para 20, where the majority elaborate on the meaning of this test:

> 'The question is whether a less intrusive measure could have been used without unacceptably compromising the objective.'

In the same passage the majority aligned themselves with the doctrinal approach contained in the minority judgment of Lord Reed. In one passage of the latter judgment at para 72, reference is made to the three *De Freitas* criteria in the following terms:

> 'The three criteria have however an affinity to those formulated by the Strasbourg Court in cases concerned with the requirement under Articles 8 to 11 that an interference with the protected right should be necessary in a democratic society … provided the third limb of the test is understood as permitting the primary decision maker an area within which its judgment will be respected.'"

[390] In *JR123* the court was addressing the permissibility of the use of "bright line" rules. The court set out its analysis of the general principles as follows:

> "[55] In *De Freitas* Lord Clyde purported to provide a comprehensive formulation of the test for proportionality in qualified human rights cases. With the evolution of the case law in the highest court this formulation has developed in certain material respects. First, the third of Lord Clyde's tests ("… no more than is necessary to accomplish the objective") is now expressed in the language of "whether a less intrusive measure could have been used" and more fully:
>
> > 'The question is whether a less intrusive measure could have been used without unacceptably compromising the objective.'
>
> Both quotations belong to *Bank Mellat (No 2),* para [20]. Second, a fourth test has been added namely whether "... a fair balance has been struck between the rights of the individual and the interests of the community" (Huang, supra). Third, the ECtHR has identified a "core issue" (which might be considered an overarching test) in cases where the legislature has proceeded by way of general measure(s), namely "whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it.": *Animal Defenders,* para [110]. Fourth, the legitimacy of legislating by pre-defined categories in appropriate contexts has been resoundingly approved.
>
> [56] All of the leading cases, European and domestic alike, make clear the unmistakable nexus between the state's margin of appreciation and the doctrine of proportionality. In assessing the measure of respect to be accorded the primary decision maker – in the present instance, the legislature – the court is required to assess the nature of the Convention right in play, the extent of the interference, the importance of the objectives underpinning the impugned measure and, where available evidentially, the actual assessment made by the public authority concerned in its decision making. Furthermore, as spelled out in *Animal Defenders* at para 108, in the case of a general measure (ie the present case) the court must "primarily" assess the legislative choices.

> This exercise will include evaluating the quality of the parliamentary consideration, with alertness to the margin of appreciation. Any risk of abuse flowing from the adoption of a more relaxed measure – which is primarily a matter for the state to assess – must also be weighed.
>
> [57] The task of the court has another important ingredient. As *Re P* makes clear at [50], it is "… to assess the proportionality of the categorisation and not of its impact on individual cases", the reason being that impact on individual cases "… is no more than illustrative of the impact of the scheme as a whole." This is derived from *Animal Defenders* at para [109]:
>
> > '... the more convincing the general justifications for the general measure are, the less importance the court will attach to its impact in the particular case.'"

[391] Turning then to the application of the relevant principles to section 43 of the 2023 Act does it pursue a legitimate aim?

[392] In this context the respondent refers to the general objective of the Act namely, to promote reconciliation through the introduction of a coherent system of providing information to victims of the Troubles. It is argued that the current civil litigation is beset with difficulties, lengthy delays and the adversarial nature of the processes including the disclosure processes are not resulting in satisfactory outcomes. Much of the civil litigation relates to claims which are stale. The respondent points to the burden on the Northern Ireland civil court system arising from the extent of existing claims currently being considered by the court.

[393] The government's position is set out in the affidavit from Mr Flatt, at paras 172-174:

> "172. The Command Paper preceding the Bill initially proposed the termination of all ongoing legacy civil cases. The Bill departed from this position, following criticism of the policy and proposed the prohibition of all new claims in tort filed on or after First Reading on 17 May 2022, with claims filed before this date allowed to continue. This prohibition was drafted to apply retrospectively from the date of the commencement of the Act. The reason for this retrospectivity was to prevent a large influx of new claims in the period between First Reading and commencement, which was deemed as likely to significantly infringe on the policy intent of reducing the burden on the NI courts

from NI legacy civil cases. The already slow progress of legacy) civil claims, and the huge backlog faced by the courts in this area (which was seen as detrimental both to providing answers for families and promoting reconciliation), were the key drivers behind this retrospective element of the policy. In his response to the Report of the Joint Committee on Human Rights, Lord Caine explained the purpose of the provisions and the balance that had been struck:

> 'It is our aim to bring to an end the adversarial cycle of legacy court proceedings, while setting up a new body that will be the sole investigator into Troubles-related deaths and serious injuries, with full police powers and access to relevant records.
>
> To have too many concurrent court processes running in tandem to the setup of the ICRIR would undermine the clarity of this approach. Families should no longer have to go through the civil courts or the coronial process in order to find out what happened to their loved ones. We will help them get access to information quicker, from a body with the powers it needs to get them that information.
>
> Enough time has passed to allow those who wanted to, to bring forward civil claims related to the Troubles. Indeed - limitation periods are common in other jurisdictions - especially after the length of time we are talking about here which in some cases is over 50 years.
>
> The Bill brings to an end all civil claims brought on or after the date of Introduction. Those filed before that date can continue. This is an area in which we have listened to concerns from a range of people since we published the Command Paper, in particular, to the strength of feeling against interfering with existing processes. That is why we changed our approach in the Bill before us today to allow cases brought before introduction to continue to their conclusion.'

173. During Committee Stage in the House of Lords on 11 May 2023, Lord Caine provided further context relating to the Government's position:

> 'I begin by reminding the House that, as regards civil cases, over 700 writs were issued against the state in legacy civil claims before the First Reading of the Bill a year ago on 17 May 2022.
>
> As has been stated many times, the Government's policy intent regarding civil claims is to reduce the burden on the Northern Ireland civil courts - which currently have a huge case load backlog to work through - while enabling the commission to establish itself as the sole investigative body looking at Troubles-related deaths and serious Injuries. It is the Government's intent that families should no longer have to go through the strained civil court system in order to receive the answers they seek.
>
> In the Government's view, there is a danger that these amendments in the name of the noble Lord and others would significantly dilute both of those aims, taking potential casework away from the ICRIR and putting it back into an already clogged system that on current estimates will take decades to work through. In our view, this is much less likely to provide answers for families in an efficient manner, which again sits in opposition to our stated aims.
>
> Our current position will allow existing claims that were filed before the Bill's Introduction to continue to conclusion while bringing to an end new processes, to ensure that not too many concurrent cases are running once the ICRIR is established. Clause 39(7) simply allows any civil cases where a final judgment has been reached before commencement to continue to conclusion, where they would otherwise be caught by the prohibition in Clause 39(1). We believe that this is a reasonable approach to

> ensuring that the prohibition on civil claims does not interfere with cases where the court has handed down a final judgment when the prohibition would otherwise apply.'

> 174. In advices to Ministers on 24 October 2022 (exhibited above), officials set out the civil litigation related to the Troubles before the Northern Ireland courts:
>
> > 'The grand total number of legacy civil claims filed with the courts is hard to quantify. This is partly due to the high total volume of claims in this area, and the issues the Crown Solicitor's Office (and the NI Courts Service) have in collating the numbers given the large volume of cases, which are constantly fluctuating as new claims are filed on an almost daily basis. However, it is reasonable to estimate based on the figures we have, that the number is approaching or even upwards of 1,000. The vast majority of cases are against state agencies.
> >
> > The number of claims brought against state agencies before first reading of the Legacy Bill (as at para b above) can be more easily quantified, and the latest estimate from the Crown Solicitor's Office is that there were around 700 filed by Tuesday 17 May 2022. These will be allowed to continue despite the limitation, leaving a significant civil claims backlog that will still need to be addressed. A large number are at an early stage and have only had writs filed, with a small number (likely less than 20) approaching trial. Due to the slow progress of the courts in getting through these claims, it is common for writs to be filed, with Statements of Claim then particularised, before lengthy disclosure processes taking years on occasion, slowing the claims down significantly. A volume such as this may take many years for the courts to work through.'"

[394] I am satisfied that section 43 of the 2023 Act pursues a legitimate aim. This is best summarised in para 173 of the affidavit by reference to the comments of

Lord Caine at the Committee stage in the House of Lords on 11 May 2023 to the effect that:

> "As has been stated many times, the Government's policy intent regarding civil claims is to reduce the burden on the Northern Ireland civil courts - which currently have a huge case load backlog to work through - while enabling the commission to establish itself as the sole investigative body looking at Troubles-related deaths and serious injuries. It is the Government's intent that families should no longer have to go through the strained civil court system in order to receive the answers they seek."

[395] That being so, the issue for the court is the proportionality assessment.

[396] In carrying out that assessment, I bear in mind the jurisprudence which recognises the margin of appreciation that must be afforded to the state. It is not for the court to substitute its personal views on the choices the legislature has made.

[397] Considering the provision in question, it seems to the court that the objective identified is sufficiently important to justify the limitation on the basis set out above. Clearly it is rationally connected to the objective.

[398] The more difficult issue relates to the third and fourth *Bank Mellat* criteria.

[399] The applicants are correct to point out that the right in play is an important one. The extent of the interference is a blanket one. It applies indiscriminately to all Troubles-related civil proceedings, including those which may include grave wrongs, such as torture and unlawful killing.

[400] In applying a blanket measure involving a "bright line" permitting of no exceptions there will be hard cases. This is apparent from the affidavit of the applicant, Ms McManus. She avers that she was unaware that civil proceedings had been issued by other victims of those involved in the murders at Sean Graham's Bookmakers. She only became aware of this on 4 February 2022 when it was reported in the media alongside the publication of a report by the Police Ombudsman into the shootings. She goes on to say in her affidavit:

> "18. Once I became aware of the prospect that you can initiate civil proceedings I decided to try and locate a solicitor to act on my behalf. I contacted Phoenix Law and asked for an appointment to discuss the report's findings and whether my family would also have a case. Once Phoenix Law confirmed they would act for me, I was advised that I needed to proceed with the formalities

> of extracting letters of administration before I could formally issue civil proceedings for the incident.
>
> 19. Following my application to the Master, letters of administration were formally granted on 17 May 2022. … This was the very same day the Bill was given its first reading in the House of Commons which included the clause (39) that prevents any civil proceedings commenced on or after the day of the first reading. (This subsequently became section 43 of the 2023 Act.
>
> 20. On the same day I issued a writ of summons against the PSNI, MoD, the SoSNI and the AGNI for damages."

[401] At para 23 she avers:

> "23. I am committed to seeing this case through to the end for my father and for the memories I have of him prior to the shooting. I want everyone to know that my father suffered, and that he deserves justice. I want to achieve the same justice for him that the other Ormeau Road families got through their civil cases."

[402] Not only will Ms McManus be unable to pursue her civil litigation as a result of the 2023 Act, but it will also bar any future claims if new information comes to light as a result, for example, of an ICRIR review or otherwise.

[403] In my view, the case law supports the respondent's submission to the effect that general measures involving bright lines of the type envisaged in section 43 of the 2023 Act are within the margin of appreciation afforded to the state sufficient to meet the test of proportionality in the context of achieving a legitimate aim.

[404] This is true in a general sense, but also specifically in the context of limitation periods.

[405] Section 43 has the effect of preventing claims arising from incidents which occurred between 25 years and 57 years ago. The provision has been introduced in the context of the creation of a new mechanism for dealing with the legacy of the Troubles.

[406] It is for the state and Parliament to strike the balance in this assessment.

[407] There is one important caveat. Section 43(1) does have a retrospective effect, albeit a limited one. The Act permits all existing claims issued prior to 17 May 2022 to continue. However, those proceedings issued between 17 May 2022 and

18 November 2023 will be ended as a result of the retrospective nature of section 43 of the 2023 Act.

[408] Where legislation applies retrospectively in order to defeat existing claims, the test is more stringent, and the court will exercise a greater degree of scrutiny. Thus, in *Scordino v Italy (No.1)* [2007] 45 EHRR 7, the Grand Chamber observed at para [126]:

> "Although, in theory, the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing law, the principle of the rule of law and the notion of fair trial enshrined in Article 6 of the Convention preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence judicial determination of a dispute …"

[409] Thus, while the state enjoys a certain margin of appreciation on how it pursues these aims, the court must be:

> "Especially mindful of the dangers inherent in the use of retrospective legalisation which has the effect of influencing the judicial determination of a dispute to which the state is a party, including where the effect is to make pending litigation unwinnable. Respect for the rule of law and the notion of a fair trial require that any reasons adduced should justify such measures between it with the greatest possible degree of circumspection (*National Provincial Building Society, Leeds Permanent Building Society, Yorkshire Building Society v the United Kingdom* [1998] 25 EHRR 127 at para [112]).

These principles were restated and affirmed in the more recent Grand Chamber judgment of *Vegotex International SA v Belgium* [2023] 76 EHRR 15 (see paras [92]-[94]).

[410] What then are the "compelling grounds of the general interests" relied upon by the respondent to justify the retrospective aspect of section 43(1)? As per Mr Flatt's affidavit the reason for this retrospectivity was to prevent a large influx of new claims in the period between first reading and commencement. It was felt that this was likely to significantly infringe on the policy intent of reducing the burden on the Northern Ireland courts from Northern Ireland legacy civil cases. There is no reliable evidence before the court as to the extent of the influx of any new claims. The only actual case of which the court is aware is that of Ms McManus who has

explained the circumstances in which proceedings were issued on her behalf. Her claim, and others like it, will remain subject to the existing limitation provisions.

[411] On the retrospective application of the provision, the recent case of *Legros and others v France*, App. No. 72173/17, 9 November 2023 is instructive. Here, the ECtHR unanimously held that there had been a violation of article 6(1) on the basis of the immediate application of a new admissibility requirement, created by the Conseil d'État to ongoing claims before the French administrative court. The new requirement stipulated that where an administrative decision failed to clarify time-limits for an appeal, it was only possible to challenge that decision within a "reasonable time", which was taken to mean one year from the time that the person concerned was notified of the decision. The court found that the application of the new rule on the time-limit for applying to administrative courts "had been both unforeseeable in principle and unassailable in practice" and impaired the very essence of the applicant's right to access a court (only French translation available; see para [161] and official summary issued by the Registrar of the Court, ECHR 305, 9 November 2023, p. 5).

[412] Was the retrospective effect of section 43 unforeseeable and unassailable in practice? Certainly, it was for Ms McManus, although I accept that in the context of general justifications the court will pay less importance to the impact in a particular case.

[413] Whilst those directly involved in the process may have been alive to the potential date when it was anticipated that what became section 43(1) of the 2023 Act would come into effect, it seems to the court that for most part, if not all, the statutory bar could not have been foreseen and given its absolute nature it clearly was unassailable. Given the obligation on the court to look for compelling grounds and to treat retrospective measures with the greatest possible degree of circumspection I consider that insofar as section 43(1) has retrospective effect, it does not meet the proportionality test.

[414] However, I am satisfied that post commencement, i.e. post 18 November 2023 the limitation imposed by section 43(2) is lawful.

[415] In terms of any argument based on a breach of article 14 in conjunction with article 6, I consider that having regard to the decision in *Stubbings* on the article 14 point and the analysis in the context of the article 2 and 3 aspects set out later in this judgment, the difference in treatment relied upon can be justified.

Section 43 and A1P1

[416] A related challenge to section 43 was raised by the NIHRC on the ground that it unlawfully interferes with the protection afforded to the peaceful enjoyment of one's possessions under A1P1. This challenge is not contained within any of the

Order 53 statements, with the exception of *Fitzsimmons*, which is considered in detail by the court below.

[417] I accept, as the NIHRC submits, that the concept of a possession under A1P1 is flexible and extends to the right to pursue a legal claim. It is clear from the relevant case law that "where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it" (see *Kopecky v Slovakia* [2005] 41 EHRR 43, at para [35]. In *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v the United Kingdom*, the European Court held that "if the applicant is unable to show a legitimate expectation that his claim would be determined in accordance with the law as it stood at the moment that he commenced proceedings, the claim may not constitute a 'possession' for the purposes of 'article 1 of Protocol No. 1.'" (para [70]).

[418] Applying these principles to the legacy civil litigation, I do not believe that the barring of future civil claims, which have not yet been brought, could give rise to a legitimate expectation in the sense of A1P1. The only concrete case presented before the court is that of Ms McManus. However, in light of the relief granted under article 6 ECHR and the absence of argument by the parties on this issue, I am of the view that it is unnecessary to consider whether Ms McManus' claim falls within the ambit of A1P1.

Section 7 of the 2023 Act – Admissibility of material in criminal proceedings

[419] It will be remembered that the ICRIR has the power to refer matters for prosecution under section 25.

[420] Section 7(2) provides that no "compelled material" shall be admissible in criminal proceedings against a person (D). Section 7(11) provides that "compelled material" means anything that has been obtained by the ICRIR from a person through the exercise of the ICRIR's powers under section 14. As explained earlier, the latter confers the power on the ICRIR to require any person by notice, to provide information, producing any documents in the person's custody or control and to produce any other thing in the person's custody or control for inspection, examination or testing.

[421] Section 7(3) prohibits the admissibility of material in criminal proceedings where D has made an application for immunity. If the application is rejected, any material provided to the immunity request panel obtained directly or indirectly as a result of the information provided in the application will be inadmissible in criminal proceedings against D.

[422] In light of the court's conclusions in relation to the immunity requests, this provision will no longer be relevant.

[423] Section 7 goes on to provide at sub-section (5) that:

> "Any other material provided by, or obtained from, D for the purposes of, or in connection with, the exercise of any of the ICRIR's functions may not be used in evidence against D unless exception 1 or 2 applies in relation to the material."

[424] For the purposes of this discussion it is not necessary to set out these exceptions. The remainder of the section also relates to matters which are not necessary to be analysed by the court.

[425] The applicants argue that section 7 imposes significant restrictions on the ability to secure the accountability of the perpetrators of Troubles-related offences. Furthermore, they argue that the extent of section 7(3) goes beyond the typical use – immunity guarantees afforded at common law.

[426] As with much of the Act the underlying purpose behind section 7 is to encourage people with relevant knowledge to come forward and provide information to the Commission which, in turn, will provide victims with information they seek in relation to the deaths of their loved ones.

[427] The policy underlining section 7 was explained by Lord Caine following a proposal in June 2023 to remove this provision:

> "I am sympathetic to the intention behind amendment 18 in the name of Baroness, Lady O'Loan, because all things considered, you would want as much information obtained by the ICRIR as possible to be available in any future criminal proceedings. But it is important to the efficacy of the information recovery process that information cannot be used in criminal proceedings against those individuals who provided, as part of the immunity process, or in response to a notice issued under Clause 14, relating to the supply of information. This is a crucial aspect of encouraging the provision of information and, in the case of supplying information under Clause 14, it provides an important legal safeguard for the right against self-incrimination – important because the clause contains a power to compel testimony, a power that police constables do not have.
>
> To be absolutely clear, Clause 7 does not restrict the use of material in criminal proceedings against anyone other than the person who provided it; and where Clause 7 does not impose restrictions, normal rules of the

> admissibility of evidence on criminal proceedings would apply …
>
> It is worth reminding the House that this arrangement is not unique. The Attorney General can give an undertaking that information collected during a public inquiry can be inadmissible in any subsequent criminal proceedings. This was the case during the Saville Inquiry into the events of Bloody Sunday, as noble lords will recall, and in the Stormont House Agreement which made it clear that any information provided to the then ICIR could not be used in criminal proceedings at all."

[428] In addition to the public inquiry examples, a comparison with the powers of coroners currently conducting legacy inquests and section 7 of the 2023 Act is useful.

[429] Section 17A of the Coroners Act (Northern Ireland) 1959 provides that a coroner can require a person to attend at a time and place stated in the notice to provide information and/or produce documents or any other thing relevant to an inquest. However, under Rule 9 of the Coroner's Rules:

> "(2) Where a person is suspected of causing the death, or has been charged or is likely to be charged with an offence relating to the death, he shall not be compelled to give evidence at the inquest.
>
> (3) Where a person mentioned in paragraph (2) offers to give evidence the coroner shall inform him that he is not obliged to do so, and that such evidence may be subject to cross-examination."

[430] The privilege against compulsory self-incrimination is a well-established principle of the common law.

[431] Such a provision was originally envisaged as part of the ICIR proposals under para [46] of the SHA:

> "The ICIR will not disclose information provided to it to law enforcement or intelligence agencies and this information will be inadmissible in criminal and civil proceedings. These facts will be made clear to those seeking to access information through the body."

[432] The limits of the provision are important. It is confined to the use of material in criminal proceedings against the defendant who provided the relevant

information. However, such material can still be used to identify and, if appropriate, prosecute other offenders.

[433] In the court's view, section 7 and, in particular, 7(2) go no further than what is accepted at common law or currently within the coronial system (save for section 7(3)). I do not consider that it is in breach of the ECHR..

[434] In relation to section 7(3) it is an integral part of the immunity scheme established under the Act. The provisions operate in tandem. Accordingly, as the immunity scheme has itself been declared unlawful, then section 7(3) as it relates to and is contingent upon immunity is also unlawful.

Section 8 of the 2023 Act – Admissibility of material in civil proceedings

[435] Section 8 deals with the issue of admissibility of material in civil proceedings. It provides:

> "**8. Admissibility of material in civil proceedings**
>
> (1) No protected material, or evidence relating to protected material, is admissible in any—
>
> (a) civil proceedings,
>
> (b) proceedings before a coroner, or
>
> (c) inquiry under the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016 (asp 2)."

[436] "Protected material" is defined in section 8(5) as "material provided to, or obtained by, the ICRIR for the purposes of, or in connection with, the exercise of any of its functions."

[437] The section does not apply to any protected material, which is obtained by the ICRIR from a relevant authority under section 5 – see section 8(4).

[438] The lead applicants, supported by the applicant, *Jordan*, challenged the lawfulness of section 8 on the grounds that it is incompatible with article 2 and 6 ECHR read alone or in conjunction with article 14 ECHR.

[439] Ms Quinlivan took the lead in submissions on this issue. Her starting point is her reliance on the well-established obligation under article 2 to carry out an effective investigation.

[440] The applicant has an extant civil action issued against the Chief Constable of the PSNI in relation to her son's death in which she seeks damages from the Chief Constable.

[441] She submits that in substance, section 8 could operate to restrict the material that she can rely upon in support of the applicant's claim against the PSNI in respect of her son's death. The prohibition relates both to "protected" material which has been provided to, or obtained by the ICRIR, and to any evidence "relating to" such material.

[442] It is argued, therefore, that in substance section 8 imposes significant restrictions on the plaintiff's ability to secure the accountability of the person or persons responsible for her son's death, including through compensation in breach of article 2 ECHR.

[443] The applicant further argues that her right under article 6(1) to access to a court "in the determination of his civil rights and obligations" is engaged. The Convention does not lay down rules governing the admissibility of evidence per se. In *Schenk v Switzerland* [1991] 13 EHRR 242, where the issue was the admissibility of an unlawfully recorded telephone conversation into evidence in a criminal trial, the ECtHR observed at para [46]:

> "Article 6 does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. Accordingly 'it is not the role of the Court, to determine, as a matter of principle, whether particular types of evidence…may be admissible…the question for the court instead is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair'"

The question before the court, then, is whether section 8 will impact civil proceedings to such an extent that fairness will be impaired. Any such impact must be weighed against the justification advanced by the respondent and whether there is a reasonable relationship of proportionality between the aim and the measure imposed. In respect of the applicant, *Jordan*, the court notes that that the death of the applicant's son has been the subject matter of a completed article 2 compliant inquest. It is, therefore, difficult to foresee circumstances in which the ICRIR will be conducting a review in relation to the death. In such circumstances section 8 will not have any impact on the applicant, *Jordan*, in relation to her ongoing civil proceedings. In the circumstances the court declines to make any order in respect of this applicant in relation to section 8. However, as the lead applicants have also requested relief in respect of section 8, the court will give due consideration to the issues raised.

[444] The reasoning behind section 8 is set out in the affidavit of Mr Flatt at paras 175-176 as follows:

> "175. The policy reasoning for restricting the use of protected material stemmed from the desire to ensure the effectiveness of the information recovery objective of the legislation. Officials note on 3 February 2021 in preparation for seeking government agreement recorded:
>
> > 'We recommend extending inadmissibility clauses in the Bill to cover information which might result in immunity. This should apply whether immunity is granted or not. This information should be inadmissible in any (including civil) future court proceedings. This should encourage participation by ensuring that individuals can come forward knowing that whatever they say will not be used against them in court in future."
>
> 176. This approach is consistent with the approach envisaged for the ICIR within the SHA, which would have ensured that information provided directly to the ICRIR would be inadmissible in both criminal and civil proceedings."

[445] In this regard it should be noted that that the ICIR envisaged under the SHA 1998 is a different animal than the ICRIR created under the 2023 Act. Importantly, the ICIR was proposed specifically to enable victims to seek and privately receive information about the Troubles-related deaths of their next of kin. It did not have a criminal investigation remit. That was to be carried out by the HIU which had policing powers, and which was dedicated to taking forward criminal investigations into outstanding Trouble-related deaths. Under the 2023 Act, the ICRIR must perform both functions. Thus, the analysis is inapt.

[446] I can well see that there is some merit in the respondent's suggestion that the prohibition in question may well encourage people to come forward and give information to ICRIR. However, in seeking to justify the prohibition it seems to me that the respondent has conflated section 7 and section 8. As already indicated the legal basis for the section 7 prohibition is sound. The section 8 prohibition goes further in excluding all protected material or evidence relating to protected material in civil proceedings. True it is, that any information obtained by ICRIR under section 5 will be available for use in civil proceedings, which should be of significant advantage to anyone such as the applicant, *Jordan*, pursuing such proceedings. Equally, it is important to note that section 8 does not apply to judicial review proceedings.

[447] However, returning to first principles it seems to the court that in pursuing her civil action the applicant, *Jordan*, and those like her, are seeking to validate their article 2 rights. The state recognises this as a way of complying with its article 2 obligations.

[448] Equally, the review by ICRIR is also the means by which the state proposes to comply with its article 2 obligations.

[449] In this context, the prohibition in section 8 does interfere with the article 2 rights of those seeking compensation against the state in respect of Troubles-related deaths or injuries.

[450] A comparison with the current system in relation to inquests and Police Ombudsman investigations is instructive.

[451] There is no prohibition on plaintiffs in civil actions using material obtained by the coroner in the course of his or her inquest. Indeed, as I understand it, they are encouraged to do so. Equally, there is no prohibition on applicants availing of material provided in a Police Ombudsman report for the purposes of civil proceedings. Indeed, many of the civil proceedings initiated have arisen because of Police Ombudsman reports.

[452] Mr McGleenan relied on the decision in *Her Majesty's Senior Coroner for West Sussex v Chief Constable of Sussex Police and others* [2022] EWHC 215 (QB). In the context of an investigation by the Air Accident Investigation Branch, the court recognised "the real force" in a chilling effect of disclosure on future investigations (para [114]) in light of the requirement for full and frank cooperation on the part of those able to assist investigations, the public interest in ensuring maximum willingness of persons to cooperate and ensuring that they do not withhold information or evidence which may inform the investigation, and the deterrent effect that disclosure to other parties for other purposes would have in the future (para 112(iii)).

[453] In that case the coroner was investigating the deaths of 11 individuals arising from a devastating crash at an air show. He sought disclosure of materials that had been obtained by the Air Accident Investigations Branch ("AAIB") which was the recognised statutory body charged with investigation air accidents. The regime which was incorporated into both EU and domestic UK law, stipulated that certain materials shall not be made available for purposes other than the accident or incident investigation unless the competent authority (the High Court) determines that "their disclosure or use outweighs the likely adverse domestic and international impact such action may have on that already future investigation" (see paras [20]-[21]).

[454] The High Court rejected the coroner's application for disclosure of the material. It pointed to the substantial harm that could be caused by routinely disclosing such material to coroner's courts in the absence of "credible evidence" that the AAIB's investigation was "incomplete, flawed or deficient." Importantly, in the balancing exercise the court concluded that such an approach would have the effect of dissuading people from assisting air accident investigations generally, for example, by simply refusing to install or activate cockpit video recording equipment. The court also took the view that there was little benefit in duplicating the task of objectively investigating the facts of such incidents.

[455] Using the air accident analogy Mr McGleenan argues that the ICRIR has been designed to be a "black box." Certain information given to it is to be capable of being used in civil proceedings.

[456] I am not persuaded by the analogy. There the court was dealing with a specific regime which provided for non-disclosure. Had the coroner been successful and had he obtained the material then, in my view, there could be no bar on it being used in civil proceedings. That is the more appropriate analogy, in my view.

[457] I do recognise there may be an element of a "chilling effect", in the event that people are aware that information they give to ICRIR may be used in civil proceedings, but this is very different from information that might be used against that person for the purposes of a criminal investigation.

[458] In conclusion, I consider that section 8 is an interference with the article 2 rights of those who seek to vindicate those rights via civil litigation against State agencies in the context of Troubles-related killings. Given the unqualified nature of the article 2 rights, such an interference is unlawful and cannot be justified. This does not affect the lawfulness of the prohibition on disclosure of information which is identified as sensitive or protected international information in accordance with the Act.

[459] Equally, I accept that the article 6 rights of such litigants are engaged in this context. It is clear that section 8 will have a bearing on the fairness of ongoing civil proceedings relating to conduct forming part of the Troubles which is the subject matter of an ICRIR review. Article 6, of course, is a qualified right. The ECHR does not lay down rules governing admissibility of evidence which are primarily a matter for regulation under national law.

[460] In applying the principles in *Nait-Liman v Switzerland* (discussed earlier at para [381]) I do not consider that it could be said the limitations apply, restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

[461] The court returns to the question of proportionality. The court does not consider that a fair balance has been struck, by section 8, between the rights of

individuals and the interests of the community. Whilst I accept that a fair balance has been struck in relation to the limitation of civil claims under section 43 (with the exception of section 43(1)), to my mind, section 8 impacts significantly on the prospect of success of those who have extant civil claims, the subject matter of which will also be covered by an ICRIR review. The prohibition is wide-ranging, extending to "evidence relating to protected material" provided to, or obtained by the ICRIR in the exercise of any of its functions. Such evidence will be inadmissible in any civil proceedings. It follows that where information is obtained from an offender, that evidence may not be used against another offender in civil proceedings who did not engage with the information recovery processes envisaged under the Act. This stands in contrast to the respondent's recognition of the failings of the current Northern Ireland civil court system which have been plagued by unsatisfactory disclosure processes. Section 8, in my view, compounds this problem. The court is not convinced that the extent of the prohibition in section 8 is necessary to advance the aim of information recovery and thereby, reconciliation. Accordingly, no reasonable relationship of proportionality has been struck and the court finds a breach of article 6(1) ECHR in respect of its impact on the fairness of extant civil proceedings.

Article 14

[462] Before completing the analysis of the statute's compliance with the ECHR, it is necessary to consider the applicants' reliance on article 14. Each of the applicants in *Dillon and others*, *Gilvary* and *Jordan*, allege a breach of article 14 in conjunction with various articles of the ECHR. They are supported in those challenges by the NIHRC and ECNI. In the preceding sections of this judgment the court has considered the arguments in relation to the substantive rights relied upon.

[463] Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[464] There has been extensive jurisprudence on what is required to establish a breach of article 14, including decisions of this court, the Court of Appeal and the Supreme Court. I do not propose to refer extensively to those judgments. In short, the court must ask itself a series of questions in order to establish whether a particular situation involves treatment which amounts to a violation of article 14.

[465] In *R(Stott) v Secretary of State for Justice* [2018] 3 WLR 1831, Lady Black at para [8] stated that in order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements:

> “(a) The circumstances must fall within the ambit of a Convention right.
>
> (b) The difference in treatment must have been on the ground of one of the characteristics listed in article 14 or “other status.”
>
> (c) The claimant and the person who has been treated differently must be in analogous situations.
>
> (d) Objective justification for the different treatment will be lacking.”

[466] In *R (DA and DS) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289, Lady Hale stated at para [136]:

> “In deciding complaints under article 14, four questions arise:
>
> (i) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights?
>
> (ii) Does the ground upon which the complainants have been treated differently from others constitute a “status?”
>
> (iii) Have they been treated differently from other people not sharing that status who are similarly situated or, alternatively, have they been treated in the same way as other people not sharing that status whose situation is relevantly different from theirs?
>
> (iv) Does that difference or similarity in treatment have an objective and reasonable justification, in other words, does it pursue a legitimate aim and do the means employed bear “a reasonable relationship of proportionality” to the aims sought to be realised (see *Stec v United Kingdom* (2006) 43 EHRR 47, para 51)?”

[467] Finally, the question of article 14 has been comprehensively considered by the Supreme Court in the case of *R (SC) v Work and Pensions Secretary (SC (E))* [2022] AC 223. I take this judgment to be the authoritative one when considering article 14

cases. Most recently it has been followed and applied in this jurisdiction by the Court of Appeal in the cases of *Lancaster and others* [2023] NICA 63 and *Department for Communities and the Department for Work and Pensions and Cox* [2021] NICA 46.

[468] At para [37] of *SC*, Lord Reed explains how an article 14 claim should be addressed:

> "37. The general approach adopted to article 14 by the European Court has been stated in similar terms on many occasions and was summarised by the Grand Chamber in the case of *Carson v United Kingdom* 51 EHRR 13, para 61 ("Carson"). For the sake of clarity, it is worth breaking down that paragraph into four propositions:
>
> (1) The court has established in its case law that only differences in treatment based on an identifiable characteristic, or status, are capable of amounting to discrimination within the meaning of article 14.
>
> (2) Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.
>
> (3) Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
>
> (4) The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background."

[469] Furthermore, in recognising the first issue raised by both Lady Black and Lady Hale referred to above, Lord Reed recognises that:

> "39. According to the case law of the European court, the alleged discrimination must relate to a matter which falls within the "ambit" of one of the substantive articles. This is a wider concept than that of interference with the rights guaranteed by those articles, as Judge Bratza

explained in his concurring judgment in *Adami v Malta* (2006) 44 EHRR 3, para 17."

[470] I turn now to the application of these considerations to the facts of these cases.

[471] The court has already determined that those provisions which relate to immunity from prosecution (sections 19 and 41), the retrospective prohibition on existing civil proceedings, and the restriction of use of protected material in civil proceedings, are in breach of articles 2 and 3 of the ECHR. That being so, it is not necessary to consider whether there has been a breach of article 14 in relation to those provisions.

[472] Turning then to the remaining provisions under challenge which the court has found not to be in breach of the ECHR, the starting point for the court is to consider whether the alleged discrimination relates to matters which fall within the ambit of one of the substantive articles.

[473] In my view, the circumstances of the alleged discrimination relate to matters which fall within the ambit of articles 2, 3, and 6 and, in the case of extant civil actions, A1P1 of the Convention.

[474] That being so, I now turn to the four propositions set out by Lord Reed in *SC*.

Can the applicants establish "status?"

[475] A feature of these applications is that the various parties have put forward different grounds for establishing status. Understandably, Mr McGleenan complains that the applicants should not be permitted to approach their article 14 arguments based on multiple alternatives conflating different possible article 14 analyses in doing so. It is important to establish the status relied upon with a degree of certainty as this will be important in analysing the discrimination said to arise. Such an analysis should refer to each status relied upon as opposed to a number of suggested statuses.

[476] In the case of *Dillon and others* it is argued that:

(a) Victims of killings and/or serious criminality at the hands of paramilitaries and/or the state during the Troubles are treated differently from victims of paramilitary or state violence after 1998. This is a difference in treatment in analogous situations.

(b) As members of an ageing cohort, namely "victims of the Troubles before Good Friday 1998" the applicants are treated less favourably in terms of access to justice than younger victims of similar offences occurring after Good Friday 1998.

(c) This difference in treatment has no reasonable justification nor does it pursue a legitimate aim.

[477] In *Jordan* the status relied upon is political opinion, national origin, association with a national minority and/or other status, namely a person who resides in Northern Ireland whose son/family member was killed by a state agent, or as a result of the actions of a state agent and who seeks compensation from the state for his death. The applicant is an Irish national and she resides in Northern Ireland.

[478] It is also argued that whilst the legislation applies across the UK, the impugned provisions disproportionately impact on persons resident in Northern Ireland.

[479] In *Gilvary* it is argued that the applicant (and those in similar positions to her) will be subject to discriminatory treatment on the basis that her relative was the subject of serious criminal offences (including torture) during the Troubles. It is argued that this amounts to an "other status" under article 14 of the ECHR. In short, the status relied upon is that of being a "Troubles' victim."

[480] The NIHRC supports the grounds of discrimination set out in *Dillon's* application and develops these to argue that in addition the Act discriminates between:

> "(a) On the one hand, individuals (or the family members of individuals) whose death/mistreatment occurring within the period defined as "the Troubles" has been the subject of inquest which has significantly advanced, a criminal investigation where a public prosecution has already commenced, or a civil action commenced before the Act entered into force, and where those proceedings have satisfied the requirements of articles 2 and 3 ECHR; and
>
> (b) On the other hand, individuals (or their family members) whose death/mistreatment for whatever reason has not been the subject of such proceedings by those dates (and/or those proceedings have not been Convention-compliant)."

[481] I am satisfied that the applicants in this case satisfy the requirements of establishing "other status" within the meaning of article 14. The jurisprudence makes it clear that "other status" has generally been given a wide meaning (see *Clift v United Kingdom* [2010] 7 WLUK 387). As Lord Hodge said at para [185] of the judgment in *Stott*:

> "185. First, the opening words of the relevant phrase, 'on any ground such as', are clearly indicative of a broad approach to status. Secondly, there is ample authority in the ECtHR, the House of Lords and the Supreme Court to support the view that the words 'any other status' should not be interpreted narrowly. Thus, in *Clift v Secretary of State for the Home Department* [2007] 1 AC 484, para 48, Lord Hope of Craighead stated that 'a generous meaning' should be given to the words 'or other status' while recognising that 'the proscribed grounds are not unlimited.' Similarly, in *R(RJM) v Secretary of State for Work and Pensions* [2009] AC 311, Lord Neuberger of Abbotsbury at para [42] spoke of 'a liberal approach' to the grounds on which discrimination was prohibited. In *Clift v United Kingdom* … paras 55 and 56, the ECtHR spoke of the listed examples of status as being 'illustrative and not exhaustive' and suggested that a wide meaning be given to the words 'other status.'"

[482] That status can be succinctly stated as being either a victim or a relative of a victim of the Troubles as defined in the Act. I accept that this status is not personal or immutable. However, the Act itself recognises this status. Certain legal rights flow from that status which come within the ambit of substantive Convention rights. I consider this to be the true status in play.

[483] I am not persuaded by the argument that the applicants and/or victims of the Troubles meet the status of "an ageing cohort" for the purposes of the article 14 exercise. The court notes that the 2023 Act provides at Schedule 3 "close family member" includes, *inter alia*, children, and there is also scope for "relevant family member" to include, for example, grandchildren or others if there are no close family members.

[484] In relation to the status relied upon by *Jordan*, namely "political opinion, national origin, association with a national minority and/or other status, namely a person who resides in Northern Ireland whose son/family member was killed by a state agent or as a result of the actions of a state agent, and who seeks compensation from the state for his death", it is clear that the legislation has a UK-wide remit. Troubles-related incidents were not confined to Northern Ireland. There is no difference in treatment between the people who were involved in incidents taking place in Northern Ireland and elsewhere in the UK. Notwithstanding the fact that the provisions are UK-wide the applicant, *Jordan*, argues that the legislation has a disproportionate effect on victims like herself who are resident in Northern Ireland. This argument was advanced on a similar basis in the *Lancaster* case and was rejected both at first instance and by the Court of Appeal. This court also rejects this argument.

Is there a difference in the treatment of persons in analogous, or relatively similar, situations?

[485] In my view, those who are the victims of state killings/torture and killings/torture by paramilitaries after 1998 are arguably in an analogous or relatively similar situation. I also conclude that those who have been victims of state violence/torture and paramilitary killings and who have had the benefit of an inquest, a criminal investigation where a public prosecution has already commenced or a civil action commenced when the Act came into force and where those proceedings have satisfied the requirements of articles 2 and 3 ECHR, are also arguably persons in an analogous, or relatively similar situation. I say arguably because I can see that there may be some debate about this. Mr McGleenan argues that the applicants are not in an analogous situation to those whom they compare themselves with in the context of the need to promote peace and reconciliation in Northern Ireland, which is the underlying purpose of the legislation. I consider that the best approach is to work on the premise that the applicants have established this element and in accordance with Strasbourg jurisprudence look to the issue of justification. (See discussion in the recent Supreme Court decision in the case of *Hilland v Department of Justice and the Secretary of State for Justice (Ministry of Justice)* [2024] UKSC 4.)

Does the difference in treatment have an objective and reasonable justification?

[486] This issue was comprehensively addressed by the Supreme Court in *SC*. Much of the focus of the judgment was on what test the court should apply in deciding whether the difference of treatment under consideration has an objective and reasonable justification. In its analysis the court considered a range of considerations from whether a measure was "manifestly without reasonable foundation" to a requirement for "very weighty" reasons for justification.

[487] In para [160] in referring to the phrase "manifestly without reasonable foundation", as used by the European Court, Lord Reed said that this,

> "is merely a way of describing a wide margin of appreciation. A wide margin has also been recognised by the European court in numerous other areas where that phrase has not been used, such as national security, penal policy and matters raising sensitive moral or ethical issues."

[488] This formulation has been applied in assessing areas involving economic and social policy, in particular, welfare entitlements.

[489] At the other end of the spectrum "very weighty" reasons for justification are required in relation to differences of treatment on grounds which are regarded as especially serious (so-called "suspect" grounds like sex, race or nationality).

[490] What is clear from the judgment is the need for deference by the courts in the political sphere.

[491] At para [162] the court observed:

> "It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in *JD* para [11]:
>
> > 'Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore, any legislation may be contested from the viewpoint of the principles of equality and non-discrimination and such cases have become more and more frequent in the courts.'
>
> In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process. As judges Pejchal and Wojtyczek commented, at para 10:
>
> > 'Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be

> independent, the judicial and political spheres have to remain separated.'"

[492] In assessing the justification for the provisions under challenge it is important to keep in mind the boundaries between legality and the political process identified by the Supreme Court.

[493] I return to the different approaches which might be appropriate depending on the matter under review and to paras [158] and [159] of the judgment in *SC* where Lord Reed stated:

> "158. Nevertheless, it is appropriate that the approach which this court has adopted since *Humphreys* should be modified in order to reflect the nuanced nature of the judgment which is required, … it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality (emphasis added). In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a 'suspect' ground is to be justified. … [my underlining]
>
> 159. It is therefore important to avoid a mechanical approach to these matters, based simply on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant."

[494] At para [161], Lord Reed further held that:

> "161. It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the manifestly without reasonable foundation formulation, it is more fruitful to focus on the question whether a wide

> margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. It follows, as the Court of Appeal noted in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2021] 1 WLR 1151 and *R (Delve) v Secretary of State for Work and Pensions* [2021] ICR 236, that the ordinary approach to proportionality will accord the same margin to the decision-maker as the 'manifestly without reasonable' foundation formulation in circumstances where a particularly wide margin is appropriate."

[495] Returning to the circumstances of these challenges, it is important to note that the court is not dealing with the question of immunity from prosecution which proved particularly controversial and which the court has held to be unlawful. What is primarily challenged under this heading is the means by which the state will carry out investigations to an identified cohort of cases involving "victims of the Troubles."

[496] The circumstances of these challenges do not easily fit into the cases which have dealt with article 14 claims. I do not consider that we are dealing here with "suspect grounds" which require weighty reasons for justification. That said, the challenged provisions propose to deny access to the courts to victims to vindicate their rights, subject to the supervisory role of the courts by way of judicial reviews. In those circumstances, the "manifestly without reasonable foundation" test is in the court's view inadequate.

[497] In accordance with *SC*, the court proposes to avoid a mechanical approach but rather is influenced by a wide range of factors in this case, including giving appropriate respect to the assessment of the democratically accountable institutions.

[498] It is for this reason that I have set out in detail the history of developments since the B-GFA, the acknowledgment of the importance of the victims of the Troubles in that Agreement, and the attempts since then to find agreement on how to deal with the legacy of the victims of the Troubles leading to the 2023 Act.

[499] The measures which are challenged have been designed to promote reconciliation. This is expressly stated as the "principal objective" of the ICRIR in section 2(4) of the 2023 Act. In doing so, it is hoped to bring an end to an aspect of the conflict that has proved elusive over a protracted period of time namely, how to deal with the legacy of the Troubles.

[500] It is acknowledged by the respondent that it cannot legislate for reconciliation or enforce reconciliation. Rather it is hoped that providing information to the victims of the Troubles via a bespoke mechanism within a limited period of time will contribute to reconciliation. The aim is to promote reconciliation as in an effort to transition from the past to the future (in the words of Eames/Bradley). The provision of information, the report on all the circumstances of a death, in addition to referral for prosecution should sufficient information be obtained, is the means by which the state has chosen to deal with the legacy of the past. In doing so, the respondent argues, it is fulfilling the requirement of paragraph 11 of the B-GFA (as a necessary element of reconciliation.) It is argued, and clearly there is support for this, that the current mechanisms are not working. This is particularly so for the victims of paramilitary violence who, for understandable reasons, have not had recourse to inquests under article 2 ECHR. Another important factor is the passage of time. As time passes the likelihood of successful prosecutions diminishes, as does the possibility of obtaining reliable and truthful information concerning the circumstances of killings during the Troubles.

[501] Undoubtedly, there is widespread opposition to these proposals. They are not supported by any of the political parties in this jurisdiction. On 20 July 2021, the Northern Ireland Assembly unanimously passed a motion that the proposals "do not serve the interests, wishes or needs of victims and survivors nor the requirements of truth, justice, accountability, acknowledgment and reconciliation."

[502] The measures are not supported by groups who represent victims as was emphasised by the able submissions of Mr Heraghty on behalf of WAVE.

[503] The proposals are opposed by the dedicated mechanisms established under the B-GFA to monitor human rights in this jurisdiction, as is apparent from the submissions of the NIHRC and the ECNI in this case. They are opposed by the respected human rights organisation, Amnesty International.

[504] Of course, what the court must examine is the justification for the difference in treatment between those who have been defined as victims of the Troubles and others who are victims of state violence or paramilitary violence and also those victims of the troubles who have had recourse to the mechanisms which are now being brought to an end.

[505] It will be seen that the prohibitions and restrictions on Troubles-related investigations and proceedings will apply across the whole of the UK, and the ICRIR has a UK wide remit. Thus, there is no difference in treatment between the people who are involved in incidents taking place anywhere in the UK.

[506] In relation to the temporal parameters established by the Act there clearly is a rational basis for the dates chosen. The year 1966 was the point at which republican and loyalist paramilitaries became actively engaged. The date of 1 January 1966 was

the date chosen by the Northern Ireland Executive's new Troubles Permanent Disablement Scheme as a starting point.

[507] With regard to the end date, 10 April 1998 is the date that the B-GFA was signed. It is widely accepted that this Agreement was a landmark event in the history of the Troubles for the reasons already set out in this judgment.

[508] It seems to the court that the dates chosen to reflect the period of the Troubles have a rational basis and can readily be justified.

[509] The substantive issue in the context of the article 14 debate is whether treating the victims of the Troubles during that period differently from other analogous victims can be justified in law.

[510] It is clear from the process that led to the 2023 Act, that an important factor was that the likelihood of justice in many cases for victims is diminishing and continues to decrease as time passes. The Act relates to incidents which occurred between 25 years and 57 years ago. If the current investigative mechanisms continue it is estimated that this could take up to 20 years. Whilst each of the bodies continue to do their duty, the PSNI, the Police Ombudsman and the courts must allocate very significant resources to these issues. The court has been supplied with an affidavit by Mr Patrick Butler, Head of the Legacy Inquest Unit and Legal Adviser to the Coroners, which contains a statement, dated 17 November 2023, from the then Presiding Coroner, Humphreys J. According to the information provided, in February 2019, funding for the Legacy Inquest Project was announced and the Legacy Inquest Unit was established to deliver the then Lord Chief Justice's plan to hear legacy inquests within five years. The initial legacy inquest caseload under the five-year plan comprised of 53 inquests relating to 94 deaths. Of those, 16 inquests remain part heard, and four others are under active case management by assigned coroners. Thirteen inquests are listed for hearing between now and April 2024. There are 10 Year 4 & 5 cases which have not yet been assigned to a coroner. However, six of those unallocated 10 are not subject to the 2023 Act since the deaths did not occur within the defined period of the Troubles. On top of that, as indicated by Mr Flatt's affidavit, the Crown Solicitor's Office has estimated that there were around 700 civil claims filed as of 17 May 2022, with only a small number (less than 20) approaching trial.

[511] Since the B-GFA, victims of the Troubles have been recognised as a cohort whose suffering and rights must be acknowledged and dealt with before there can be a true resolution of the conflict referred to as the Troubles. The context here is important. The measures are designed to promote peace and reconciliation and to bring an end to conflict in which political agreement has proved elusive over a protracted period of time.

[512] It seems to the court that Parliament is entitled to devise a mechanism by which investigations into killings or maltreatment during the Troubles can be

investigated in a coherent way via bespoke mechanisms. Whether those mechanisms meet the state's obligations under the ECHR is a separate issue which has been dealt with in this judgment. Insofar as they do meet those requirements, it seems to the court that there is an objective and reasonable justification for doing so, even though it involves treating them differently from other analogous victims. The proposed ICRIR pursues the legitimate aim of carrying out those investigations previously carried out by PSNI, the Police Ombudsman, the courts and inquests. Whether the proportionality element is satisfied is to a large extent a matter of political judgment.

[513] Returning to the *SC* case, in its ultimate conclusions, the court states at paras [208]-[209]:

> "208. The assessment of proportionality, therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning. There are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies.
>
> 209. That is what happened in this case. The democratic credentials of the measure could not be stronger. It was introduced in Parliament following a General Election, in order to implement a manifesto commitment (para 13 above). It was approved by Parliament, subject to amendments, after a vigorous debate at which the issues raised in these proceedings were fully canvassed, and in which the body supporting the appellants was an active participant (para 185 above). There is no basis, consistent with the separation of powers under our constitution, on which the courts could properly overturn Parliament's judgment that the measure was an appropriate means of achieving its aims."

[514] Obviously, in *SC* the balance which was being struck is very different from the balance being struck here. The court has separately applied legal reasoning as to whether the proposed new mechanisms are compliant with the state's obligations under the ECHR. In the article 14 context, what the court is considering is the decision to treat the victims of the Troubles differently via the mechanisms which have been established under the Act. Those mechanisms have been approved by Parliament via primary legislation, subject to amendments after a vigorous debate at which the issues raised in these proceedings were canvassed. As per the decision of the Grand Chamber in *Animal Defenders International v United Kingdom* [2013] 57 EHRR 21 – that in order to determine the proportionality of a general measure such as this the court must primarily assess the legislative choices underlying it. As per para [110] of the judgment:

> "… the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it."

[515] Subject to the court's supervisory role in terms of ECHR compliance, I consider that considerable weight should be given to the views of Parliament expressed through primary legislation in establishing the mechanism for investigations. Ultimately, this choice was a political one and the balance struck by the state withstands legal scrutiny.

[516] In conclusion, therefore, I am satisfied that the difference of treatment identified by the court in this case is compliant with article 14 taken together with the substantive rights relied upon by the applicants. This, of course, does not apply to the breaches which have been identified earlier in this judgment. The article 14 consideration is confined to those provisions in respect of which a breach has not been established.

[517] For completion, I should add that had I accepted the applicants' arguments in relation to the alternative statuses, which I have rejected, then equally I would have found that any difference in treatment was justified and that no breach of article 14 could be established.

The Windsor Framework arguments

Article 2(1) of the Windsor Framework

[518] The court has already determined that some of the provisions of the 2023 Act are in breach of articles 2, 3 and 6 ECHR. Notwithstanding this conclusion it is necessary to consider potential breaches of the WF because, as will be seen later, the effect of any breach established results in the disapplication of the offending provision. In this context, I only propose to consider those provisions of the Act which I have found are incompatible with the ECHR, namely, sections 7(3), 8, 12, 19, 20, 21, 22, 39, 41, 42(1) of the 2023 Act. I do not consider that those which I found to

be ECHR compliant could be in breach of the WF, as should be clear from the analysis below.

[519] The lead applicants and *Gilvary*, supported by the Commissions, argue that the provisions of the 2023 Act breach Article 2(1) WF.

The status of the Protocol/Windsor Framework in UK law

[520] On 17 October 2019, the UK and EU reached agreement on a new Withdrawal Agreement ("WA") and a political declaration setting out the framework for their future relationship. The WA came into force on 1 February 2020 following "exit day" which was 31 January 2020. The protocol of Ireland/Northern Ireland (renamed the Windsor Framework) formed part of that WA. As recorded by the preamble, following the entry into the force of the WA, European Union law ceased to apply in the UK (subject to the arrangements laid down in the WA). Article 4 WA sets out "methods and principles relating to the effect, the implementation and the application of this Agreement." Article 4 provides:

> "1. 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.
>
> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.
>
> 3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.
>
> 4. The provisions of this 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."

[521] These principles were summarised in *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307 as:

> "(i) the principle of equal legal effect of the Agreement in the UK and EU in Article 4(1);
>
> (ii) the principle of direct effect also in Article 4(1);
>
> (iii) that the Withdrawal Agreement takes precedence over inconsistent UK law in Article 4(2);
>
> (v) the application of the methods and general principles of Union law to "Union law or to concepts or provisions thereof" in Article 4(3); and
>
> (v) the applicability of the jurisprudence of the CJEU (prior to the expiry of the transition period) to the implementation and application of the Agreement, in Article 4(4)."

[522] Article 13(2) WF provides that the provisions of the Protocol/WF shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of European Union ("CJEU"). The limitation in article 4(4) WA which stipulates that only pre-transition period CJEU case law may be relevant to the implementation and application of the WA, does not apply to the WF under article 13(2).

[523] In compliance with the UK's obligations of implementation under Article 4(2), it inserted section 7A to the European Union (Withdrawal Act) 2018, through the European Union (Withdrawal Act) Act 2020 which provides as follows:

> "(1) Subsection (2) applies to—
>
> (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and
>
> (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,

> as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.
>
> (2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—
>
> (a) recognised and available in domestic law, and
>
> (b) enforced, allowed and followed accordingly.
>
> (3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)."

[524] The drafting of section 7A mirrors that of section 2 of the European Communities Act 1972 and replicates the position in terms of remedy under that statute. Section 2 is, as explained by the Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583 at paras [65]-[66]:

> "65. …the "conduit pipe" by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU law an independent and overriding source of domestic law.
>
> 66. Section 18 of the 2011 Act [the European Union Act], set out in para 30 above, was enacted in order to make it clear that the primacy of EU law over domestic legislation did not prevent it being repealed by domestic legislation. But that simply confirmed the position as it had been since the beginning of 1973. The primacy of EU law means that, unlike other rules of domestic law, EU law cannot be implicitly displaced by the mere enactment of legislation which is inconsistent with it. That is clear from the second part of section 2(4) of the 1972 Act and *Factortame Ltd (No 2)* [1991] 1 AC 603. The issue was informatively discussed by Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151, paras 37-47."

[525] The mirroring of section 2 of the European Communities Act 1972 is stated in the explanatory notes accompanying section 7A:

> "31. The approach in the Act is intended to give effect to Withdrawal Agreement law in a similar way to the

manner in which EU Treaties and secondary legislation were given effect through section 2 of the ECA (European Communities Act). Although the ECA gives effect to EU Treaties and secondary legislation, it is not the originating source of that law but merely the 'conduit pipe' by which it is introduced into UK domestic law. Further, section 2 of the ECA can only apply to those rights and remedies etc that are capable of being 'given legal effect or used' or 'enjoyed.'

32. The approach in the Act to give effect to Article 4 is to mimic this 'conduit pipe' so that the provisions of the Withdrawal Agreement will flow into domestic law through this Act, in accordance with the UK's obligations under Article 4. The approach also provides for the disapplication of inconsistent or incompatible domestic legislation where it conflicts with the Withdrawal Agreement. This ensures that all rights and remedies etc arising under the Withdrawal Agreement are available in domestic law."

[526] The 'mimic effect' of section 7A was also recently confirmed by the Supreme Court in *Re Allister and others* [2023] 2 WLR 457. The relevant question before the court was whether section 7A meant that any enactment, in that case, Acts of Union 1800 which, it was argued, were "constitutional" should be read and have effect subject to obligations and restrictions in the WA including the WF. At paras [66]-[68] Lord Stephens concluded:

"66. A clear answer has been expressly provided by Parliament in relation to any conflict between the Protocol and the rights in the trade limb of article VI. The answer to any conflict between the Protocol and any other enactment whenever passed or made is that those other enactments are to be read and have effect subject to the rights and obligations which are to be recognised and available in domestic law by virtue of section 7A(2).

67. The modification of article VI of the Acts of Union does not amount to a repeal of that article. The Acts of Union and article VI remain on the statute book but are modified to the extent and for the period during which the Protocol applies.

68. The debate as to whether the effect of article VI was suspended or modified or subjugated for as long as the Protocol was in existence is not of real significance.

> The effect of the statutory language is that article VI is "subject to" the Protocol. However, the Protocol does not cover all aspects of trade between His Majesty's subjects of Ireland and His Majesty's subjects of Great Britain. Accordingly, the subjugation of article VI is not complete but rather article VI is modified in part. Furthermore, the subjugation is not for all time as the Protocol is not final or rigid so that those parts which are modified are in effect suspended."

[527] In short, any provisions of the 2023 Act which are in breach of the WF should be disapplied.

Has there been a breach of Article 2 of the WF?

[528] Article 2 provides:

> "1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union Law listed in Annex 1 to this Protocol and shall implement this paragraph through dedicated mechanisms.
>
> 2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of Representatives of the Human Rights Commission of Northern Ireland and Ireland, in upholding human rights and equality standards."

What is the test for establishing a breach of Article 2 WF?

[529] The parties have put forward a number of tests to be applied. I propose to adopt the most recent iteration of the test applied by the Court of Appeal in *Re SPUC Pro-Life Limited Application* [2023] NICA 35. In that case Keegan LCJ held that in order to establish a breach of article 2(1) the following six elements must be established:

> "(i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged;
>
> (ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020;
>
> (iii) That Northern Ireland law was underpinned by EU law;
>
> (iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU;
>
> (v) This has resulted in a diminution in enjoyment of this right; and
>
> (vi) This diminution would not have occurred had the UK remained in the EU."

Element 1: A right included in the relevant part of the B-GFA is engaged

[530] A particular bone of contention between the parties was whether the B-GFA was a treaty/international agreement and, therefore, susceptible to the interpretation principles established by the Vienna Convention on the Law of Treaties ("VCLT"). This is significant because the VCLT may permit the court to engage in a more purposive interpretation exercise as opposed to adopting a strict textual approach. Thus, in *R (On the application of ST (Eritrea)) v Secretary of State for the Home Department* [2012] 2 AC 135 Lord Hope referred to article 31 VCLT when interpreting article 32(1) of the 1951 Refugee Convention. The latter provision protects a refugee "lawfully in the territory" of the contracting state from being expelled, subject to national security or public safety reasons. Lord Hope at paras [30]-[31] observed:

> "30. There is no doubt that the Convention should be given a generous and purposive interpretation, bearing in mind its humanitarian objects and the broad aims reflected in its preamble … Support for this approach is to be found in article 31(1) of the Vienna Convention on the Law of Treaties. Reflecting principles of customary international law, it requires a treaty to be interpreted in the light of its object and purpose. So it must be interpreted as an international instrument, not a domestic statute. It should not be given a narrow or restricted interpretation.
>
> 31. But it must be remembered too that, however generous and purposive its approach to interpretation

may be, the court's task remains one of interpreting the document to which the contracting parties have committed themselves by their agreement. As Lord Bingham was at pains to emphasise in the *Roma Rights* case, at para 18, it must interpret what the parties have agreed to. It has no warrant to give effect to what they might, or in an ideal world would, have agreed. One should not overlook the fact that article 31(1) of the Vienna Convention also states that a treaty should be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context.'"

[531] In similar vein, in *Reyes v Al-Malki* [2019] AC 735, Lord Sumption stated at paras [10]-[11]:

> "10. It is not in dispute that so far as an English statute gives effect to an international treaty, it falls to be interpreted by an English court in accordance with the principles of interpretation applicable to treaties as a matter of international law. That is especially the case where the statute gives effect not just to the substance of the treaty but to the text …
>
> 11. The primary rule of interpretation is laid down in article 31(1) of the Vienna Convention on the Law of Treaties (1969):
>
> > 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'
>
> The principle of construction according to the ordinary meaning of terms is mandatory ("shall"), but that is not to say that a treaty is to be interpreted in a spirit of pedantic literalism. The language must, as the rule itself insists, be read in its context and in the light of its object and purpose. However, the function of context and purpose in the process of interpretation is to enable the instrument to be read as the parties would have read it. It is not an alternative to the text as a source for determining the parties' intentions."

Does the VCLT apply?

[532] Mr McGleenan argues that the B-GFA, or more specifically, Strand Three of the B-GFA is not part of an international treaty but rather an agreement between political parties in Northern Ireland. He argues the VCLT has no role to play in the interpretation exercise. He urges caution on the court and says the B-GFA should be construed strictly in accordance with domestic law. He cautions against the court adopting too broad an interpretation which could, in effect, lead to the disapplication of provisions of primary legislation based on loosely defined rights and concepts.

[533] I am persuaded that the VCLT applies to the interpretation exercise to be carried out by the court. The British and Irish governments were involved in, and facilitated, the talks between the parties. The British and Irish governments simultaneously entered into an international agreement welcoming the B-GFA which was annexed to their text. The opening paragraph of the Agreement between the two governments states:

> "Welcoming the strong commitment to the Agreement reached on 10 April 1998, by themselves and other participants in the multi-party talks and set out in Annex 1 to the Agreement (hereinafter "the multi-party Agreement")."

Pursuant to article 31(2) VCLT annexes form part of a treaty for the purposes of interpretation.

[534] In article 2 of the B-GFA, the two governments affirm their "solemn commitment to support and, where appropriate, implement the provisions of the Multi-Party Agreement." Furthermore, the B-GFA includes obligations on the British and Irish governments. By way of example, the British government agreed to complete incorporation into Northern Ireland law of the ECHR. Similarly, the Irish government agreed to take steps to "further strengthen the protection of human rights in its jurisdiction." In addition, importantly, the court also is engaged in an interpretative exercise of Article 2(1) WF. The rights, safeguards and equality of opportunity referred to in the relevant chapter of the B-GFA Agreement are incorporated into Article 2 which is undoubtedly a treaty provision.

[535] Therefore, the court concludes that it is entitled to take a generous and purposive approach in interpreting article 2(1) WF.

Rights, safeguards and equality of opportunity

[536] I return now to the crucial question as to what is meant by "the rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled "Rights, safeguards and equality of opportunity."

[537] The protection against discrimination listed in annex 1 to the WF is not relevant to the issues in this case.

[538] The relevant chapter commences as follows:

> "**HUMAN RIGHTS**
>
> 1. 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 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 fully choose one's place of residence;
> - The right to equal opportunity in all social and economic activity regardless of class, creed, disability, gender or ethnicity;
> - The right to freedom from sectarian harassment;
> - The right of women to full and equal political participation."

[539] Specifically, (as per para [71] above) the chapter refers to victims of violence at paras [11] and [12] as follows:

> "**Reconciliation and Victims of Violence**
>
> 11. The participants believe that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation. They look forward to the results of the work of the Northern Ireland Victims Commission.
>
> 12. It is recognised that victims have a right to remember as well as to contribute to a changed society. …"

[540] Clearly, the list of specific rights identified are not exhaustive. This is confirmed by the Government's Explainer document at paragraph 9 where it is noted that "the relevant provisions include, but may not be limited to, (these rights)." How then does the court interpret "civil rights?"

[541] Mr Southey argues that the notion of civil rights encompasses those fundamental human rights which existed at the time of the B-GFA. From his client's perspective this would include protection against torture as protected by article 3 ECHR, article 4 CFR and Customary International Law prohibiting its use. The applicants, supported by the interveners, argue that the notion of civil rights encompasses a broad sweep of fundamental human rights such as those contained in articles 2, 3, 6, 8 and 14 ECHR and articles 1, 2, 4 and 47 CFR. Article 52(3) CFR provides:

> "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent union law providing more extensive protection."

Accordingly, article 47 mirrors article 6 of the ECHR. Articles 2 and 4 mirror articles 2 and 3 of the ECHR. Article 1 provides, "Human dignity is inviolable. It must be respected and protected."

[542] The starting point must be the text itself but in the context of the relevant chapter of the B-GFA to which article 2 WF refers. The chapter deals with rights broadly categorised under the heading "Human Rights". The chapter having identified certain rights including civil rights goes on to set out the means by which respect for human rights was to be enshrined in Northern Ireland law in the following paragraphs. Accordingly, the British government pledged to incorporate into Northern Ireland law the ECHR, direct access to the courts and remedies for the breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency (paragraph 2). Paragraph 4 provides for the establishment of the new Northern Ireland Human Rights Commission to advise on the scope for defining, in Westminster legislation, rights supplementary to those of the ECHR, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. It was envisaged that those additional rights, in conjunction with the ECHR, were to "to constitute a Bill of Rights for Northern Ireland."

[543] The term "civil rights" has been defined in the Oxford English Dictionary as including "the political, social and economic rights which are recognised as the entitlement of every member of a community, and which can be upheld by appeal to the law." Relying on this definition, Mr McCrudden, on behalf of the ECNI, argues that the term should be interpreted broadly and should, at least, be informed by the international human rights treaties that the United Kingdom was party to at that time.

[544] If the ordinary meaning of the words civil rights is not apparent the court should look at the text of the agreement as a whole, having regard to its object and purpose, against the political and legal context in which the B-GFA was made. From this, the court must seek to, insofar as it is possible, to ascertain what was in contemplation of the parties.

[545] If one considers the text of the B-GFA as a whole, respect for fundamental human rights is clearly a core objective of the parties to the Agreement, for example, para [2] of the Declaration of Support states:

> "… we firmly dedicate ourselves to the achievement of reconciliation, tolerance and mutual trust, and to the protection and vindication of the human rights of all" (emphasis added).

[546] Similarly, paragraph [2] of the section on Policing and Justice expresses a commitment to a system of criminal justice which is effective, efficient, fair, impartial and "which conforms with human rights norms."

[547] I acknowledge the respondent's contention that these references are not found in the relevant part of the B-GFA referred to in article 2(1) WF, but it seems to the court that they do provide interpretive assistance, having regard to the VCLT, and adopting a generous and purposive interpretative approach.

[548] This is supported, in my view, by the clear objective of the parties to the WF expressed in the preamble. At para [4] the parties affirm:

> "That the Good Friday or Belfast Agreement of 10 April 1998 between the Government of the United Kingdom, the Government of Ireland and the other participants in the multi-party negotiations (the "1998 Agreement"), which is annexed to the British-Irish Agreement on the same date (the "British-Irish Agreement"), including a subsequent implementation agreements and arrangements, should be protected in all its parts" (emphasis added).

[549] This commitment informed the UK's entire approach to the withdrawal from the EU:

> "The UK government's approach to withdrawal from the European Union (EU) has been underpinned by our steadfast commitment to upholding the Belfast ("Good Friday") Agreement ("the Agreement") in all its parts" (emphasis added) (UK's explainer document, para [1]).

[550] Pursuant to article 32 VCLT, the court may also have recourse to supplementary means of interpretation in order to confirm the meaning resulting from the application of article 31. In this respect the court is entitled to take into account the *travaux preparatoires*. Mr McCrudden referred the court to the proposal from the Northern Ireland Women's Coalition (one of the political parties involved in the multi-party talks) which led to the introduction of paragraphs 11 and 12. This proposal follows on from the Women's Coalition's earlier paper to the multi-party talks in which it stated its belief that "victims, just like society as a whole, have interests in justice, in peace building and in achieving a situation where there will be no more victims of political violence." The Women's Coalition have identified that "in order to create a climate of credibility for the rule of law on the exercise of justice", "that it is important to deal with the legacy of the past." The papers continued, "there are a number of incidents inherited from the past that need to be addressed by government and other organisations involved – the issues of alleged collusion; disputed killings and disappeared relatives – all of which require an acknowledgement of the underlying right to truth" (see Northern Ireland Women's Coalition, *Justice, Rights and Safeguards*, Strand 1 Submission, Justice, Rights and Safeguards, Monica McWilliams Papers, Queen's University Belfast, Box 12 MMW, Strand 1 Papers, Agenda Items 5+6, NIWC, Submission).

[551] He also referred to the joint declaration of 15 December 1993 (Downing Street Declaration) as part of *travaux preparatoires* of the B-GFA negotiating process. It is in this document that the term "civil rights" first appears. Thereafter, in the document "A new framework for Agreement: A shared understanding between British and Irish governments to assist discussion and negotiations involving the Northern Ireland parties" dated 22 February 1995 the following appears:

> "50. There is a large body of support, transcending the political divide, for the comprehensive protection and guarantee of fundamental human rights. Acknowledging this, both Governments envisage that the arrangements set out in this Framework Document will be complemented and underpinned by an explicit undertaking in the Agreement on the part of each Government, equally, to ensure in its jurisdiction in the island of Ireland, in accordance with its constitutional arrangements, the systematic and effective protection of common specified civil, political, social and cultural rights. They will discuss and seek agreement with the relevant political parties in Northern Ireland as to what rights should be so specified and how they might best be further protected, having regard to each Government's overall responsibilities including its international obligations. Each Government will introduce appropriate legislation in its jurisdiction to give effect to any such measure of agreement.

> 51. In addition, both Governments would encourage democratic representatives from both jurisdictions in Ireland to adopt a Charter or Covenant, which might reflect and endorse agreed measures for the protection of the fundamental rights of everyone living in Ireland. It could also pledge a commitment to mutual respect and to the civil rights and religious liberties of both communities …"

[552] It will be seen that much of this is reflected in the chapter on rights, safeguards and equality of opportunity.

[553] This material provides some insight into what was ultimately agreed. That said the court has not had the benefit of access to the entirety of all the relevant documents leading to the B-GFA. Whilst this material therefore provides some context, it is of limited weight in carrying out the interpretive exercise.

[554] An additional source of supplementary information is the UK Government's Explainer document on article 2(1). In this explainer, the UK acknowledges its commitment to championing human rights and notes that "the key rights and equality provisions in the agreement are supported by the … ECHR" (para [3]). Discussing the "future-facing elements" of the article 2(1) commitment, para [7] states that, "future developments in best practices in the area of human rights and equalities in the rest of the UK, the EU and rest of the world will be taken into consideration as the [article 2(1)] commitment is implemented." A narrow interpretation of "civil rights" undermines the forward-facing dimension of the non-diminution commitment in article 2(1).

[555] In addition, the test proposed by the UK in the explainer provides this court with interpretative guidance as to how the UK intended article 2(1) to be applied. Paragraph [10] provides for a three part test, the first element of which is formulated as:

> "1. That the right, safeguard or equality of opportunity provision or protection is covered by the relevant chapter of the Agreement."

The word "covered" is a broad one and applying it to the relevant chapter of the B-GFA human rights are undoubtedly within the scope of, and thematically covered in, the relevant section.

[556] An assessment of the first element, however, does not rest solely on what is meant by civil rights.

[557] Paragraphs [11] and [12] are clearly important. Mr Larkin placed significant emphasis on these provisions. They expressly acknowledge the suffering of the victims of violence which obviously includes the applicants in these cases. This is a specific commitment. In Mr Larkin's words, they may be considered to particularise or reinforce the broad sweep of paragraph [1]. The court considers that the human rights of Troubles victims must at a minimum be respected in order to fulfil this commitment.

[558] In the context of victims' rights the Victims' Directive is an important consideration.

[559] In general terms, this Directive lays down minimum standards on the rights, support and protection of victims of crime. Specifically, it provides victims with rights to review a decision not to prosecute (article 11) and a right to a decision on compensation from the offender in the course of criminal proceedings (article 16). This Directive will be discussed further below but it plainly seems to have been within the scope of victims' rights under the rights, safeguards and equality of opportunity chapter.

[560] This is evident from the Government Explainer at paragraph [13] which provides:

> "It should be noted … there are other pieces of EU law that are relevant to the 'rights, safeguards and equality of opportunity" chapter of the Agreement which had been implemented and retained EU law – the EU Withdrawal Act 2018 – or domestic law in Northern Ireland, these include, but are not limited to the Victims' Directive … we do not envisage any circumstances in which those rights would be rolled back. However, provided the rights in question are relevant to the aforementioned chapter of the Agreement, they are in scope of the UK government's commitment that there will be no diminution of rights as a result of the UK leaving the EU."
> [my underlining]

[561] Having considered all these matters I conclude that the first element of the test has been met. Articles 11 and 16 of The Victims' Directive are engaged through the commitment to civil rights and to victims in paras [11] and [12]. The remaining question is whether the victims' fundamental human rights which includes the right to life, the right to be free from torture, cruel, inhuman or degrading treatment, the right to access a court, the right to be free from discrimination and the right to dignity are engaged under the relevant part of the B-GFA. In my view, they are encompassed within the notion of "civil rights" and are protected through the commitment to victims in paragraph [11].

Element 2 – The right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020

[562] Plainly, the rights under articles 2, 3, 6 and 14 ECHR were given effect in domestic law prior to December 2020 under the HRA. Victims also enjoyed a public law right to challenge decisions by the PPS declining to prosecute.

[563] The applicants strongly supported by the NIHRC and ECNI go further and argue that EU law, in the form of the CFR and the Victims' Directive had direct effect in Northern Ireland prior to the end of the transition period (in addition to them serving as underpinnings of Northern Ireland law – the third element of the test). Accordingly, the applicants rely directly on the relevant rights contained therein.

[564] EU law could only have direct effect prior to December 2020 if it enjoyed competence in respect of the relevant matter (see the *Re SPUC* [2022] NIQB 9 at [132] and [2023] NICA 35 at [59])]. In this case the competence is clear. Article 82(2)(b) of the Treaty on the Functioning of the European Union ("TFEU") provides for an explicit EU competence to set minimum standards on the rights of victims of crime. Equally, the CFR has provisions of specific relevance to the rights of victims, namely articles 2, 4 and 47.

[565] Thus, relying on article 13(2) WF, reliance is placed on the CJEU decision in the case of C-38/18, *Gambino*, ECLI:EU:C:2019:628, 29 July 2019 in which the Victims' Directive is treated as having direct effect and is interpreted in conformity with the relevant rights contained in the CFR.

[566] In this regard, the court revisits its approach in the case of *Re Angesom* [2023] NIKB 102 on the issue of direct effect. In that case the applicant, an asylum seeker, was the subject of a specific decision which resulted in him being removed from Northern Ireland to Scotland. The court upheld the decision and found there to be no breach of the applicant's ECHR rights or a diminution of rights under article 2(1) WF on the basis that the applicant could not demonstrate in practice how the removal resulted in an interference with, or a diminution of, the enjoyment of his rights and that this was the consequence of the UK's withdrawal from the EU.

[567] In that case the applicant sought to rely, *inter alia*, on the direct effect of article 7 of the EU Receptions Conditions Directive. This court did no find article 7 to be capable of meeting the conditions of direct effect. It also drew from previous jurisprudence of the European Court of Justice in *Becker v Finanzamt Munster-Innenstadt* [1992] ECR 53 and concluded that the correct domestic implementation of the Directive would preclude the direct effect of the provisions contained therein. However, my attention having been drawn to the case of *Marks & Spencer Plc v Commissioners of Customs and Excise* [2002] ECR I06325, ECLI; EU; C2002 in which the CJEU held that "where the national measures correctly implementing the Directive were not being applied in such a way as to achieve the results sought by it" individuals could continue to directly rely on the provisions of the Directive.

Whilst this would not have altered the conclusion reached by the court in *Angesom*, I accept the approach of the CJEU in *Marks & Spencer Plc* as the correct statement of the applicable law.

[568] Connected to the Victims' Directive, Mr Mercer on behalf of the NIHRC drew my attention to the fact that the Victims' Directive has been implemented in Northern Ireland via the Victim Charter (Justice Act (Northern Ireland) 2015) Order (Northern Ireland) 2015 which was issued by the DoJ under sections 28 and 31 of the Justice Act (Northern Ireland) 2015.

[569] As affirmed by the Northern Ireland Court of Appeal in *Re Brady's Application* [2018] NICA 20 at para [41], the Charter implements relevant provisions of the EU Directive establishing minimum standards on the rights, support and protection of victims and crime.

[570] I am satisfied that the rights relied upon by the applicants were given effect in whole or in part in Northern Ireland on or before 31 December 2020, that is the Victims' Directive, articles 2, 3, 6 and 14 ECHR and articles 1, 2, 4 and 47 CFR.

Element 3 - That Northern Ireland law was underpinned by EU law

[571] For article 2(1) WF to apply, insofar as Northern Ireland law did give effect to a relevant B-GFA right, it must be shown that Northern Ireland law in this respect was "underpinned" by EU law prior to 31 December 2020.

[572] I am satisfied that the rights of victims are underpinned by EU law.

[573] This is clear from the contents of the Victims' Directive. The recital provides at para [8]:

> "Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism recognises that terrorism constitutes one of the most serious violations of the principles on which the Union is based, including the principle of democracy, and confirms that it constitutes, inter alia, a threat to the free exercise of human rights."

[574] At para [11] the recital provides:

> "This Directive lays down minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection."

[575] Para [16] of the recital provides:

> "Victims of terrorism have suffered attacks that are intended ultimately to harm society. They may therefore need special attention, support and protection due to the particular nature of the crime that has been committed against them. Victims of terrorism can be under significant public scrutiny and often need social recognition and respectful treatment by society. Member States should therefore take particular account of the needs of victims of terrorism, and should seek to protect their dignity and security."

[576] Turning to the Directive itself, article 1 imposes an obligation on member states:

> "Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings. The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status."

[577] Article 11 of the Directive under the heading "Rights in the event of a decision not to prosecute" reads as follows:

> "1. Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
>
> 2. Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
>
> 3. Member States shall ensure that victims are notified without unnecessary delay of their right to review, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.

> 4. Where the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law, the review may be carried out by the same authority.
>
> 5. Paragraphs 1, 3 and 4 shall not apply to a decision of the prosecutor not to prosecute, if such a decision results in an out-of-court settlement, in so far as national law makes such provision."

[578] In my view, it is clear that the Victims' Directive is an "underpinning" measure that satisfies the third element. Further, in my view, underpinning of the rights in the B-GFA is found in articles 1, 2, 4 and 47 CFR. Support for victims of crime in and through the criminal process is a competence shared between the EU and member states.

[579] According to article 51 CFR:

> "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

[580] In *Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd) (In Liquidation)* [2012] 1 WLR 3333 at para [28] Lord Kerr delivering the judgment of the Supreme Court stated:

> "28. Although the Charter thus has direct effect in national law, it only binds member states when they are implementing EU law - article 51(1). But the rubric, "implementing EU law" is to be interpreted broadly and, in effect, means whenever a member state is acting "within the material scope of EU law."

[581] Returning to the Victims' Directive Schedule 66 provides:

> "This Directive respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, it seeks to promote the right to dignity, life, physical and mental integrity, liberty and security, respect for private and family life, the right to property, the principle of non-discrimination, the principle of equality between

> women and men, the rights of the child, the elderly and persons with disabilities, and the right to a fair trial."

[582] The rights of victims of crime, recognised in the B-GFA are within the competence of EU law and are underpinned by EU law in the form of the Victims' Directive and the CFR.

Element 4 - That underpinning has been removed, in whole or in part, following withdrawal from the EU

[583] This element is probably best addressed in considering the fifth and sixth elements. However, it is clear that directives are not within the definition of "Direct EU legislation" under section 3(2) of the 2018 Act and do not, therefore, form part of domestic law after IP completion day by virtue of section 3(1).

[584] In addition, by section 5(4) of the 2008 Act, "the Charter of Fundamental Rights is not part of domestic law on or after IP completion day."

Element 5 - This has resulted in the diminution and enjoyment of this right

[585] On this issue, the court takes the opportunity to refine its obiter comments in the case of *Angesom*.

[586] True it is, that the applicants continue to enjoy the protection of ECHR in domestic law. Breach of ECHR rights only entitle an applicant to a declaration of incompatibility. However, a breach of article 2 WF means that the offending provision has been disapplied. As per *De Smith's Judicial Review* (9th Edition, para 14.166):

> "Significantly, assessment of the diminution of rights also requires assessment of the enforcement mechanisms and procedures available to protect those rights …"

In the words of Mr Mercer, on behalf of the NIHRC, if the relevant rights are co-extensive the applicant is entitled to the greater remedy. In light of the court's analysis under the ECHR, having concluded that the applicants have established a breach of articles 2, 3 and 6 of the ECHR it follows there has been a diminution in enjoyment of the rights under articles 2, 4 and 47 of the Charter.

[587] Although decided before the WF entered into force, an analogous approach for the present purposes may be found in *Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777. In that case the court was dealing with potential breaches of article 47 CFR and article 6 ECHR. The Secretary of State accepted that on the facts of the case if the ECHR was violated, so was the CFR. Lord Sumption at para [78] observed:

> "It follows that there is no separate issue as to article 47 of the Charter. The only difference that it makes is that a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied; whereas the remedy in the case of inconsistency with article 6 of the Human Rights Convention is a declaration of incompatibility."

[588] In light of the court's analysis under the ECHR, having concluded that the applicants have established a breach of articles 2, 3 and 6 of the ECHR it follows that there has been a diminution in enjoyment of the rights under articles 2, 4 and 47(2) CFR.

[589] The court does not consider there to be a diminution of the rights protected under articles 1 and 16 of the Victims' Directive. Article 1(2) provides that the rights set out in the Victims' Directive shall apply in a non-discriminatory manner. The court has not found the provisions of the 2023 Act to be discriminatory under article 14 ECHR. In my view, the same reasoning applies in respect of this challenge under the Victims' Directive (see paras [496]-[519] above).

[590] Article 16 of the Victims' Directive requires member states to ensure that victims are entitled to obtain a decision on compensation from the offender and that member states promote measures to encourage offenders to provide adequate compensation to victims. The lead applicants complain that the shutting down of civil redress against perpetrators through section 43 removes this very protection. As such, the challenge relating to article 16 is confined to an assessment of the lawfulness of section 43, a task which has already been undertaken by this court (see paras [414]-415] above). There is a difference, however, in that article 16 only deals with compensation from the offender, and not from the state. The court is unaware of any claim initiated against an offender after the date of First Reading which would give rise to an issue of retrospectivity under article 16 of the Victims' Directive. In any case, as the court has indicated, compensation orders may be made by the criminal courts. Accordingly, the limitations imposed on civil proceedings are lawful and do not breach article 16 of the Victims' Directive.

[591] What is left for the court to consider is whether the impugned provisions of the 2023 Act result in a diminution of article 1 CFR and article 11 of the Victims' Directive.

The right to dignity as a standalone right

[592] The applicants also sought to rely on the right to dignity protected under article 1 CFR. This requires separate consideration owing to the lack of express protection under the ECHR. The applicants argue that their dignity has been taken away by the removal of rights under the 2023 Act. In the respondent's view, the concept of dignity is too broad and an impossible standard to apply, in particular,

when seeking to disapply provisions of primary legislation enacted by sovereign Parliament.

[593] The ECNI also focused on the application of human dignity to the present case. Mr McCrudden detailed in particular, how the right to dignity is now understood as a standalone right, justiciable and inviolable. For example, in *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307, the EWCA upheld the decision of the Upper Tribunal holding that the right to dignity under article 1 CFR continued to apply (following the UK's withdrawal) to the extent that persons with a right of residence are entitled to enjoy that right in a dignified manner, "in the sense of meeting a minimum level of viability" (para [2]). The case concerned a Romanian national, AT, who applied for universal credit as a single person with a dependent child. Her application was refused by the SSWP on the basis she was not "in Great Britain" for the purposes of section 4(1)(c) of the Welfare Reform Act; the relevant provision excluded persons with only limited leave to remain under Appendix EU of the Immigration Rules from the scope of the definition. AT relied on article 13 WA which provides that "Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1) of Directive 2004/38/EC." The Upper Tribunal held that the CFR applied to the right of residence set out in article 13 WA and that article 1, "ensured that the right was rendered effective and could be enjoyed on a continuing basis" (para [16]). The appellant challenged the Upper Tribunal's application of the CFR contending that it does not apply to the WA. The Court of Appeal rejected this argument holding that the Charter applies to the implementation and application of the provisions of WA through article 4 (para [91]).

[594] The court's consideration of the right to dignity turned on the interpretation of a prior CJEU judgment in Case C-709 *CG v The Department for Communities in Northern Ireland* EU:C:2021:602 (15 July 2021) ("CG"). In *CG*, the court applied article 1 CFR:

> "standing alone, to impose a duty of result on the host state to 'ensure' that a person in the situation of CG had a right of residence to 'live in dignified conditions'" (para [72]).

[595] In reaching its conclusion, the court in *AT* made several important points. First, it reaffirmed the CJEU's position in *CG* that article 1 is a freestanding right. At para [105] it stated the following:

> "First, at least at the level of principle, Article 1 is freestanding (see paragraphs [32]-[36] above) as was confirmed by the CJEU in CG (ibid paragraph [89] set out at paragraph [72] above). It is the founding Article of the

> Charter. It is cast in language as unequivocal and emphatic as it is concise: "Human dignity is inviolable." The concomitant duty is expressed in unflinching terms; it "must" be both respected and protected. There is no suggestion that it is to be construed as subordinate to any other Charter provision, such as Article 4. Furthermore, the Explanations (see paragraph [32] above) explicitly say that the right to dignity is both a right in itself and the "real basis" for (other) fundamental rights. None of the other rights can be " used " to "harm" the dignity of a person ie other rights are subordinate to Article 1 and not vice versa. Consistent with this the last sentence of the Explanations stipulates that dignity must therefore be respected, "… even where a right is restricted." In other words, if another Charter right is, properly construed, restricted in a way which undermines dignity then it must be supplemented by Article 1. Dignity and degrading and inhuman treatment are not, in the Charter, treated as legally synonymous."

[596] Second, the court underlined the purpose behind the WA which is to provide for "enhanced rights of enforcement relative to those available under the HRA. Provisions finding their way into domestic law via the Agreement and section 7A EUWA 2018 can be enforced under the conditions set out in Article 4(1) and (2) of the Agreement … which confers direct effect upon litigants and a connected power and duty on national courts to disapply inconsistent domestic law" (para [106]).

[597] Third, following the Upper Tribunal's analysis, Green LJ determined at para [112]:

> "Ultimately, the approach to determining the benchmark for the standard of review under Article 1 must now be found in the judgment of the CJEU in CG which addresses the provisions of law in issue in this case and concerned closely analogous facts (emphasis added). The CJEU did not frame its analysis in terms of degradation or inhumanity. The CJEU applied Article 1 on its own to CG and Article 1 in conjunction with Articles 7 and 24 to the position of mother and children … On the basis of CG the facts relevant to a Charter violation are within a relatively narrow compass and focus upon: the availability of means and resources to meet needs (which would include accommodation); the degree of isolation; and, the degree of dependency of children. The provision of accommodation, such as access to a refuge, will not be treated as sufficient if it is merely temporary. It is right,

> finally, to note that the factors taken into account were those the CJEU considered relevant "in the present case" (paragraph [91]) ie the conclusion whether there was indignity was fact and context specific. It would therefore be wrong to treat paragraphs [92] and [93] as laying down hard and fast rules. They are nonetheless strongly indicative as to how the standard should be applied" (emphasis added).

[598] Despite upholding the findings of the Upper Tribunal, Green LJ was at pains to point out the particular caution which should be exercised when dealing with the right to dignity under article 1 CFR:

> "177 Finally, having come to the conclusion that there is a difference in principle between Article 1 of the Charter and other provisions, in order to address the detailed and extensive arguments of the SSWP under all of the grounds of appeal, there is an important caveat or word of caution to add.
>
> 178. The concept of "dignity", as the Upper Tribunal observed, has a protean character to it. The authors of The EU Charter of Fundamental Rights (ibid – see paragraph [35] above) at paragraph [01.32] say that it is "one of the most difficult concepts to understand and define in law." In the present case the FtT held on the facts of the case that AT was in an undignified position and that her treatment and that of her child fell below the standard required under Article 3 ECHR i.e. degrading and inhuman treatment.
>
> 179. Although it has been necessary to address the detailed arguments of the SSWP this judgment is not the place to explore or seek to define in any greater detail, what the principle of "dignity" entails in practice. Nor is this the case in which to express detailed views on the nature or extent of any daylight existing between Article 1 and other provisions, such as Article 4 (Article 3 ECHR). This might need to be considered in future cases. Finally, nor is this the case in which to explore in detail the extent to which the common law duty of humanity (see paragraph [35] above) would in a future case serve to cover the situation of a person such as AT, though I do agree with the broad observations below on this by Lord Justice Dingemans." [paras [177]-[179]].

[599] In light of the above, *AT*'s helpful exploration of the contours of the right to dignity has limited application. The standard applied in *AT* was whether the respondent could live in dignified conditions. This is not a standard that can be read across to the present case.

[600] According to the ECNI, central to the concept of human dignity, is the idea of human agency and more specifically, the capacity of an individual to act within society; where that capacity to act in a certain way is removed, the right to dignity is breached. The ECNI identifies an effective investigation as one of the primary mechanisms for the restoration of dignity and refers the court to two cases to make good this point. The first is *Re McEvoy* [2023] NICA 66, in which Keegan LCJ cited with approval the first instance judgment of Stephens J in *Jordan* [2014] NIQB 71, where he stated at para [27]:

> "the investigation into the death of a close relative impacts on the next of kin at a fundamental level of human dignity. It is obvious that if unlawful delays occur in an investigation that this will cause feelings of frustration, distress and anxiety."

[601] In the second case of *MA, BB v Secretary of State for the Home Department*, [2019] EWHC 1523, the High Court observed:

> "When dignity and humanity has been stripped one purpose of an effective investigation must be to restore what has been taken away through identifying and confronting those responsible, so far as it is possible."

[602] Whilst certainly not averse to the ECNI's conception of human dignity, the court does have considerable difficulty in using it as the correct standard to apply in the present case. The reference to human dignity by Stephens J, cited with approval by the NICA, is in the context of an assessment of damages for an unlawful delay to the investigation of a Troubles-related death and provides little assistance to this court as to the standard to be applied to an assessment of article 1 CFR as a standalone right. Similarly, in *MA* the reference to dignity arises in connection with the investigatory duty under article 2/3 ECHR, which has already been covered extensively in this judgment. In the absence of a universally accepted legal definition of human dignity and a clear, exacting standard of how the right may be applied in this context, the court is unable to find a substantive breach of article 1 CFR as a standalone right in the 2023 Act. What is at issue is a breach of the State's investigative duties under articles 2/3 of the ECHR and articles 2 and 4 of the Charter.

[603] In addition to the breaches of the ECHR, and the CFR it is argued that the granting of immunity through section 19 of the Act functionally prevents the applicants from availing of the right guaranteed in article 11 of the Victims'

Directive. They can have no effective right to review a decision not to prosecute when immunity from prosecution is granted under the Act. Additionally, it is submitted that section 41, providing that no criminal enforcement action may be taken against any person in respect of the offence, while not necessarily engaging article 2 and 4 CFR in all cases, will introduce an impermissible blanket derogation from article 11.

[604] It is the respondent's case that article 11 is only engaged once "inside the prosecutorial process" and, therefore, does not impair victims access to that right once a case has been referred to the DPP, under section 25 of the 2023 Act. The respondent makes the additional point that nothing in the 2023 Act would prevent the applicants from challenging the decision of the ICRIR not to refer an individual to the prosecutor by way of judicial review. Whilst this possibility remains open, it is argued that the requirements of article 11 continue to be met. In essence, the respondent characterises the provisions of article 11 of the Directive as being fundamentally procedural in nature. Reliance is placed on the case of *R(AC) v DPP* [2018] EWCA Civ 2092, in particular on the pithy statement of Rafferty LJ in *R(AC)* that article 11 VD "does no more than set out procedural rules" and that the provisions should be read deferentially to the system operating in each individual member state (para [46]). The respondent further points out that the Directive does not dictate to member states the offences which should or should not be prosecutable under its own national law.

[605] In *R(AC)* the claimant's husband was convicted of abducting two of her children. She claimed that her husband's sister had encouraged and financed the abduction and sought to review the decision of the Crown Prosecution Service ("CPS") not to charge the sister. However, paragraph 11(iii) of the Victims' Right to Review Guidance ("VRR") provided that the right to request a review "did not apply to cases where charges had been brought against some, but not all, possible suspects." Relying on article 11 of the Victims' Directive, the claimant sought a declaration that para 11 of the VRR was unlawful. In dismissing the appeal, Rafferty LJ held that article 11 "did not accord victims a right of review in all cases but contemplated a right of review in accordance with the victims' role in the relevant criminal justice system" and that para 11(iii) of the VRR was a proportionate way to meet concerns relating to resources and/or operational discretion (at p. 917, F-G).

[606] At paras [46]-[47], Rafferty LJ held:

> "46. Article 11 does no more than set out procedural rules. The scheme read as a whole is designed to be sensitive to differing systems within Member States, as the Divisional Court found.
>
> 47. … As I have set out, the court considered that particular circumstances permitted a Member State to identify the scope of any right. Once that is understood it

> must follow, as the Divisional Court identified, that a discretion can be afforded not to review. No aspect of this reasoning seems to me inimical to the general flexibility evident within and afforded by the Directive. Further support for that conclusion lies in a reading of Article 11(1) which, as I have also set out above, reads (and the Divisional Court emphasised) that procedural rules for a review are set by national law."

[607] In *R(AC)* the court was dealing with a situation where the CPS had initially exercised its discretion not to prosecute, a decision which was communicated to the claimant. Indeed, the CPS, in an attempt to avoid litigation agreed to carry out "an exceptional course of ad hoc review outside the VRR" whereby an independent prosecutor concluded that there was no reasonable prospect of a conviction. This decision was unchallenged by the claimant. Crucially, in that case discretion could be (and was) exercised by the CPS whether to prosecute the alleged accomplice. In contrast, the 2023 Act purports to remove the discretion of the PPS to decide whether to prosecute a particular category of offenders by the granting of immunity. No review is available in respect of the effects of sections 19 and 41 (nor in respect of those reviews not leading to section 25 referrals).

[608] It is correct that article 11(1) and article 11(2) both permit procedural rules to be established by national law. However, the substantive entitlement embedded in article 11 is a matter for implementation only and may not be taken away by domestic law. The Directive pre-supposes the possibility of a prosecution. Any removal of this possibility is incompatible with the Directive. The DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU, published by the European Commission in December 2013 states that article 11 of the Directive "respects national <u>procedural</u> autonomy" (p. 30). The same guidance document provides that any transition measures should respect the general principles of EU law and the CFR (p. 1).

[609] These effects are incompatible with the Directive which has direct effect in light of the case of *Marks & Spencer Plc v Commissioner of Customs & Excise* [2002] ECR I06325, ECLI; EU; C2002.

[610] In all these circumstances, the court concludes that sections 8, 19, 20, 21, 22, 39, 41, 42(1) of the 2023 Act have resulted in a diminution in enjoyment of the right or rights in the relevant parts of the B-GFA.

Element 6 – This diminution would not have occurred had the UK remained in the EU

[611] The test for whether any diminution "results" from the UK's withdrawal from the Union, is whether "but for" the UK's withdrawal, the diminution and protection

"would have been able to occur legally" (*De Smith, Judicial Review (9th edition)*, at para 14.175).

[612] The court concludes that had the United Kingdom remained in the EU it could not have acted incompatibly with the Victims' Directive nor in a manner incompatible with the CFR. In enacting the provisions referred to above it has so acted incompatibility and therefore, the sixth element has been established.

[613] In conclusion, the remedy in respect of sections 7(3), 8, 12, 19, 20, 21, 22, 39, 41, 42(1) of the 2023 Act is disapplication.

Article 2(2) of the WF

[614] At the hearing Mr Southey, on behalf of *Gilvary*, also argued that the 2023 Act breaches article 2(2) WF.

[615] Article 2(2) provides:

> "The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards."

[616] In the B-GFA, reference is made to the NIHRC and its role. Section 5 states that its role will include:

> "… keeping under review the adequacy and effectiveness of laws and practices … and, in appropriate cases, bringing court proceedings."

[617] It is argued that this demonstrates that the NIHRC has a key role to play in safeguarding the rights protected by article 2(1) WF.

[618] Consistent with the provisions of the B-GFA, section 69 of the Northern Ireland Act 1998 gives the NIHRC a range of powers and functions intended to safeguard human rights (including the rights in relation to torture). These powers and functions include:

(a) Reviewing the adequacy and effectiveness of Northern Ireland of law and practice relating to the protection of human rights.

(b) Bringing proceedings involving law and practice relating to the protection of human rights.

(c) Conducting investigations.

[619] The issue raised by Mr Southey is whether by enacting the 2023 Act the state has continued "to facilitate" the work of the NIHRC.

[620] Mr McGleenan objected to the court granting leave on this issue. The Order 53 Statement made a reference to article 2 of the Windsor Framework, without more and he argued that specific leave of the court was required with a direction that the matter be particularised in an amended Order 53 Statement.

[621] I agreed to hear argument on the matter in the course of the hearing.

[622] It is relevant that the NIHRC did not seek to raise this argument in its lengthy written submission. The court did receive a subsequent note indicating that "the Commission agrees that a secondary impact of the legislation may restrict its ability to exercise its statutory powers under the Northern Ireland Act 1998 and therefore may be in breach of article 2(2)." It reserved it position pending hearing from the respondent.

[623] However, I have concluded that there is no merit in this argument. I do not consider that anything in the 2023 Act impedes the work of the NIHRC or frustrates its function in practice.

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

[625] Therefore, leave is refused in respect of this ground.

The constitutional arguments

[626] The constitutional argument, advanced by Mr Larkin and Mr Southey, is founded on the premise that the court can strike down legislation where it conflicts with a fundamental constitutional principle, in this case, the right of access to the courts. The constitutional right of access to the courts is a longstanding principle of the common law. It is "inherent in the rule of law" itself, as recognised by the UKSC in *R (Unison) v Lord Chancellor* [2020] AC 869 at para [66].

[627] Parliamentary sovereignty, so the applicants contend, is not unlimited and remains subject to limitations imposed by Parliament itself, for example, through the

HRA and importantly, for the present purposes, also by the common law. Whilst Mr Larkin and Mr Southey admit that there is no instance of UK judges exercising such a power to strike down an Act of Parliament on the basis that it is contrary to the rule of law and therefore unconstitutional, the possibility has not been ruled out by the courts.

[628] Thus, in *Dr Bonham's Case* (Thomas & Fraser edition, Volume 4 (1826), p. 367 at 375) the possibility of common law providing the basis for a court to "ajudge" an Act of Parliament as "utterly void" is first contemplated by Coke CJ. Further reliance is placed on several more recent authorities, in particular *Jackson v Attorney General* [2006] 1 AC 262, *Moohan v Lord Chancellor* [2015] AC 901 and *(Privacy International) v Investigatory Powers tribunal* [2020] AC 491.

[629] The applicants draw support from obiter dicta in *Jackson*, speculating that the courts have the authority to strike down a provision of primary legislation if it violates fundamental constitutional principles. Most notably, Lord Steyn at para [101] observed:

> "The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal."

[630] Lord Hope, going further than Lord Steyn, explained that the "rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based." (para [107]). Lady Hale, in similar terms stated that the "courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny." (para [159]).

[631] In *Moohan*, which concerned the right of convicted prisoners to vote in the Scottish independence referendum, Mr Larkin emphasised the statement of Lord Hodge at para [35]:

> "While the common law cannot extend the franchise beyond that provided by parliamentary legislation, I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful. The existence and extent of such a power is a matter of debate, at least in the context of the doctrine of the sovereignty of the United Kingdom Parliament: see *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, Lord Hope of Craighead DPSC (paras 49-51) and in relation to the Scottish Parliament Lord Reed JSC: paras 153—154. But such a circumstance is very far removed from the present case, and there is no need to express any view on that question."

[632] Finally, the applicants rely heavily on the approach endorsed by three judges (Lord Carnwath, Lady Hale and Lord Kerr) in *Privacy International*:

> "144. In conclusion on the second issue, although it is not necessary to decide the point, I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law."

[633] In the applicants' view, the provisions of the 2023 Act which shut down recourse to civil and criminal courts are "fundamentally antithetical" to the rule of law and should, in line with the power identified by the courts in the above authorities, be struck down.

[634] Mr McGleenan, dealing with the matter in short shrift, took the court to extracts of the seminal work of Lord Bingham's *The Rule of Law*. His comprehensive treatment of the matter, Mr McGleenan argues, demonstrates that there is no authority for the proposition advanced by the applicants. For example, Lord Bingham, addressing *Dr Bonham's case*, notes that:

> "It is not entirely clear what Coke meant; it appears that this observation may have been added after judgment had been given; it did not represent his later view; it was relied on as one of the reasons for his dismissal as Chief Justice of the King's Bench; and it was not a view which commanded general acceptance even at the time … there is no recorded case in which the courts, without the authority of Parliament, have invalidated or struck down a statute … As Goldsworthy demonstrates, to my mind wholly convincingly, the principle of parliamentary sovereignty has been endorsed without reservation by the greatest authorities on our constitutional, legal and cultural history." (*The Rule of Law*, p. 163).

[635] Lord Bingham further rejected the views espoused by Lord Steyn, Lord Hope and Lady Hale in *Jackson*. Writing extrajudicially in his book, he observed that there was no authority for these propositions and that the principle of Parliamentary sovereignty could not be:

> "A creature of the judge made common law which judges can alter: if it were, the rule could be altered by statute, since the prime characteristic of any common law rule is that it yields to a contrary provision of statute. To my mind, it has been convincingly shown that the principle of parliamentary sovereignty has been recognized as fundamental in this country not because the judges invented it but because it has for centuries been accepted as such by judges and others officially concerned in the operation of our constitutional system. The judges did not by themselves establish the principle and they cannot, by themselves, change it." (*The Rule of Law*, p. 167).

[636] It is pointed out by Mr McGleenan that each time such a course of action has been contemplated by the courts in the case law relied upon by the applicants, it appears in the form of "reflective ruminations" to which no precedential weight can be attached. In the respondent's view, in cases where the compatibility of primary legislation with the ECHR is under challenge, Parliament has provided that the appropriate remedy is a declaration of incompatibility under section 4 HRA.

Consideration

[637] I share the reservations of Lord Bingham and the views expressed by Professor Goldsworthy in *The Rule of Law*:

> "What is at stake is the location of ultimate decision-making authority – the right to the 'final word' – in a legal system. If the judges were to repudiate the doctrine of parliamentary sovereignty, by refusing to allow Parliament to infringe unwritten rights, they would be claiming that ultimate authority for themselves. In settling disagreements about what fundamental rights people have, and whether legislation is consistent with them, the judges' word rather than Parliament's would be final. Since virtually all significant moral and political controversies in contemporary Western societies involve disagreements about rights, this would amount to a massive transfer of political power from parliaments to judges. Moreover, it would be a transfer of power initiated by the judges, to protect rights chosen by them, rather than one brought about democratically by parliamentary enactment or popular referendum. It is no wonder that the elected branches of government regard that prospect with apprehension." (p. 167-168).

[638] However, even if I was sympathetic to the argument, in my view, the applicant's reliance on the above authorities do not support the existence, much less define the scope, of a power to declare unlawful provisions of primary legislation on the basis that they come into conflict with the constitutional right of access to the courts.

[639] Parliamentary sovereignty was reaffirmed by the Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 at paras [42]–[43] (*Miller No 1*) and in *R (Miller) v The Prime Minister* (*No 2*) [2020] AC 373 at para [41] as being a fundamental principle of the UK constitution. More recently, in *Re Allister*, Lord Stephens (with whom Lord Reed, Lord Hodge, Lord Lloyd-Jones and Lord Sales agreed) considered that:

> "The most fundamental rule (emphasis added) of UK constitutional law is that Parliament, or more precisely the Crown in Parliament, is sovereign and that legislation enacted by Parliament is supreme" (para [66]).

[640] Touching on the issue more specifically, Stephens LJ in *Re JR80* [2021] NI 115 discussed the question of whether there are limits to parliamentary sovereignty at

common law. His exposition of the case law relied upon by the applicants is instructive:

> "[52] In *R (Jackson & others) v Attorney General* [2006] 1 A.C. 262 the question was whether the Hunting Act 2004 was invalid it being contended that its enactment without the consent of the House of Lords was not in accordance with the provisions of section 2 of the Parliament Act 1911. The principle in *Pickin* that the courts in this country have no power to declare enacted law to be invalid was affirmed by Lord Bingham of Cornhill at page 281 paragraph [27]. However, the issue as to whether the Hunting Act 2004 had been passed in accordance with the Parliament Act 1911 was justiciable as it concerned the proper interpretation of section 2(1) of the 1911 Act … It can be seen that the issue in Jackson turned on the proper construction of section 2 of the 1911 Act which is a "question of law which cannot, as such, be resolved by Parliament." On that basis Jackson authoritatively defines one particular circumstance in which the courts will hear and give judgment upon the question as to whether an Act of Parliament is invalid. However, on an obiter basis Lords Steyn and Hope raised questions as to whether there were other circumstances in which the courts could declare an Act of Parliament to be invalid … It can be seen that *Jackson* did not decide that there was a common law exception to the principle that "the courts in this country have no power to declare enacted law to be invalid" but even if there was such an exception the threshold for its operation is extraordinarily high…
> (emphasis added)
>
> [53] A common law exception to Parliamentary sovereignty was also considered obiter by Lord Hodge in *Moohan v Lord Advocate* [2015] AC 901 at 925 paragraph [35] … He added that the "existence and extent of such a power is a matter of debate, at least in the context of the doctrine of the sovereignty of the United Kingdom Parliament" but that "such a circumstance (was) very far removed from the present case" so that there was "no need to express any view on that question." It can be seen that Moohan is not authority for either the existence or extent of such a power but rather gives another illustration of the extraordinarily high threshold for the operation of such a power if it did exist."

[641] Given the foregoing, this leaves the applicant with the approach of Lord Carnwath in *Privacy International*. However, the *obiter* comments relied upon are similarly expressed in hypothetical terms and deal with a different factual scenario than the one before this court. The case concerned the interpretation of section 67(8) of the Regulation of Investigatory Powers Act 2000, and whether (i) this provision operated to oust the supervisory jurisdiction of the High Court to quash a judgment of the Investigatory Powers Tribunal by judicial review for errors of law, and (ii) if so, whether it was legally permissible for Parliament to do so by statute. Section 67(8) provides,

> "Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."

[642] Following the approach of the House of Lords in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, on the first question, the majority held that section 67(8) does not oust the supervisory jurisdiction of the High Court for errors of law on the basis that a determination vitiated by any error of law was not to be treated as a "determination" for the purposes of section 67(8); "In other words, the reference to such a determination was to be read as a reference only to a legally valid determination" (para [105]). Lord Carnwath confirmed the existence of a common law presumption against the ousting of the jurisdiction of the High Court (para [107]), citing with approval, the approach taken in *Cart v The Upper Tribunal* [2011] UKSC 28 which stated that judicial review can only be excluded by the "most clear and explicit words" (para [111]). This finding rendered discussion on the second issue "strictly unnecessary" (para [113]). Lord Carnwath, however, proceeded to expand on the notion that "it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review" (para [131]).

[643] In my view, this decision is of limited assistance to the applicants. It is concerned with statutory exclusion of judicial review, an issue which does not arise in the present case. Moreover, there is little suggestion or authoritative support for the proposition, outside the context of ouster clauses, that the courts can rule that an Act of Parliament is contrary to the rule of law and therefore, unconstitutional. Such an argument would be contrary to the recent reaffirmation of the principle of sovereignty by the Supreme Court in *Miller No 1*, *No 2* and *Re Allister*. Rather, *Privacy International* serves as confirmation that the courts will prevent an interpretation of a statutory provision resulting in the exclusion of the supervisory jurisdiction of the High Court to review decisions of inferior courts for errors of law; I note, however, that the courts have not considered this appropriate where the language used in an Act of Parliament is sufficiently "clear and explicit."

[644] The circumstances giving rise to this judgment demonstrate that Parliament itself has provided the court with the tools to scrutinise the legality of the provisions of the 2023 Act in line with the scope prescribed by the legislature under section 4 HRA and section 7A EUWA 2018. The latter, as previously discussed, confers the power to "subjugate" provisions of primary legislation which are incompatible with the WA/WF. This approach is entirely consistent with "the core tenets of parliamentary sovereignty, as affirmed by recent authority" (see Keegan LCJ in *Re Allister* [2022] NICA 15, para [191] and Lord Stephens in *Re Allister* at para [10]). The relief sought by the applicants in respect of this element of their challenge may be obtained, if successful, on the constitutionally safe ground provided by section 7A EUWA 2018 and section 4 HRA. It is, therefore, unnecessary for the court to explore this question further which so far has been confined to legal theory.

Fitzsimmons

Factual background

[645] This challenge raises a discrete issue under sections 46 and 47 of the 2023 Act. These provisions appear under the crossheading "Interim Custody Orders" ("ICO") and deal directly with the validity of ICOs made pursuant to Article 4(1) of the Detention of Terrorists (Northern Ireland) Order 1972 ("the 1972 Order") and paragraph 11(1) of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973 ("the 1973 Act").

[646] On 8 September 1975, the applicant was convicted of an offence of attempting to escape from detention, contrary to paragraph 38(a) of the 1973 Act and common law. He received a sentence of nine months' imprisonment. His detention was founded on an ICO dated 1 March 1973. Such detentions were more commonly referred to as "internment without trial." The ICO, which was made and signed by a Parliamentary Under Secretary of State, included the following rehearsal:

> "THE SECRETARY OF STATE in pursuance of Article 4(1) of the Detention of Terrorists (Northern Ireland) Order 1972 hereby orders the detention of Patrick Fitzsimmons …"

[647] On 13 May 2020, the Supreme Court delivered judgment in *R v Adams* [2020] UKSC 19 holding that the ICOs issued under Article 4(1) of the 1972 Order were required to be made (as opposed to being signed) by the Secretary of State personally.

[648] Following this decision, the applicant's conviction was quashed by the Court of Appeal on 14 March 2022 after an extension of time to appeal was granted. Further, at the time the present proceedings were instituted the applicant had two extant actions: the first seeking damages for false imprisonment and a breach of article 5 ECHR (Writ of Summons issued 10 March 2022 and the second seeking

compensation for miscarriage of justice under section 133 of the Criminal Justice Act 1988 (application lodged 27 June 2023).

The Adams litigation

[649] An understanding of two cases concerning Mr Gerard Adams is necessary to place the applicant's claim in its context. This court has summarised the factual matrix of both decisions in the second relevant case, *Re Adams* [2023] NIKB 53 at paras [7]-[23]. The following points bear repeating.

[650] More than four decades after his convictions for attempting to escape from detention, Mr Adams sought and was granted an extension of time within which to appeal. The issue emerged as a result of legal advice obtained under the '30-year rule' from JBE Hutton QC (later Lord Hutton of Bresagh) who was the legal adviser to the Attorney General. Mr Hutton pointed out that "a court would probably hold that it would be a condition precedent to the making of an ICO that the Secretary of State should have considered the matter personally."

[651] Mr Adams' appeal was advanced on this basis. He contended that the condition precedent of the Secretary of State's personal consideration was not established in evidence at his trial, and that his convictions were, accordingly, unsafe.

[652] A "note for the record" dated 17 July 1974, disclosed in advance of the applicant's appeal confirmed that, in fact, the Secretary of State had not given personal consideration to the applicant's case. A further document was disclosed headed "Legality of ICOs", dated 19 July 1974 which revealed that the Attorney General relied on the "presumption of law that any instrument which appears on the face to have been properly executed must be assumed to comply with any necessary prior procedures." It was on this basis that the decision was made to proceed with the prosecution against Mr Adams.

[653] The Court of Appeal dismissed the applicant's appeal (see [2018] NICA 8) holding that the *Carltona* principle applied and that the Minister of State was entitled to make the decision to authorise the ICO. Importantly, the Court of Appeal made clear that, had it found in favour of the appellant's argument on *Carltona* it would have rejected the respondent's resistance to the appeal on the basis of the presumption of regularity:

> "54. The presumption is that all things are presumed to have been lawfully done, unless proved to the contrary. However, this presumption is displaced where there is evidence to the contrary. In the present case it is apparent that the Secretary of State did not consider the appellant's case on the making of the ICO. Accordingly, the respondent may not rely on the presumption of regularity

> as to the making of the ICO by the Secretary of State personally."

[654] The respondent's argument based on the presumption of regularity was not pursued before the Supreme Court.

[655] Mr Adams was successful on appeal to the Supreme Court. Lord Kerr, delivering the unanimous decision of the court, based his conclusion on a reading of the relevant statutory provisions. In the court's view, the *Carltona* principle was displaced by the "unmistakeably clear" wording of the statutory language (paras [25]-[26]). Lord Kerr noted further that "the power invested in the Secretary of State by Article 4(1) was a momentous one" (para [38]) and accordingly, his convictions were quashed by order on 13 May 2020.

[656] The second decision concerns a claim brought by Mr Adams under section 133 of the Criminal Justice Act 1988. Section 133(1) imposes a duty on the DoJ to pay compensation,

> "when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice."

[657] Following the reversal of his conviction, Mr Adams sought compensation under section 133(1). By letter dated 15 December 2021, the DoJ confirmed that compensation should be refused as his conviction was overturned, "on the basis of a legal ruling on facts known all along, and not on the ground that a newly discovered fact shows beyond reasonable doubt that there has been a miscarriage" (see para [23]).

[658] On 28 April 2023, this court, satisfied that the applicant met the test for compensation under section 133(1), quashed the decision of the DoJ (see *Re Adams' Application* [2023] NIKB 53 at para [64]). The DoJ gave notice of an appeal against this decision on 8 June 2023. Mr Sayers explained that the DoJ sought to advance the argument on appeal that sections 46 and 47 of the 2023 Act renders the entire appeal academic. The Court of Appeal gave judgment on 26 February 2024. It refused to grant an indeterminate stay in relation to the appeal on the grounds that it was now academic as a result of sections 46 and 47.

The statutory scheme

[659] Sections 46 and 47 (with the exception of 47(5)) came into force two months after the date the Act was given Royal Assent (18 November 2023). Section 46 provides the following:

"**Interim custody orders: validity**

(1) This section applies in relation to the functions conferred by—

(a) Article 4(1) of the 1972 Order, and

(b) paragraph 11(1) of Schedule 1 to the 1973 Act, (which enabled interim custody orders to be made, and which are referred to in this section as the "order-making functions").

(2) The order-making functions are to be treated as having always been exercisable by authorised Ministers of the Crown (as well as by the Secretary of State).

(3) An interim custody order is not to be regarded as having ever been unlawful just because an authorised Minister of the Crown exercised any of the order-making functions in relation to the order.

(4) The detention of a person under the authority of an interim custody order is not to be regarded as having ever been unlawful just because an authorised Minister of the Crown exercised any of the order-making functions in relation to the order.

[…]

(7) In this section and section 47—

"1972 Order" means the Detention of Terrorists (Northern Ireland) Order 1972 (S.I. 1972/1632 (N.I. 15));

"1973 Act" means the Northern Ireland (Emergency Provisions) Act 1973;

"authorised Minister of the Crown" means a Minister of the Crown authorised to sign interim custody orders—
[…]"

[660] Section 47 sets out the consequences flowing from the above in relation to extant and future criminal and civil proceedings:

"**Interim custody orders: prohibition of proceedings and compensation**

> (1) On or after the commencement day, a civil action may not be continued or brought if, or to the extent that, the claim that is to be determined in the action involves an allegation that—
>
> (a) the person bringing the action, or another person, was detained under the authority of an interim custody order, and
>
> (b) that interim custody order was unlawful because an authorised Minister of the Crown exercised any of the order-making functions in relation to the order.
>
> (2) On or after the commencement day, criminal proceedings relating to the quashing of a conviction may not be continued or brought if, or to the extent that, the grounds for seeking to have the conviction quashed involve an allegation that—
>
> (a) the person bringing the proceedings, or another person, was detained under the authority of an interim custody order, and
>
> (b) that interim custody order was unlawful because an authorised Minister of the Crown exercised any of the order-making functions in relation to the order."

[661] Section 47(3) provides a saving clause for criminal proceedings at pre-commencement stage, which is defined in subsection (6) as a proceeding for which leave was given before the commencement day, or which followed from a referral made by the Criminal Cases Review Commission before the commencement day. Section 47(4) states:

> "(4) On or after the commencement day, no compensation for a miscarriage of justice is to be paid in respect of a conviction that has been reversed solely on the ground that an interim custody order was unlawful because an authorised Minister of the Crown exercised any of the order-making functions."

Grounds of challenge

[662] The applicant challenges the decision of the respondent to enact sections 46(2), (3), (4) and 47(1) and (4) on the basis that the retrospective/retroactive effect of the impugned provisions are incompatible with articles 6 and 7 ECHR and A1P1. The applicant seeks a declaration under section 4 HRA to that effect.

Relevant authorities

Article 6 and A1P1

[663] The contours of the right to access a court, protected under article 6, are laid out above in the section discussing section 43. Similarly, the relevant principles of proportionality relied upon by this court to guide its assessment are also set out in that section. At the outset, the respondent accepts that the applicant's article 6 rights are plainly engaged by sections 46 and 47.

A1P1

[664] A1P1 permits an individual to be deprived of "the peaceful enjoyment of his possessions" only "in the public interest and subject to the conditions provided for by law and by the general principles of international law." The concept of a 'possession' is flexible and extends to a right to pursue a legal claim which has a sufficient basis in national law. For example, in *Kopecky v Slovakia* [GC] (Application no. 44912/98) (28 September 2004), the Grand Chamber noted:

> "'Possessions' can be either 'existing possessions' or assets, including claims, in respect of which the applicant can argue that he or she has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right." (para [35]).

[665] The Grand Chamber further observed at para [48]:

> "Another aspect of the notion of "legitimate expectation" was illustrated in Pressos Compania Naviera S.A. and Others v. Belgium (judgment of 20 November 1995, Series A no. 332, p. 21, § 31). The case concerned claims for damages arising out of accidents to shipping allegedly caused by the negligence of Belgian pilots. Under the domestic rules of tort, such claims came into existence as soon as the damage occurred. The Court classified the claims as "assets" attracting the protection of Article 1 of Protocol No. 1. It then went on to note that, on the basis of a series of decisions of the Court of Cassation, the applicants could argue that they had a "legitimate

> expectation" that their claims deriving from the accidents in question would be determined in accordance with the general law of tort.
>
> The court did not expressly state that the "legitimate expectation" was a component of, or attached to, a property right as it had done in *Pine Valley Developments Ltd and Others* and was to do in *Stretch* (see references in paragraphs 45 and 46 above). It was however implicit that no such expectation could come into play in the absence of an "asset" falling within the ambit of Article 1 of Protocol No. 1, in this instance the claim in tort. The "legitimate expectation" identified in *Pressos Compania Naviera S.A. and others* was not in itself constitutive of a proprietary interest; it related to the way in which the claim qualifying as an "asset" would be treated under domestic law and in particular to reliance on the fact that the established case-law of the national courts would continue to be applied in respect of damage which had already occurred.
>
> […]
>
> 52. In the light of the foregoing, it can be concluded that the Court's case-law does not contemplate the existence of a "genuine dispute" or an "arguable claim" as a criterion for determining whether there is a "legitimate expectation" protected by Article 1 of Protocol No. 1. The court is therefore unable to follow the reasoning of the Chamber's majority on this point. On the contrary, the Court takes the view that where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it." [emphasis added]

[666] In *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom* - 21319/93, 21449/93 and 21675/93, the court found that at the time of instituting certain proceedings, the applicants could not be said to have had a legitimate expectation that their claims would be determined in accordance with the law as it stood:

> "By that time Parliament had shown its continuing resolve to reassert its original intention … [A] retroactive amendment of the law which has the effect of extinguishing an existing claim that is before the domestic

> courts, will not necessarily contravene Article 1 of Protocol No. 1. If the applicant is unable to show a legitimate expectation that his claim would be determined in accordance with the law as it stood at the moment that he commenced proceedings, the claim may not constitute a 'possession' for the purposes of Article 1 of Protocol No. 1." (para [70]).

[667] The case of *Draon v France* (Application no. 1513/03) (6 October 2005) concerned the birth of a child with a disability not detected during pregnancy due to prenatal diagnostic negligence. The applicants claimed compensation but in the course of proceedings, legislation applicable to pending cases was enacted overruling, inter alia, the effect of a judgment of the Conseil d'Etat. It was concluded that the legislature:

> "… thereby deprived the applicants of an existing 'asset' which they previously possessed, namely an established claim to recovery of damages which they could legitimately expect to be determined in accordance with the decided case-law of the highest courts of the land."

[668] The court engaged in a two-stage consideration of whether the interference was justified commencing with the requirement that the aim be in the public interest and secondly, whether the public interest aim was of sufficient weight for the court to be able to find the interference proportionate (see para [77]).

[669] The court is mindful that where consideration of article 6 and A1P1 arise together in the context of retroactive legislation, the same analytical framework may be applied to both. Thus, the ECHR Guide on A1P1 provides at para [244]:

> "The adoption of a new retroactive law that regulates the impugned situation while proceedings concerning a proprietary interest of the applicant are pending, may constitute a violation of both Article 6 and Article 1 of Protocol No. 1, when the adoption of the law is not justified by compelling reasons of general interest and poses an excessive burden on the applicant (*Caligiuri and Others v Italy*, § 33)"

[670] The appropriate test in this context for a breach is laid out by the Grand Chamber of the European Court in *Vegotex International SA v Belgium* 76 EHRR 15. The case concerned tax assessment proceedings. In October 1995 the applicant was ordered to pay a tax surcharge which was disputed by the applicant. On 24 October 2000, the tax authorities served the applicant company with a payment order. This had the effect of "interrupting the limitation period" after which the debt would have become time barred. This was the common administrative practice at the time.

However, on 10 October 2002, the Court of Cassation ruled against this practice finding that a payment order did not interrupt the five-year limitation period where the tax assessment was disputed. This prompted a response from the legislature who introduced a new provision in 2004 to the effect that a payment order made in respect of a disputed tax debt constituted a "valid act interrupting the limitation period." The gravamen of the applicant company's complaint was that this applied retrospectively to tax disputes which had become time-barred such as in the applicant company's case. In dealing with this issue, the court set out the relevant test:

> "92. In the context of civil disputes, the Court has repeatedly ruled that although, in principle, the legislature is not prevented from regulating, through new retrospective provisions, rights derived from the laws in force, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute, save on compelling grounds of the general interest (emphasis added) (see *Stran Greek Refineries and Stratis Andreadis v Greece*, 9 December 1994, § 49, Series A no. 301-B; *Zielinski and Pradal* and *Gonzalez and Others v France* [GC], nos. 24846/94 and 9 others, § 57, ECHR 1999-VII; *Scordino v Italy* (no. 1) [GC], no. 36813/97, § 126, ECHR 2006-V; and, more recently, *Dimopulos v Turkey*, no. 37766/05, § 45, 2 April 2019, and *Hussein and Others v Belgium*, no. 45187/12, § 60, 16 March 2021).
>
> 93. There are dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party, including where the effect is to make pending litigation unwinnable (see *National & Provincial Building Society, Leeds Permanent Building Society* and *Yorkshire Building Society v the United Kingdom*, 23 October 1997, § 112, Reports of Judgments and Decisions 1997-VII – hereafter "Building Societies"). Respect for the rule of law and the notion of a fair trial therefore require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection (emphasis added) (ibid., and see also *Maggio and Others v Italy*, nos. 46286/09 and 4 others, § 45, 31 May 2011).

> 94. The Court has found that those principles, which are essential elements of the concepts of legal certainty and protection of litigants' legitimate trust, are also applicable to criminal proceedings (see *Scoppola v Italy* (no. 2) [GC], no. 10249/03, § 132, 17 September 2009; see also, to similar effect, *Biagioli v San Marino* (dec.), no. 8162/13, §§ 92-94, 8 July 2014, and *Chim and Przywieczerski v Poland*, nos. 36661/07 and 38433/07, §§ 199-207, 12 April 2018)."

[671] At para [108], the court highlighted several elements relevant to an assessment of whether an impugned legislative intervention is justified on compelling grounds of general interest:

> "The court will assess … whether or not the line of case-law overturned by the legislative intervention complained of had been settled (see paragraphs 109-112 below); the manner and timing of the enactment of the legislation (see paragraphs 113-114 below); the foreseeability of the legislature's intervention (see paragraphs 115-119 below); and the scope of the legislation and its effects (see paragraphs 120-122 below)."

[672] The Grand Chamber unanimously held that there was no violation of article 6 ECHR in relation to the legislature's intervention during the appeal proceedings. The court found that,

> "73 … By enacting the retrospective provision in question, the legislature sought to counteract the effect of that Court of Cassation ruling, which itself was retrospective, and to reaffirm the legality of an administrative practice that had been followed hitherto and the legitimacy of which had not seriously been called into question (see the Constitutional Court judgment of 7 December 2005, points B.19.1-B.19.4 of the reasoning, paragraph 38 above). Thus, the aim of the legislature's intervention was to reassert the administrative authorities' original intention. Accordingly, it was not unforeseeable (see, to similar effect and mutatis mutandis, OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and Others, cited above, § 72).
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> 74. The Court must also have regard to the fact that what was at stake was not simply the protection of the State's financial interests (see, conversely, Pressos Compania Naviera S.A. and Others v. Belgium, 20 November 1995,

Series A no. 332, in which the State's liability was in issue, and Maggio and Others, cited above, in which the legislature sought to restore balance in the social-security system). The aim in the present case was also to ensure that taxes were paid by those who were liable for them (see paragraph 40 above).

75. The legislature's intervention was designed to ensure legal certainty (see paragraph 73 above) and, as observed by the Constitutional court, to prevent arbitrary discrimination between different taxpayers (see the Constitutional Court judgment of 7 December 2005, point B.19.5 of the reasoning, cited at paragraph 38 above). These aims on the part of the legislature are to be understood in the light of the timeline in the present case. On 24 October 2000 the payment order was served on the applicant company, stating specifically that it was aimed at interrupting the limitation period. The change in the case-law of the Court of Cassation occurred on 10 October 2002, while the applicant company's application was pending before the Court of First Instance. There is no indication in the case file that the applicant company pleaded before the Court of First Instance that its debt had become time-barred. This would suggest, as observed by the Constitutional Court (see point B.19.11 of the reasoning of the judgment cited above) that it considered, like other taxpayers, that the payment order had interrupted the limitation period. It was only subsequently, in its notice of appeal of 15 April 2004, that the applicant company referred for the first time to the new case-law of the Court of Cassation and inferred from it that the debt had become time-barred on 15 February 2001, that is to say, even before the delivery of the Court of Cassation judgment of 10 October 2002. Section 49 of the Miscellaneous Provisions Act of 9 July 2004 subsequently entered into force on 25 July 2004, before the Court of Appeal had given its ruling.

76. It therefore appears that, until the Court of Cassation judgment of 10 October 2002, the applicant company itself considered the limitation period to have been interrupted by the payment order of 24 October 2000. Having hoped, rather than expected, to be able to benefit from the new case-law of the Court of Cassation (see the Constitutional Court judgment of 7 December 2005, point B.19.11 of the reasoning, cited at paragraph 38 above), it could not

> therefore have been surprised by the legislature's response (see, to similar effect, OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and Others, cited above, § 71).
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> 77. Accordingly, in the specific circumstances of the present case, the measure in question was based on compelling grounds of general interest, the aim being to restore the interruption of the limitation period by payment orders that had been served well before the Court of Cassation's 2002 judgment, and thus to allow the disputes pending before the courts to be resolved, without affecting taxpayers' substantive rights (see, to similar effect, National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society, cited above, § 112, and OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and Others, cited above, § 72)."

[673] What follows from the Grand Chamber's discussion is that any assessment conducted by the court into the policy grounds advanced in support of retroactive/retrospective measures is a fundamentally fact-specific exercise. In this respect, I do not consider that where the restoration of legal certainty is advanced as a compelling ground of general interest, it ought, following *Vegotex*, to be determinative of whether that ground has been met. The relevant principles set out by the Grand Chamber must be applied to each specific case.

[674] Although in oral submissions the test identified in *Vegotex* was acknowledged by the respondent, in its written submissions an alternative test, applied by the NICA in *RHANI and Forgrave* [2023] NICA 13, in the context of an A1P1 analysis was suggested. In this case, the Court of Appeal applied the principles set out in *Wilson v First County Trust*. Here, Lord Rodger suggested that:

> "201. … an appropriate test might be formulated along these lines: Would the consequences of applying the statutory provision retroactively, or so as to affect vested rights or pending proceedings, be "so unfair" that Parliament could not have intended it to be applied in these ways? In answering that question, a court would rightly have regard to the way the courts have applied the criterion of fairness when embodied in the various presumptions."

[675] This test was applied by the Court of Appeal who found it striking that no issue was taken with the above formulation and that no alternative legal test was offered (see para [95]). The court considers that the *Vegotex* test is the appropriate

one in this case. It is a decision of the Grand Chamber providing concrete guidance on the interpretation and application of article 6 and A1P1 which are in issue in this case.

Article 7 ECHR

[676] Article 7(1) ECHR embodies an essential element of the rule of law from which no derogation is permitted; that is, only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and that retrospective application of the criminal law will be prohibited where it is to an accused's detriment is impermissible (see *Achour v. France* [2007] 45 EHRR 2 at para [41]).

The applicant's challenge

[677] In relation to the first limb of the challenge, the applicant avers that the right of effective access to a court, as protected under article 6, may be violated where, in the course of civil proceedings, legislation is introduced which influences the judicial determination of a legal dispute.

[678] The applicant draws a distinction between retrospective and retroactive legislation. Mr Sayers refers the court to an academic article entitled "*Retroactivity, Retrospectivity and Legislative Competence in Northern Ireland: Determining the Validity of Janus-faced Legislation*" by Mr Ronan Cormacain. The author notes that legislation of this type can:

(i) Be "retroactive" – the legislation has effect before it was actually made, by virtue of "deeming";

(ii) Be "retrospective" – the legislation looks back to the past, and, although it does not apply in the past, it applies future consequences to what happened in the past; or

(iii) Interfere with existing rights.

[679] In *Adams* the Supreme Court determined that all ICOs made under Article 4(1) of the 1972 Order by persons other than the Secretary of State were unlawful. Sections 46(2), (3) and (4) have, however, now conferred a "deemed" lawfulness on unlawfully made ICOs and unlawful detention secured on foot of such ICOs.

[680] The section 47 prohibitions are founded on the validity retroactively confirmed on ICOs by section 46. It is the deemed lawfulness of what had hitherto been unlawful that underpins each prohibition.

[681] The section 47 prohibitions (civil actions, quashing of convictions, and compensation for miscarriages of justice) may be considered to be, in effect, the outworkings of section 46(2).

[682] In the words of Mr Sayers:

> "The retroactive nature of the provisions could scarcely be more clearly stated. The 2023 Act reaches back half a century and changes the legal effect of order-making functions exercised otherwise than by the Secretary of State personally. In doing so, it renders criminal conduct, which was not criminal, before the commencement day.

[683] This type of legislation is more difficult to justify than retrospective legislation which applies future consequences to what happened in the past. As set out in *Vegotex*, only compelling grounds of general interest are sufficient to justify retrospective and/or retroactive legislation which has the effect of influencing the judicial determination of a dispute. As such, any justification advanced must be treated by the court with the greatest possible degree of circumspection. The applicant notes that there are two justifications proffered by the respondent: to provide legal certainty through the restoration of the *Carltona* principle and reducing the burden on the Northern Ireland courts system.

[684] In respect of the first, the applicant submits that the Supreme Court's decision (by which this court is bound) in *R v Adams* had no detrimental effect on the *Carltona* principle; the court simply found that the presumption was displaced by the clear statutory wording. Accordingly, legal certainty was provided by the UKSC's unanimous ruling which has now been upset by the impugned provisions. Second, the applicant points out that sections 46 and 47 make no mention of the *Carltona* principle. Rather, the provisions are aimed at preventing a cohort of cases materially similar to *Adams* from progressing. This, Mr Sayers says, is made patently obvious in the Parliamentary materials and Government advice relating to the ICO amendment, which reveal how the policy intent drifted from restoration of the *Carltona* principle to denying compensation. Mr Sayers drew particular attention to the fact that sections 46 and 47 derive from an amendment introduced on 10 May 2023, less than two weeks after this court's decision in *Re Adams*. In this respect, the applicant argues that this legislative intervention was "ad hoc", "reactive" and "unforeseeable."

[685] In relation to the second justification, the applicant rejects the comparison drawn between the provisions of the Act dealing with ICOs and section 43 which shuts down civil claims. Not only does the former go further, denying the applicant the benefit of any grace period, but the number of cases identified at the outset of the ICO amendment likely to be affected (around 40 civil actions) is not sufficient to support the argument that prohibiting such cases will reduce some unduly onerous burden on the courts system. Additionally, the applicant submits the cohort in respect of compensation for miscarriage of justice is even smaller given the facility for the identification of lead cases.

[686] As such, the applicant asserts that the effect of sections 46 and 47 give rise to an unlawful interference by the legislature intentionally designed to influence the judicial determination of his extant civil actions. There are no compelling grounds of general interest capable of remedying such interference which results in a breach of his rights under article 6.

[687] The second element of the applicant's challenge is founded upon the premise that his extant claims constitute possessions for the purposes of A1P1. He contends that the outcome of the *Adams* litigation gave rise to a legitimate expectation that he would be compensated for an unlawful infringement of his liberty and that he had a statutory entitlement to compensation under section 133(1) of the 1988 Act for a miscarriage of justice. Relying on the same arguments outlined above in relation to article 6, the applicant observes that such interference did not pursue a legitimate aim and was disproportionate.

[688] Finally, the applicant raises concerns that any person who seeks to quash a conviction following the decision *of R v Adams* will be unable to do so as a result of section 47(2). He argues this provision, in effect, guarantees that those individuals will be held guilty of a criminal offence which did not constitute a criminal offence at the time when it was committed, a direct violation of article 7.

The respondent's position

[689] The respondent, whilst acknowledging this court is bound by the Supreme Court's decision in *R v Adams*, proceeds on the premise that it was wrongly decided. In essence, the respondent contends that the Court failed to have regard to the constitutional presumption that Parliament should be taken to have intended that the *Carltona* principle should apply. In any case, the respondent submits that the decision of the UKSC in *Adams* is not dispositive and that the restoration of the *Carltona* principle constitutes a compelling ground of general interest sufficient to justify the interference.

[690] The respondent observes it is a recognised feature of UK constitutional law that disagreements between the judiciary and the legislature may be resolved determinatively by the latter through the enactment of legislation. It is argued that the evidential material reveals a consistent focus on, and support for, the restoration of the *Carltona* principle. As observed by the House of Lords, there was a concern that individuals would be inappropriately advantaged by the UKSC's decision and there was a need to restore the widely held view of Parliament that the *Carltona* principle applied to situations such as those dealt with in *Adams*. From Parliament's perspective, the ICO provisions necessarily required retrospective application to reverse an error of the Supreme Court which itself had retrospective effect. Finally, reliance is placed on several authorities supporting the proposition that defects of a technical nature such as drafting errors may provide a proper basis for retrospective legislation. Given the foregoing, the respondent considers the *Vegotex* test is satisfied. Mr McGleenan points out that section 46 refers not only to article 4 of the

Detention of Terrorists (Northern Ireland) Order 1972, but also para (11) of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973. Since that issue was not before it the Supreme Court did not consider whether a detention order made by a Commissioner under Schedule 1 was valid notwithstanding who signed the ICO which preceded it, when it should have so found if it had been asked to do so. Essentially, this is because the legislation intended that detention on foot of a ministerial order should be time-limited and provided the detention continued under the Order (the ICO) only until the case was determined by a Commissioner who had to exercise an independent and free-standing judgment to decide, de nova, on the basis of the evidence before him, that the conditions for making the detention order were satisfied. Mr McGleenan argues, therefore, that the judgment and decision of a Commissioner draws a line between the detention on foot of ministerial action and the detention on foot of judicial action so that that any ICO does not affect the Commissions subsequent decision.

[691] In this regard it is noted that the Court of Appeal in *Adams*, in *obiter* comments, took a different view and considered that the "making of a lawful ICO was a condition precedent to the referral of the matter to the Commissioner by the Chief Constable and to the determination of the Commissioner as to the making of a detention order" (para [53]).

[692] The respondent asserts that it does not accept that the applicant's extant claims constitute possessions under A1P1.

[693] In the respondent's view, the applicant does not have standing to advance a claim under article 7 ECHR as his conviction has already been quashed by the NICA. On this issue, Mr Sayers argued that victim status is not required when seeking a declaration of incompatibility under section 4 HRA.

Consideration

Article 6 ECHR

[694] The applicant has two extant claims which are now extinguished as a result of sections 46 and 47 of the 2023 Act. The court considers that sections 46 and 47 plainly are an interference with the applicant's article 6 rights. The issue for the court is whether the respondent can justify the interference, recognising that as per the discussion above in relation to section 43 of the 2023 Act. Article 6 is not an absolute right, but a qualified one which may be restricted in certain circumstances. As per *Vegotex* given the effect of the interference the measures must be treated with "the greatest possible degree of circumspection".

[695] Applying the orthodox approach the question of whether the interference in this case is justified requires consideration of whether the interference pursues a legitimate aim, and whether it is proportionate, striking a fair balance between the general interest and the protection of the individual's fundamental rights.

[696] This approach is built into the Grand Chambers approach in *Vegotex*. The court proposes to apply the principles set out therein in assessing the justification for the undoubted interference of the applicant's article 6 rights in this case.

[697] The following considerations are relevant:

(i) The case-law with regards to the validity of ICOs made under the 1972 Order was definitively settled by the unanimous Supreme Court ruling in *R v Adams*. It is on this basis that the applicant has now brought several undetermined claims which were brought before the 2023 Act entered into force. The court is further bound by the Supreme Court's finding that the *Carltona* principle was not undermined but rather, displaced in the *Adams* case by the "unmistakably clear" statutory language, a conclusion that appears to have been shared in July 1974 by JBE Hutton QC. In *Vegotex*, the legitimacy of the administrative practice "had not seriously been called into question" and had been reaffirmed by the Court of Cassation (see para [38]). The same cannot be said in relation to unlawfully made ICOs following the Supreme Court's ruling.

(ii) The court is satisfied that the manner and timing in which the ICO amendments were introduced militate against the respondent's contention that the restoration of the *Carltona* principle constitutes a compelling ground of general interest. The amendment was only introduced on the last day of Committee Stage in the House of Lords on 11 May 2023, two weeks after this court's decision in *Re Adams*. According to the initial advice dated 18 May 2023, "it aimed to prohibit the bringing of compensation claims linked to the Supreme Court ruling in Gerry Adams' favour in 2020." This amendment was initially opposed by the Government due to its perceived "limited impact." Therefore, despite references to the *Carltona* principle in Government advice and in the House of Lords debate at Third Reading, the Government's policy intent, in my view, skews disproportionately in favour of securing an amendment to "bar 'Adams-type' compensation claims." Indeed, in a final advice opened to this court dated 28 June 2023 the explanation of the policy intent makes no mention of the *Carltona* principle. Rather, it restates the express purpose of prohibiting civil cases, applications for compensation as a result of miscarriages of justice and appeals against conviction "brought directly as a result of the ruling in *R v Adams*." Certainly, the amendment could hardly be said to be in pursuit of the Legacy and Reconciliation Policy objectives of the 2023 Act. Rather, it was ad hoc and reactive to the *Adams* litigation.

(iii) This policy intent manifests itself in the statutory language of sections 46 and 47. In this respect, the absence of any reference to the *Carltona* principle in the provision is significant.

(iv) In line with the considerations identified by the Grand Chamber in *Vegotex* and also the recent decision of *Legros* discussed above (see para [412]), the court is satisfied that the retroactive/retrospective effect of sections 46 and 47 was unforeseeable and rendered the applicant's article 6 rights unassailable in practice. In particular, the court is influenced by the fact that the impugned provisions go further than section 43. The applicant was unable to sustain any claim until after his conviction was quashed on 14 March 2022. At the earliest, the possibility of any such a claim would only have arisen after the Supreme Court's decision on 13 May 2020. This is not a case where the potential plaintiff/applicant has waited for many years and allowed a limitation period to accrue before initiating proceedings.

(v) The scope of the impugned provision is narrow. They are concerned solely with the validity of ICOs and with preventing benefit to those identified following *R v Adams* as having been unlawfully detained on foot of ICOs that were unlawfully made. They have no wider effect.

(vi) The fact remains that as a matter of law the applicant has been acquitted of the offence which forms the basis of his claims. He should be treated as such accordingly.

(vii) The court is not persuaded by Mr McGleenan's characterisation of the Supreme Court decision in *Adams* as being based on "a technicality." As the Supreme Court pointed out the power invested in the Secretary of State by Article 4(1) was "a momentous one", involving the detention of citizens without trial. The court was clearly alive to the *Carltona* principle taking the view that it was displaced by "unmistakably clear" wording of the statutory language.

(viii) The court is not persuaded that the interference is justified on the basis of an alleged burden on the courts. There is simply no evidential basis to sustain this. The cohort affected is small.

(ix) If it is felt necessary to restore or reinforce the *Carltona* principle or put it on a statutory footing, this can be achieved without retroactively interfering with the rights of a small number of individuals.

[698] The effect of sections 46(2), (3) and (4) and 47(1) and (4) is to retroactively prohibit the extant civil claims of the applicant who has been found by a court of law to be acquitted on the basis of an unlawfully made ICO. In light of these considerations the court concludes that the respondent has not demonstrated compelling grounds of a general interest to justify the interference with the applicant's article 6 rights.

A1P1

[699] Following the line of European jurisprudence, the first question this court must ask is whether the applicant's extant claims may be considered "assets." The applicant must demonstrate that the claims have a sufficient basis in national law, for example where there is settled case law of the domestic courts confirming it.

[700] In relation to the applicant's civil claim for false imprisonment, the applicant lodged his claim following a determination of the highest domestic court which unanimously ruled that his detention had been unlawful. I am satisfied that the applicant could have reasonably expected this claim to be determined in accordance with the law of tort and therefore, constituted an asset within the meaning of A1P1.

[701] However, the applicant could not have a legitimate expectation in respect of his claim for a breach of article 5 ECHR. The applicant's detention occurred in 1973, 27 years before the HRA entered into force in October 2000, which does not have retrospective effect (with the exception of the procedural obligations under articles 2 and 3).

[702] Finally, at the time of writing this judgment, the court notes that its decision in *Re Adams* on the issue of statutory compensation for miscarriage of justice was on appeal. The court is hesitant to conclude that the applicant had a legitimate expectation of judgment being delivered in his favour. Therefore, although this court delivered a judgment favourable to the applicant in *Re Adams*, the matter was not, when the application was lodged, settled for the purposes of A1P1.

[703] Given the foregoing and the court's conclusion under article 6, the court is satisfied that there has been a breach of A1P1 in respect of the applicant's tort claim for false imprisonment.

Article 7 ECHR

[704] There is some debate surrounding whether the victim status is required where an applicant is seeking to obtain a declaration of incompatibility under section 4 HRA. For instance, in *R (on the application of Countryside Alliance) v Attorney General* [2006] EWCA Civ 817, Lord Phillips CJ stated that the HRA:

> "does not purport to prescribe rules for standing if a declaration like this is sought, in contrast to the rule in section 7(1)(a), which entitles a person who claims that a public authority has acted (or proposed to act) in way which is made unlawful by section 6(1) to bring proceedings against that authority in the appropriate court, but only if he is (or would be) a victim of the unlawful act."

[705] This issue was considered in *Re NIHRC Application for Judicial Review* [2019] 1 All ER 173 in which the standing of the NIHRC to institute an *actio popularis* was challenged. On this procedural issue Lady Hale (with whom Lord Kerr and Lord Wilson agreed) delivered a minority opinion, stating at para [17]:

> "But we know that the Human Rights Act provides two different methods of seeking to ensure compliance with the Convention rights. One is for victims to bring proceedings in respect of an unlawful act of a public authority, or to rely on such an unlawful act in other proceedings, pursuant to section 7(1) of the HRA. The other is to challenge the compatibility of legislation under sections 3 and 4 of the HRA, irrespective of whether there has been any unlawful act by a public authority. This may be done in proceedings between private persons, as in *Wilson v First County Trust (No 2)* [2004] 1 AC 816 and *Ghaidan v Godin-Mendoza*. But it may also be done in judicial review proceedings brought by person with sufficient standing to do so. A current example is *Steinfeld v Secretary of State for Education* [2017] 3 WLR 1237, where the provisions in the Civil Partnership Act 2004 limiting civil partnerships to same sex couples are under challenge. The NIHRC clearly has standing to bring such proceedings by virtue of section 69(5)(b)."

[706] Lord Kerr at paragraph [185] opined:

> "Cases which challenge primary legislation without claiming that a public authority has acted unlawfully do not engage section 6. They are actions under sections 3 or 4 and the victim requirement need not be satisfied."

[707] However, the views expressed by Lady Hale and Lord Kerr were ultimately not carried by the majority. Lord Mance delivering the lead judgment on this issue stated as follows:

> "61. It is wrong to approach the present issue on the basis of an assumption that it would be anomalous if the Commission did not have the (apparently unlimited) capacity suggested to bring proceedings to establish the interpretation, or incompatibility with Convention rights, of any primary Westminster legislation it saw as requiring this for the better protection of human rights. The issue is one of statutory construction, not a priori preconception. It is in fact, no surprise, in my view, that Parliament did not provide for the Commission to have capacity to

> pursue what would amount to an unconstrained *actio popularis*, or right to bring abstract proceedings, in relation to the interpretation of UK primary legislation in some way affecting Northern Ireland or its supposed incompatibility with any Convention right. On the contrary, it is natural that Parliament should have left it to claimants with a direct interest in establishing the interpretation or incompatibility of primary legislation to initiate proceedings to do so, (emphasis added) and should have limited the Commission's role to giving assistance under sections 69(5) and 70 and to instituting or intervening in proceedings involving an actual or potential victim of an unlawful act as defined by section 7 of the Human Rights Act 1998.
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> 62. True it is that sections 3 and 4 of the HRA are not made expressly subject to the 'victimhood' requirement which affects sections 6 and 7 (*Rusbridger v Attorney General* [2004] 1 AC 357 at 21 per Lord Steyn); though they must undoubtedly be subject to the usual rules regarding standing in public law proceedings. However, a capacity to commence general proceedings to establish the interpretation or incompatibility of primary legalisation is a much more far reaching power than one to take steps as or in aid of an actual or potential victim of an identifiable unlawful act. Further, Parliament's natural understanding would have reflected what has been and is the general or normal position in practice, namely that sections 3 and 4 would be and are resorted to in aid of or as a last resort by a person pursing a claim under sections 7 and 8: see *Lancashire County Council v Taylor* [2005] EWCA Civ 284, [2005] I WLR 2668 at 28 reciting counsel's submission, and to someone who had not been and could not be 'personally adversely affected' would be to ignore section 7. This being the normal position, it is easy to understand why there is nothing in section 7(1) to confer (the apparently unlimited) capacity which the Commission now suggest that it has to pursue general proceedings to establish the interpretation or incompatibility of primary legislation under sections 3 and/or 4 of the HRA, in circumstances when its capacity in the less fundamental context of an unlawful act under sections 6 and 7 is expressly and carefully restricted."

[708] A similar issue arose in *Re Ewart's Application* [2019] NIQB 88 following the UKSC decision in *Re NIHRC*. This concerned an individual challenge to the abortion

law provisions. The applicant contended that the legislation preventing access to termination of pregnancy in cases of fatal foetal abnormality was incompatible with Article 8 ECHR and that the failure to amend legislation was an unlawful act under section 6(1) HRA. In relation to the first limb, the Attorney General for Northern Ireland argued that the applicant was not a victim within the meaning of article 34 of the Convention and therefore did not have standing. Keegan J observed that:

> "[53] … a person bringing a claim under the section 4 route must be able to show that he or she would be able to assert his or her human rights under Article 34 of the Convention. The ECtHR jurisprudence recognises that a person may be a victim for the purposes of the Convention <u>where they are impacted by the possible future application to them of legislation which may be incompatible</u> (emphasis added). The requirement of victimhood which is specifically found in section 7 is not present in section 4. That is most likely because there is no specific reference to an unlawful act. In other words a person directly affected can be a potential victim of an unlawful act. In *Norris v Ireland* (1989) 13 EHRR 186 this was encapsulated in the phrase that the claimant must "run the risk of being directly affected by it" That principle was subsequently affirmed in *Ramadan v Malta* 2016 ECHR 76136/12.
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> [54] In *Sejdic v Bosnia Herzegovina* (2009) 28 BHRC 201 the court was faced with an admissibility challenge which led to consideration of this issue. In this case the applicants were a Roma and a Jewish citizen each experienced in fulfilling prominent public roles. The Dayton Peace Agreement of 1995 had made a distinction between constituent people (Bosnians, Croats, Serbs) and others for the purposes of running for election to the House of Peoples and the Presidency. The ECtHR in deciding the admissibility question in favour of the two applicants, ruled as follows:
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>> '28. It is reiterated that in order to be able to lodge a petition by virtue of Article 34 of the Convention, a person, NGO or group of individuals must be able to claim to be a victim of a violation of the rights set forth in the Convention. In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure. The Convention does not, therefore, envisage, the bringing of an

> actio popularis for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider without having been directly affected by it, that it might contravene the convention. It is, however, open to the applicants to contend that a law violates their rights, in the absence of an individual measure of implementation, if they belong to a class of people who risk being directly affected by the legislation or if they are required either to modify their conduct or risk being prosecuted (emphasis added) (see *Burden v UK* 2008 24 BHRC 709 at paragraphs 33-34 and the authorities cited therein).'"

[709] Having considered the foregoing and the wording of article 7 itself, I am not persuaded that the applicant has standing to bring a claim under article 7 ECHR. Article 7 protects individuals from being *found guilty* of a criminal offence which did not constitute an offence at the time when it was committed. The applicant's conviction was quashed on 14 March 2022 and neither sections 46 or 47(2) (which must be read together for the purposes of the article 7 challenge) have the effect of overturning that ruling. Insofar as the applicant has standing to bring a claim under article 6 ECHR and A1P1, the court has found that the retroactive effect of sections 46(2), (3), (4), 47(1) and 47(4) on the applicant's extant claims to be unlawful and therefore, any detriment to the applicant arising out of section 46 has been addressed by this court under articles 6 and A1P1. The court is of the view that it is appropriate to address any alleged incompatibility with article 7 ECHR against a concrete factual case.

Final conclusions and orders

[710] Having analysed the challenges in a thematic way the court now turns to summarising its conclusions with reference to the relief sought by each of the applicants.

Lead case – Dillon and others

(i) The court makes a declaration pursuant to section 4 of the Human Rights Act 1998 that the provisions in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 relating to immunity from prosecution, namely sections 7(3), 12, 19, 20, 21, 22, 39, 41, 42(1) are incompatible with articles 2 and 3 of the European Convention on Human Rights.

(ii) The provisions in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 relating to immunity from prosecution, namely sections 7(3), 12, 19, 20, 21, 22, 39, 41 and 42(1) are incompatible with article 2 of the Ireland/Northern Ireland Protocol/Windsor Framework. Pursuant to section 7A of the EU (Withdrawal) Act 2018 article 2 of the Ireland/Northern Ireland Protocol/Windsor Framework has primacy over these provisions thereby rendering them of no force and effect. These provisions should therefore be disapplied.

(iii) The court makes a declaration pursuant to section 4 of the Human Rights Act 1998 that section 43(1) of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 which provides that a relevant Troubles-related civil action that was brought on or after the day of the first reading in the House of Commons of the Bill for this Act may not be continued on or after the day on which this section comes into force is incompatible with article 6 of the European Convention on Human Rights. This declaration applies generally but specifically to the applicant Lynda McManus.

(iv) Section 43(1) of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 is also incompatible with article 2 of the Ireland/Northern Ireland Protocol/Windsor Framework. Pursuant to section 7A of the EU (Withdrawal) Act 2018 article 2 of the Ireland/Northern Ireland Protocol/Windsor Framework has primacy over this legislative provision thereby rendering it of no force and effect. Section 43(1) shall therefore be disapplied both generally and specifically with respect to the applicant Lynda McManus.

(v) The court makes a declaration pursuant to section 4 of the Human Rights Act 1998 that section 8 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 relating to the exclusion of evidence in civil proceedings is incompatible with articles 2, 3 and 6 of the European Convention on Human Rights.

(vi) Section 8 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 is also incompatible with article 2 of the Ireland/Northern Ireland Protocol/Windsor Framework. Pursuant to section 7A of the EU (Withdrawal) Act 2018 article 2 has primacy over section 8, therefore rendering it of no force and effect. Section 8 should therefore be disapplied.

[711] The court declines to grant any of the other relief sought by the applicants.

Teresa Jordan

[712] The applicant, Teresa Jordan, was granted leave to apply for judicial review in respect of two provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, namely sections 41 and section 8.

[713] In the lead case of Dillon and others the court has made a declaration pursuant to section 4 of the Human Rights Act 1998 that section 41 of the 2023 Act is incompatible with articles 2 and 3 of the ECHR and that it should be disapplied as being in breach of Article 2 of the Ireland/Northern Ireland Protocol/Windsor Framework. Lest any issue be taken that none of the individual applicants in the lead case had standing to challenge section 41, the court granted leave to this applicant given that she was directly affected by section 41, in relation to the potential prosecution of police officers relating to their conduct at the time of her son's killing. The court, therefore, makes the following order in respect of Teresa Jordan:

(i) A declaration pursuant to section 4 of the Human Rights Act 1998 that section 41 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 in relation to the prohibition of criminal enforcement action is incompatible with article 2 of the ECHR.

(ii) Section 41 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 is incompatible with article 2 of the Ireland/Northern Ireland Protocol/Windsor Framework. Pursuant to section 7A of the EU (Withdrawal) Act 2018 article 2 has primacy over section 41 thereby rendering it to have no force and effect. Section 41 should therefore be disapplied.

[714] The applicant also challenged section 8 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 in relation to the admissibility of material in civil proceedings. The court has already granted relief to the lead applicants in respect of section 8. Given that the death of the applicant's son has been the subject matter of a completed article 2 compliant inquest, it is difficult to foresee circumstances in which the ICRIR will be conducting a review in relation to the death. In such circumstances section 8 will not have any impact on the applicant in relation to her ongoing civil proceedings. In the circumstances the court declines to make any order in respect of this applicant in relation to section 8. Should any issue arise, she will enjoy the benefit of the order made in the lead case in any event.

Gemma Gilvary

[715] The applicant was granted leave by the court so that it could consider a specific case involving allegations of torture. Case management directions were issued on 9 October 2023, shortly before the Supreme Court delivered its judgment in *Re Dalton* [2023] UKSC 36 (18 October 2023) in which it provided definitive clarification on the circumstances in which the obligation to investigate a death under article 2 of the ECHR arises.

[716] In short, the Supreme Court ruled that where a death had occurred more than 12 years before the coming into force of the HRA, then the obligation to investigate that death would not arise in domestic law under article 2 of the ECHR and the HRA

unless the "Convention values" test was satisfied. The applicant's brother was murdered after being tortured in January 1981, and so the case falls outwith the temporal limits set out in *Dalton*.

[717] Mr McGleenan, on behalf of the respondent, argued that the applicant did not have standing as her article 3 rights were not engaged in light of the decision in *Dalton*.

[718] There are two potential answers to this submission. Firstly, it could be argued that the applicant is entitled to rely on article 3 of the ECHR domestically because there is an ongoing criminal investigation into the disappearance and torture of her brother. His abduction, torture and death was included within those cases investigated by Jon Boutcher in what is known as "Operation Kenova." That investigation was established to identify whether there was evidence of the commission of criminal offences by a State agent within the IRA known as Stakeknife, or by members of the British Army, the security services or other government agencies in respect of the cases connected to the alleged agent known as Stakeknife. Maurice Gilvary's murder fell within the remit of this investigation.

[719] Since these proceedings have been issued the report of Operation Kenova has been completed and sent to the DPP and government. Public statements by the DPP have ruled out prosecutions for a significant number of the cases investigated. The court is obviously unaware of the details of the report or the final position in relation to prosecutions, in particular, in relation to the case of Maurice Gilvary.

[720] In *Re McCaughey* [2012] 1 AC 725, the House of Lords confirmed that, where an inquest or other investigation is already taking place into a death which occurred before the HRA came into force, the investigation had to comply with article 2 of the ECHR. The court considers that the same reasoning should apply to article 3 of the ECHR. Operation Kenova is such an investigation.

[721] *Dalton* did not expressly overrule *McCaughey* which the applicant says remains good law. It could therefore be argued that the Operation Kenova investigation and the consideration of criminal prosecutions by the DPP cannot be ended prematurely in circumstances which do not comply with article 3 of the ECHR.

[722] The court is aware that this argument is currently being considered in a series of judicial reviews relating to article 2 compliant inquests. The applicant expressly indicated to the court that she did not wish to rely on this line of argument and the court does not therefore consider it appropriate to rule on this point. This is particularly so given the fact that the court is unaware of the actual contents of the Operation Kenova report and whether the DPP will recommend prosecution in relation to his death.

[723] At the hearing, therefore, the applicant relied on the second answer, namely that the 12 year temporal limit set out in *Dalton* does not apply in cases which meet the "Convention values" test. Mr Southey argues that that test is satisfied in the circumstances of this case.

What is the Convention values test?

[724] According to *McQuillan*, the Strasbourg jurisprudence provides that there must, in the alternative to a genuine connection, "be an extraordinary situation in which the need to ensure effective protection of the guarantees and underlying values of the Convention constitutes a sufficient basis for such a connection" (para [53]). This is fundamentally a question of jurisdiction; in the absence of a genuine connection, the applicant must satisfy the Convention values test in order for the court to have jurisdiction to examine the complaint (see Lord Leggatt's opinion in *Dalton*, para [257]). Although not advanced by the applicant in *Dalton*, the Supreme Court identified the international and domestic jurisprudence relevant to the Convention values test to date. In summary, Lord Reed notes that the ECtHR clarified the Convention values test in the case of *Janowiec*:

> "the Grand Chamber considers the reference to the underlying values of the Convention to mean that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity … The heinous nature and gravity of such crimes prompted the contracting parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to agree that they must be imprescriptible and not subject to any statutory limitation in the domestic legal order."

[725] Additionally, the European Court has held that Convention values test does not apply to events which occurred before the Convention came into existence (para [29].

[726] In *Re Finucane's (Geraldine) Application* [2015] NIQB 57 (para [35]), Stephens J characterised "the murder of a solicitor involving collusion by State agencies" as negating the very foundations of the Convention. The Court of Appeal ([2017] NICA 7, para [167]) whilst finding the test to be "an extremely high hurdle to overcome" did not find Stephens J's conclusion to be "unreasonable." The Supreme Court ([2019] UKSC 7, para [113]) did not address the question given that the genuine connection test was, in any case, satisfied. More recently, however, Lord Leggatt, Lord Burrows and Dame Keegan, whilst noting the particularly

appalling set of facts presented in *Finucane*, disagreed with Stephens J's conclusion: At para [262] Lord Legatt opined that,

> "262. Given the apparent restriction of the "Convention values" test in *Janowiec* to serious crimes under international law, such as war crimes, genocide and crimes against humanity, I would not feel able to say that the facts of Finucane came within this category. But in my view Stephens J identified with complete clarity the circumstances which made the evidence of state involvement in Mr Finucane's murder a matter of such gravity."

[727] Similarly, at [336] Lord Burrows and Dame Keegan considered:

> "336. We would not go so far as to suggest that the facts of Finucane met the "convention values" test and to that extent we disagree with Stephens J. That test imposes an extremely high hurdle. What is principally in mind are serious crimes under international law, such as war crimes, genocide or crimes against humanity. In McQuillan, while not necessary for the decision, the Supreme Court considered it likely that acts of torture by the state would also satisfy the test. But, while not falling within the "convention values" test, it is our view that, not least because of the "rule of law" aspect of the facts that we have identified, the decision in Finucane is one that this court ought to be very reluctant indeed to overrule."

[728] *McQuillan* involved three appeals. The two additional appeals (*McGuigan* and *McKenna*) concerned allegations of torture perpetrated by members of the RUC, in August 1971, against fourteen men (including the appellants) who were detained by the security forces for interrogation; these fourteen individuals became known as the 'Hooded Men.' An important consideration was the fact that the conduct complained of was administered as a matter of deliberate policy by the law enforcement agencies of the state, who were acting under orders and were trained as to how it should be inflicted. It was authorised at a very high level including ministerial authorisation and was, therefore, an administrative practice of the state. In *McQuillan*, the Supreme Court makes it clear that the Convention values test is intended to apply only to "extraordinary situations" (see para [191]). The examples provided in the jurisprudence relate to "serious crimes under international law, such as war crimes, genocide or crimes against humanity." Although a "powerful argument that the Convention values test" was met was advanced in the cases of *McGuigan* and *McKenna*, the court did not consider it necessary to resolve the issue in order to decide those appeals.

[729] On the basis of the factual material before the court it is impossible to assess the extent of any state involvement in the torture and execution of Maurice Gilvary. The practice referred to as "disappearing" alleged informers is a shameful legacy of paramilitary organisations, primarily the IRA who engaged in such egregious breaches of fundamental human rights. Any approved State involvement in this practice would be repugnant to international norms and the rule of law.

[730] In light of the above, the court finds it difficult to state confidently that the applicant's circumstances meet the Convention values test. This should not be understood as confirmation that torture does not fall within the range of serious crimes, contemplated in the jurisprudence, as capable of satisfying the Convention values test. Rather, in the court's view, the prevailing trend suggests that acts of torture sanctioned by the State would meet such a test. Therefore, the court declines to make any declaration in respect of the applicant, *Gilvary*, on the basis that she lacks the required standing to make a case under article 3 ECHR based on the Convention values test. The court's conclusion is based on the lack of concrete evidence available to sustain a claim of state-sponsored torture.

[731] As outlined above Operation Kenova completed its investigation into whether there was evidence of the commission of any criminal offences by State agents in relation to the torture and death of Maurice Gilvary. It is now for the DPP to decide whether there is sufficient evidence to bring criminal charges against anyone involved in those events.

[732] In practice, the 2023 Act will not now close down the investigation or any potential prosecution. Any decision by the DPP not to prosecute, having received the report, can be challenged by way of judicial review by the applicant.

[733] In this particular case a criminal investigation has been completed.

[734] In the lead case the court has made clear that it considers the immunity provisions in relation to prosecution in relation to deaths such as that involving the applicant's brother are of no legal force or effect and are contrary to both articles 2 and 3 of the ECHR.

[735] The applicant will have the benefit of the Kenova report when published. Should she consider further investigation is necessary it will be open to her to request a review by ICRIR to look into all the circumstances of her brother's death. The possibility of prosecution remains open under section 25 of the 2023 Act. As a result of the court's ruling in the lead case any potential defendant will be unable to avail of the immunity provisions in the 2023 Act.

[736] These practical considerations, some of which have arisen since the application was lodged, also militate against the making of an order in this case. The court hopes that the applicant will take comfort from the court's finding in the lead

case and will be reassured that the effect of the Act has not closed down the Kenova investigation as was initially feared.

[737] Therefore, the application is refused.

Patrick Fitzsimmons

[738] The court makes the following order which applies specifically to the applicant, Patrick Fitzsimmons:

(i) The court makes a declaration pursuant to section 4 of the Human Rights Act 1998 that the provisions in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 relating to interim custody orders, namely sections 46(2), (3) and (4) and 47(1) and (4) are incompatible with the applicant's rights under article 6 of the European Convention of Human Rights and Article 1 of Protocol 1 to the European Convention of Human Rights.