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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **20/09/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MARTINA DILLON, JOHN McEVOY, LYNDA McMANUS AND BRIGID HUGHES 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

Applicants/Cross-Appellants

AND THE SECRETARY OF STATE FOR NORTHERN IRELAND

Respondent/Appellant

POLICE OMBUDSMAN FOR NORTHERN IRELAND, 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)

Intervenors

Mr John Larkin KC with Mr Jude Bunting KC, Malachy McGowan and Laura King (instructed by Phoenix Law Solicitors) for the applicants/cross-appellants Dillon, McEvoy, McManus & Hughes
Ms Karen Quinlivan KC with Ms Lara Smyth (instructed by Madden Finucane Solicitors) for the applicant/cross-appellant Jordan
Mr Hugh Southey KC with Mr Aidan McGowan (instructed by KRW Law) for the applicant/cross-appellant Gilvary
Mr Donal Sayers KC with Mr Eugene McKenna (instructed by O'Muirigh Solicitors) for the applicant/cross-appellant Fitzsimmons
Mr Tony McGleenan KC with Mr Philip McAteer and Ms Laura Curran (instructed by the Crown Solicitor's Office) for the respondent/appellant
Mr Simon McKay (instructed by Legal Services Directorate, PONI) for the notice party the Police Ombudsman for Northern Ireland
Mr Peter Coll KC with Mr Terence McCleave (instructed by the Departmental Solicitor's Office) for the notice parties the 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 intervenor the Northern Ireland Human Rights Commission
Mr Christopher McCrudden (instructed by a solicitor for the Equality Commission for NI) for the intervenor the Equality Commission for Northern Ireland
Mr David Heraghty KC (instructed by Higgins Holywood Deazley Solicitors) for the intervenor WAVE
Ms Monye Anyadike-Danes KC with Mr Karl McGuckin (instructed by Phoenix Law Solicitors) for the intervenor Amnesty International (UK)
Mr Frank O'Donoghue KC with Mr Andrew McGuinness (instructed by DWF Law) as an intervenor for the Independent Commission for Reconciliation and Information Recovery

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Before: Keegan LCJ, Horner LJ and Scoffield J

KEEGAN LCJ (*delivering the judgment of the court*)

Glossary

B-GFA:	Belfast/Good Friday Agreement
CFR:	Charter of Fundamental Rights of the European Union
CJEU:	Court of Justice of the European Union
CMP:	Closed Material Proceeding
CRE:	Commission for Racial Equality
DOJ:	Department of Justice
ECA 1972:	European Communities Act 1972
ECHR:	European Convention on Human Rights
ECNI:	Equality Commission for Northern Ireland
ECtHR:	European Court of Human Rights

EUWA 2018:	European Union (Withdrawal) Act 2018
EUWAA 2020:	European Union (Withdrawal Agreement) Act 2020
HRA:	Human Rights Act 1998
ICO(s):	Interim Custody Order(s)
ICRIR:	Independent Commission for Reconciliation and Information Recovery
Legacy Act/ the 2023 Act:	Northern Ireland Troubles (Legacy and Reconciliation) Act 2023
NIHRC:	Northern Ireland Human Rights Commission
NIO:	Northern Ireland Office
PONI:	Police Ombudsman for Northern Ireland
PPS:	Public Prosecution Service
PSNI:	Police Service of Northern Ireland
RSE:	Rights, Safeguards and Equality of Opportunity
SHA:	Stormont House Agreement
SOSNI:	Secretary of State for Northern Ireland
TFEU:	Treaty on the Functioning of the European Union (2009)
UKG:	UK Government
VCLT:	Vienna Convention on the Law of Treaties (1969)
VD:	Victims' Directive
WA:	EU-UK Withdrawal Agreement
WF:	Windsor Framework (formerly known as the Protocol on Ireland/Northern-Ireland)

Introduction

[1] This is an appeal and cross-appeal from a decision of Mr Justice Colton ("the trial judge") with the citation [2024] NIKB 11. The applicant families are cross-appellants in this case but will be referred to as the applicants throughout. The Secretary of State for Northern Ireland ("SOSNI") is the substantive appellant but will be referred to as SOSNI throughout to maintain clarity and consistency.

[2] This case concerns the legality of primary legislation, the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the 2023 Act"), which was introduced to deal with the legacy of Northern Ireland's troubled past, and whether that legislation offends the European Convention on Human Rights ("ECHR") and/or undermines rights previously guaranteed by EU law. Throughout this judgment we refer to paragraphs from the first instance judgment in bold for ease of reference.

[3] We will not repeat the entire background as we adopt what has been set out so comprehensively by the trial judge. Clearly, there has been a long run-in to the enactment of this legislation. This was helpfully explained by the trial judge in the

section of his judgment entitled 'How Did We get Here.' From reading that section, it is plain that attempts to resolve this issue have been extensive, leading up to the Stormont House Agreement ("SHA") in 2014 which remained the blueprint for dealing with the legacy of our past until the 2023 Act but the substance of which was not adopted. We also recognise that there are many competing perspectives on these issues from the government – both the government which promoted the 2023 Act and (it seems) the current government – and those affected across all communities in Northern Ireland.

[4] In summary, those who have brought the lead case are directly affected by the end of inquests and civil actions and the potential grant of immunity from prosecution, as set out in their affidavit evidence. Martina Dillon's husband Seamus was shot and killed outside the Glengannon Hotel on 27 December 1997. The inquest into Mr Dillon's death came to an end as a result of the legislation on 1 May 2024 in circumstances where there is evidence to be tested in relation to potential collusion by state authorities. John McEvoy was seriously injured during a gun attack at the Thierafurth Inn, Kilcoo on 19 November 1992. The 2023 Act has ended the Police Ombudsman and police investigations in his case despite the revelation of possible state collusion in the attack. Brigid Hughes' husband, Anthony, was killed during a security force operation in Loughgall on 8 May 1987. The 2023 Act means that that inquest is also ended. Lynda McManus is the daughter of James McManus, who was severely injured in a gun attack on the Sean Graham Bookmakers, Ormeau Road, Belfast on 5 February 1992. The Act prevents further civil action or criminal investigation in relation to that incident. These people carry with them the visceral pain of brutal events from our past.

[5] Patrick Fitzsimmons claims that the legislation will wrongly deny him compensation because of a criminal conviction which has been quashed. Gemma Gilvary is the sister of Maurice Gilvary, who was taken, tortured and killed by the IRA on 12 January 1981.

[6] Some families have managed to achieve a measure of truth and justice by virtue of inquest and civil proceedings in Northern Ireland courts; and also, by means of criminal prosecutions, where that was achievable. Others who have been affected by the Troubles in Northern Ireland, from both sides of the community divide, including those affected by terrorist violence, continue to seek justice, truth and accountability and continue to suffer as time passes. A central question in these proceedings has been whether the Independent Commission for Reconciliation and Information Recovery ("ICRIR") is a viable alternative to deal with outstanding cases within a reasonable timescale. There is also a human side to this case which we recognise given the hurt and trauma that bereaved families have experienced over many years.

[7] Furthermore we are conscious that whilst this case arises in the legal sphere, it also occupies the political space. Hence, we are also aware of the potential political ramifications of this case. However, to be clear, our role is not to make policy. The courts are simply concerned with the legality of the legislation. This is a legitimate part of the judicial function reflective of adherence to the rule of law and the constitutional role of the courts recognised both at common law and in legislation. We proceed on that basis.

[8] At this point in our judgment we will address certain factual findings that the trial judge made. In dealing with this subject matter Mr Larkin KC made a valid preliminary point that the SOSNI appears to want us to depart from these factual findings without good reason. That is not a route an appellate court will lightly take, as is well known and as was reiterated by this court recently in *Re JR87's Application* [2024] NICA 34 at paras [74] and [75], including the following:

> "[74] The principles to be applied when reviewing findings of fact as here are clearly set out in the unanimous decision of the Supreme Court in *DB v Chief Constable of the PSNI* [2017] UKSC 7. That decision reveals a principled reluctance to interfere with the findings of fact of a trial judge even in the judicial review context where the evidence is on affidavit."

[9] In any event, even if we were minded to reconsider some of the factual findings, the SOSNI has advanced no coherent reason why we should embark upon a course of reopening the factual findings made at first instance. We see no reason to disturb the factual findings of the trial judge.

[10] The trial judge found that "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." (**para [187]**) This is a finding which he was entitled to make.

[11] In addition the trial judge found that, for the purposes of considering the legality of the 2023 Act, the Troubles ended in 1998. That is a finding he was entitled to make and, indeed, which he was almost inevitably bound to reach in view of the way in which the Act itself defines the Troubles. In addition, we are extremely reluctant to be drawn into a detailed deconstruction of Colton J's analysis of the purpose of this legislation, particularly given the care and attention he applied to this after examining the source documents at some length. Thus, we proceed on the basis of the factual finding of the trial judge that there was a policy drive pre-enactment to end (what were considered to be) vexatious claims against

veterans: see **paras [70]-[140]**. Colton J has amply explained why this should be taken to be at least one aim pursued by the legislation. This factual finding of course does not prevent the SOSNI relying upon reconciliation and the promotion of peace as further aims of the new legislation.

[12] Finally, Colton J accurately refers at **para [501]** of his judgment to the widespread opposition to the legislation. This is something of which we are aware, as citizens as well as judges in Northern Ireland, given the public discourse. Colton J summarises the position thus:

> "Undoubtedly, there is widespread opposition to these proposals. They are not supported by any of the political parties in this jurisdiction … [the Assembly held that] the proposals do not serve the interests, wishes or needs of victims or survivors nor the requirements of truth, justice accountability, acknowledgement and reconciliation."

Again, we consider that this is a finding the trial judge was entitled to make.

The questions that arise on appeal for determination

[13] This is a wide-ranging appeal engaging many complicated issues that arise in the legacy field and in relation to the Windsor Framework. However, in substance the appeal can be broken down into consideration of the following essential questions:

(i) Was the trial judge at first instance entitled to disapply provisions of the 2023 Act under article 2(1) of the Windsor Framework ("WF") (and the related EU and Treaty mechanisms)?

(ii) Was the trial judge right to issue declarations of incompatibility against provisions of the 2023 Act for the Act's failure to comply with articles 2 and 3 ECHR?

(iii) Was the trial judge wrong to find no violation of the ECHR with respect to the ICRIR's ability to comply with its obligations under the ECHR?

Questions (i) and (ii) together form the core of the appeal and question (iii) forms the core of the cross-appeal.

[14] In addition, we identify three ancillary issues with which we will also deal, as follows:

(iv) Was the trial judge wrong to find that article 8 ECHR was not engaged in the *Jordan* case?

(v) Was the trial judge correct to make a declaration of incompatibility in the *Fitzsimmons* case?

(vi) Was the trial judge correct to dismiss the *Gilvary* case based on lack of standing?

[15] Some of these issues – encapsulated within question (ii) at para [13] above – have now become uncontroversial given correspondence we received from the Crown Solicitor's Office of 29 July 2024 after the hearing of this case. This letter stated, *inter alia*:

> "The appellant Secretary of State for Northern Ireland no longer seeks to pursue the grounds of appeal against the section 4 Human Rights Act declarations of incompatibility made by the court at first instance. These grounds of appeal have been abandoned. As such we would invite the court to dismiss the SOSNI's grounds of appeal against the findings of incompatibility with the ECHR.
>
> SOSNI does still pursue all grounds of appeal against the findings of the court at first instance in relation to the interpretation and effect of Article 2(1) of the Windsor Framework. This aspect of the judgment has potentially wide-ranging implications for other UK legislation which extends to Northern Ireland, and for the UK's human rights settlement as a whole.
>
> Further, SOSNI maintains, in all respects, its defence of the various cross appeal, whether related to the Windsor Framework or the ECHR (including non-exhaustively but in particular the grounds of cross appeal related to the ECHR compatibility of ICRIR)."

[16] The approach adopted (as explained above) is unusual but welcome in a contentious case such as this. The concessions made correlate with the view taken by this court on the compatibility issues. We will therefore set out our own reasoning in much more summary form in relation to the issues that are no longer disputed. In addition, we will provide our conclusion on the WF point which remains contentious and on the issues raised by the cross-appeal. We are of course mindful of the recent statement made by the SOSNI to Parliament indicating that the

new government formed after the recent General Election already intend to bring forward legislation (in the form of a remedial order) to remedy the illegality found by the court below.

[17] For ease of reference we deal with each of the six subject areas indicated above under the following broad headings in the ensuing paragraphs of this judgment:

(i) The Windsor Framework - paras [54]-[161];

(ii) The immunity provisions - paras [162]-[173];

(iii) The effectiveness/independence of ICRIR, civil actions - paras [174]-[274];

(iv) *Jordan*, article 8 - paras [275]-[286];

(v) *Fitzsimmons* - paras [287]-[297];

(vi) *Gilvary* - paras [298]-[307].

[18] We begin our analysis with an overview of the 2023 Act.

General overview of the 2023 Act

[19] Section 1 of the 2023 Act outlines a series of definitions. Section 1(1)-(2) defines the Troubles as:

> "(1) […] the events and conduct that related to Northern Ireland affairs and occurred during the period—
>
> (a) beginning with 1 January 1966, and
>
> (b) ending with 10 April 1998.
>
> (2) That includes any event or conduct during that period which was connected with—
>
> (a) preventing,
>
> (b) investigating, or

(c) otherwise dealing with the consequences of, any other event or conduct relating to Northern Ireland affairs."

[20] Section 1(4) addresses "other harmful conduct", termed as, "any conduct forming part of the Troubles which caused a person to suffer physical or mental harm of any kind (excluding death)."

[21] 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. A threshold for seriousness is introduced in section 1(5)(b), extending to instances of (i) murder, manslaughter, or culpable homicide, (ii) another offence committed by causing the death of a person, or (iii) an offence committed by causing a person to suffer serious physical or mental harm.

[22] Section 1(5)(c) sets out that a Troubles-related offence is a "connected" offence if it:

"(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."

[23] Part 2 of the Act establishes the ICRIR. In summary, this part of the Act contains the following core provisions:

(a) Sections 2-6: who the ICRIR are and what powers they possess;

(b) Sections 7-8: admissibility of information in criminal and civil proceedings;

(c) Sections 9-18: reviews of death and other harmful conduct, including the procedure for requesting a review, the conduct of reviews, supply of information and the production and publication of reports;

(d) Sections 19-24: immunity from prosecution;

(e) Section 25: information for prosecutors;

(f) Sections 26-27: revocation of immunity and an offence for false statements;

(g) Sections 28-29: the historical record of deaths;

(h) Sections 30-34: disclosure of information;

(i) Section 35: biometric material; and

(j) Sections 36-37*:* review and conclusion of the work of the ICRIR.

[24] Part 3 of the Act concerns investigations and legal proceedings. Again, in its simplest form, these provisions cover the following:

(a) Sections 38-42: criminal investigations and proceedings including the grant of immunity (section 39) and the prohibition of criminal enforcement action (section 41);

(b) Sections 43-45: civil proceedings, inquests and police complaints;

(c) Sections 46-47: Interim custody orders ("ICOs"); and

(d) Section 48: release of prisoners.

[25] Part 4 of the Act then deals with the memorialisation of the past, while Part 5 concerns commencement etc. The Act has 13 schedules which concern, *inter alia,* the ICRIR (Schedules 1-2); disclosure of information (Schedule 6); and the identification of sensitive information (Schedule 8).

Rights commitments in the Belfast/Good Friday Agreement

[26] In the context of the UK's withdrawal from the European Union, the Belfast/Good Friday Agreement ("B-GFA") has been afforded special protection. Article 2(1) of the WF imposes an international law obligation on the United Kingdom ("UK") in the following way:

> "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."

[27] The relevant aspects of the Rights, Safeguards and Equality of Opportunity ("RSE") provisions contained within the B-GFA are 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 freely choose one's place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
- the right to freedom from sectarian harassment; and
- the right of women to full and equal political participation.

United Kingdom Legislation

2. The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.

[…]

A Joint Committee

10. It is envisaged that there would be a joint committee of representatives of the two Human Rights Commissions, North and South, as a forum for consideration of human rights issues in the island of Ireland. The joint committee will consider, among other matters, the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland.

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. The achievement of a peaceful and just society would be the true memorial to the victims of violence. The participants particularly recognise that young people from areas affected by the troubles face particular difficulties and will support the development of special community-based initiatives based on international best practice. The provision of services that are supportive and sensitive to the needs of victims will also be a critical element and that support will need to be channelled through both statutory and community-based voluntary organisations facilitating locally based self-help and support networks. This will require the allocation of sufficient resources, including statutory funding as necessary, to meet the needs of victims and to provide for community-based support programmes.

13. The participants recognise and value the work being done by many organisations to develop reconciliation and mutual understanding and respect between and within

> communities and traditions, in Northern Ireland and between North and South, and they see such work as having a vital role in consolidating peace and political agreement. Accordingly, they pledge their continuing support to such organisations and will positively examine the case for enhanced financial assistance for the work of reconciliation. An essential aspect of the reconciliation process is the promotion of a culture of tolerance at every level of society, including initiatives to facilitate and encourage integrated education and mixed housing."

The Victims' Directive/Victim Charter

[28] At first instance, and again before this court, the applicants have relied on provisions of EU law to advance their argument under the WF. Specific reliance was placed on Directive 2012/29/EU, the "Victims' Rights Directive" or "Victims' Directive" ("VD"), which establishes minimum standards on the rights, support and protection of victims of crime in EU law.

[29] The legislative intent behind the Directive is set out in the Recitals. Recital 1 states:

> "(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, the cornerstone of which is the mutual recognition of judicial decisions in civil and criminal matters."

[30] This objective is further elucidated at Recital 11:

> "(11) 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."

[31] Recital 3 then identifies the underpinning of the Directive in EU law:

> "(3) Article 82(2) of the Treaty on the Functioning of the European Union ("TFEU") provides for the establishment of minimum rules applicable in the Member States to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, in particular with regard to the rights of victims of crime."

[32] As the substance of this appeal concerns the ending of the criminal process in relation to Troubles-related offences, Recital 43 takes on a particular significance:

> "(43) The right to a review of a decision not to prosecute should be understood as referring to decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers, but not to the decisions taken by courts. Any review of a decision not to prosecute should be carried out by a different person or authority to that which made the original decision, unless the initial decision not to prosecute was taken by the highest prosecuting authority, against whose decision no review can be made, in which case the review may be carried out by that same authority. The right to a review of a decision not to prosecute does not concern special procedures, such as proceedings against members of parliament or government, in relation to the exercise of their official position."

[33] Turning to the body of the Directive, two articles are relied upon. First, article 11, entitled 'Rights in the event of a decision not to prosecute', sets out the minimum rights of the victim in that event:

> "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 receive, 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."

[34] Second, article 16 considers the victim's right to a decision on compensation from an offender in the course of criminal proceedings:

> "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."

[35] We have also considered the Victim Charter, as given effect by the Victim Charter (Justice Act (Northern Ireland) 2015) Order (Northern Ireland) 2015and made pursuant to sections 28 and 31(3) of the Justice Act (Northern Ireland) 2015. The Explanatory Note that accompanies the 2015 Order expressly provides that the Charter "implements a range of obligations arising out of the EU Directive (2012/29/EU) [the VD] establishing minimum standards on the rights, support and protection of victims of crime."

[36] With a summary of the legislative background now set out, we turn to the treatment of the 2023 Act at first instance.

Treatment of the 2023 Act at first instance

[37] The broad approach of the trial judge at first instance was to first engage with the relevant provisions of the 2023 Act through the lens of the ECHR, and then to consider the provisions he had found incompatible with Convention rights within the framework of EU law. Accordingly, only the provisions of the Act found to be unlawful in the ECHR sense were considered for disapplication.

[38] In respect of the lead case ('*Dillon*'), the trial judge found as follows:

(a) The provisions relating to immunity from prosecution were contrary to articles 2 and 3 ECHR and were further incompatible with article 2(1) WF. These provisions and their effect were:

(i) section 19: the ICRIR must grant immunity subject to three conditions (the trial judge considered this the 'main provision');

(ii) section 7(3): material obtained by the ICRIR from a person who has made an application for immunity may not be used in criminal proceedings against the person who provided the material;

(iii) section 12: the ICRIR may carry out a review if a person requesting immunity ("P") caused the death or other harmful conduct, or P's conduct relates to other conduct that caused the death;

(iv) section 20: the procedural matters following requests for immunity;

(v) section 21: determining a request for immunity;

(vi) section 22: the establishment of an immunity panel;

(vii) section 39: no criminal enforcement action may be taken against those granted immunity for serious or connected Troubles-related offences;

(viii) section 41: prohibition of criminal enforcement action in relation to a Troubles-related offence unless it is serious or connected to a Troubles-related offence; and

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

The first instance court issued a declaration of incompatibility under section 4 HRA and further disapplied these provisions pursuant to section 7A EUWA 2018.

(b) The ending of Troubles-related civil proceedings was incompatible with article 6 ECHR and article 2(1) WF. This finding concerned section 43(1), which had the effect that any civil action brought on or after the day of the First Reading of the Bill (17 May 2022) may not be continued. (It is important to note that this provision had retroactive effect). The court issued a section 4 HRA declaration and further disapplied these provisions pursuant to section 7A EUWA 2018.

(c) The inadmissibility of material in civil proceedings was incompatible with articles 2, 3 and 6 ECHR and was further incompatible with article 2(1) WF. The relevant provision was section 8, under which no protected material, or evidence relating to protected material, is admissible in civil proceedings, proceedings before a coroner or any inquiry under the Inquiries into Fatal Accidents and Sudden Deaths (Scotland) Act 2016. The court, again, issued a section 4 HRA declaration and further disapplied these provisions pursuant to section 7A EUWA 2018.

[39] Dealing with the *Jordan* case the court mirrored its approach to section 41 which it applied in *Dillon* but declined relief in respect of section 8 of the Act. The applicant's challenge under articles 8 and 14 ECHR also failed.

[40] In respect of the *Gilvary* case, the court concluded that the applicant's application should be refused on the basis that she did not have sufficient standing within the meaning of section 7 HRA.

[41] In respect of *Fitzsimmons*, the court made an order that sections 46(2)-(4) and 47(1) and (4) of the 2023 Act (the Interim Custody Order provisions) were incompatible with the applicant's rights under article 6 and A1P1 ECHR.

[42] The court declined to grant any declarations or relief in respect of the following matters:

(a) The five-year time limit on reviews: this aspect of the applicants' case concerns sections 9(8), 10(3) and 38 of the Act. While the court noted its concern at the lack of flexibility to deal with new cases where evidence comes to light (**para [249]**), the court concluded that it was not possible to make a declaration *ab ante* in this respect (**paras [251]-[252]**).

(b) The ICRIR's capacity to discharge its article 2 and 3 obligations: the relevant provisions were sections 2(7)-(9), 2(11), 9(3), 10(2), 30, 31, 33, 34, 36, 37(1); Schedule 1, paras 6, 7, 8, 10; and Schedule 6, para 4. This aspect of the case included:

    (i) Whether the ICRIR was sufficiently independent: the court concluded that "the proposed statutory arrangements taken together with the policy documents published by the Commission inject the necessary and structural independence into the ICRIR" (**para [284]**);

    (ii) Whether the ICRIR has the capacity to carry out an effective investigation: the court concluded that, subject to the discussion on immunity, all investigations will be capable of leading to prosecutions (**para [305]**);

(iii) Whether the powers of disclosure could satisfy the procedural elements of articles 2 and 3: the court went so far as to say that the powers of disclosure were an improvement on the situation in relation to inquests (**para [319]**);

(iv) Whether there was sufficient scope for victim participation: the court found that the Commission could compel witnesses to be examined under section 14 of the Act (**para [351]**) and uncritically took into account the ICRIR's proposal to utilise section 3 of the Act to second legal representatives to be its officers (**paras [355] and [358]**). As a result, the court found that "[i]f these policies are adopted and implemented, the ICRIR will be seen to do all that it can to ensure transparency and victim participation" (para **[356]**); and

(v) Whether the requirements for legal aid and public hearings were met: the court concluded that a fair reading of the ICRIR's policy documents tilted the balance in favour of effectiveness (**paras [358]-[360]**).

Taking these conclusions on effectiveness and independence together, the court declined to make orders in respect of 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; and/or Schedule 6, para 4.

Summary of the arguments on appeal

[43] Although we will only reference the arguments in summary form for the purposes of this judgment, we confirm that we have considered all of the submissions in detail, including the very helpful contributions from the intervenors. We are indebted to all counsel and solicitors for the huge effort put into this case and for their research and learning which has been of the highest quality. Necessarily, this judgment seeks to address the core points in the case and does not purport to deal in detail with every sub argument made in support.

[44] We summarise the core points as follows. First, as regards, the WF arguments, the SOSNI's grounds of appeal are that the trial judge erred by finding that the provisions of the Act were incompatible with article 2(1) and disapplying them pursuant to section 7A EUWA 2018. Specifically, the SOSNI argues that the trial judge erred:

(a) In his interpretation of the WF by equating a breach of the ECHR with a breach of the European Union Charter of Fundamental Rights ("CFR") (judgment, **paras [518], [588] and [602]**);

(b) In failing to conclude that diminution cannot occur where the CFR right is mirrored in the ECHR, and, in any case, in making a finding of diminution *ab ante*;

(c) In finding that the VCLT applied when construing provisions of the B-GFA (judgment, paras **[530]-[535], [547] and [550]-[553]**);

(d) In finding in blanket fashion that the VD was engaged and that it has direct effect (judgment, **paras [530]-[561]**);

(e) In finding that the rights were covered by the B-GFA, and by further not specifying which rights were engaged (judgment, **para [610]**);

(f) In his analysis of the test in *Re SPUC's Application* [2023] NICA 35; and

(g) In applying the VD and the CFR despite article 2 WF not applying any EU law directly (judgment, **paras [585]-[591]**).

[45] This was essentially a frontal attack on all aspects of the trial judge's reasoning on the WF point. As we understand it, all of the above arguments are maintained, notwithstanding the SOSNI's abandonment of his grounds of appeal relating to the trial judge's findings of violations of Convention rights. The SOSNI further challenges the conclusion that disapplication was the mandatory, or an appropriate, remedy for diminution of rights in breach of the non-diminution guarantee in article 2 WF.

[46] With respect to the ECHR arguments, the SOSNI initially contended that the trial judge erred in issuing declarations of incompatibility under section 4 HRA. Specifically, the SOSNI's grounds of appeal (now abandoned) were that the trial judge erred:

(a) In his application of the *Ullah* principle in its contemplation of immunity and amnesties;

(b) In finding that the Troubles ended, in effect, in 1998;

(c) In failing to apply an appropriate margin of appreciation with respect to sections 8 and 43(1) of the Act, and in finding that neither provision met the proportionality threshold; and

(d) By making declarations of incompatibility notwithstanding the guidance provided by the UKSC in *Re Attorney General for Northern Ireland's Reference (Abortion Services (Safe Access Zones) (NI Bill))* [2022] UKSC 32 and by this court in *Re JR123's Application* [2023] NICA 30 – with the effect that the court

failed to consider whether the provisions would give rise to a breach of ECHR in 'all or most cases.'

[47] In *Fitzsimmons*, the applicant argued that the trial judge erred in law:

(a) In concluding that the applicant's claim was an asset within the meaning of A1P1 (judgment, **para [700]**);

(b) In relying on the test in *Vegotex* (judgment, **paras [694] and [696]**) and in failing to consider that the restoration of the *Carltona* principle represented a compelling ground of general interest; and

(c) In failing to conclude that the impugned ICO provisions correct an error on the part of the UKSC in *Adams* (although this was not pursued with any vigour at the hearing, recognising that this court would be bound by the UKSC's reasoning in *Adams*).

[48] In their cross-appeal, the applicants in the *Dillon* appeal argue that the trial judge erred in failing to make a declaration of incompatibility in relation to a number of additional provisions of the 2023 Act, namely:

(a) Sections 9, 10 and 38 of the Act, which impose a five-year time limit on requests for reviews of deaths or other harmful conduct forming part of the Troubles, as they are incompatible with articles 2 and 3 ECHR;

(b) Section 43 of the Act (insofar as it does not have retrospective effect), which prevents civil claims, as it is incompatible with article 6 ECHR;

(c) Section 45, which brings an end to Police Ombudsman for Northern Ireland ("PONI") investigations, insofar as it is incompatible with articles 2 and 3 ECHR; and

(d) Section 44 of the Act and sections 7, 9-11, 13 and 15-17 of the Act, which will bring an end to inquest proceedings and replace them with a review by the ICRIR, insofar as these provisions are incompatible with articles 2, 3 and 6 ECHR.

[49] Further, the *Dillon* litigants argue that the trial judge erred in not recognising that these provisions were also incompatible with article 2(1) WF and that he ought to have disapplied them accordingly.

[50] The cross-appeal from the remaining parties can be dealt with more briefly. In *Jordan*, the applicant argued that the trial judge erred in holding that article 8

ECHR was not engaged in her case, and that he was wrong to reject the applicant's status of association with a national minority when considering her article 14 claim.

[51] In *Gilvary*, the applicant argued that the trial judge was wrong to find that she lacked standing to bring a claim, and that the trial judge was further wrong to consider that she had not demonstrated "concrete evidence" to sustain such a claim. It is further contended that the trial judge was wrong to reject that applicant's claim under article 14 ECHR. *Gilvary* brings a cross-appeal on the WF arguments and, fundamentally, that the limitations on investigation and prosecutions in respect of torture amounted to an affront to common law constitutional principles and that parliamentary sovereignty should be limited to that effect.

[52] In *Fitzsimmons*, the applicant argues that the trial judge was wrong to conclude that a party is required to have victim status in order to benefit from a section 4 HRA remedy.

[53] With the arguments now summarised, we proceed to set out our conclusions on the six core issues identified at paras [13]-[14] herein.

1. Conclusion: The Windsor Framework

[54] Properly analysed there are four key issues in play as regards this aspect of the appeal:

(i) Whether article 2(1) WF can be relied upon;

(ii) Whether the VD and/or CFR contain rights which are justiciable in this context;

(iii) Whether there has been any diminution of rights in the sense described in the *SPUC* case; and

(iv) Whether the provision of a remedy mandates disapplication of primary legislation.

Before answering these questions, it is important to set out the governing legal provisions in, what is, a complicated area of law.

[55] The starting point is the European Union Withdrawal Agreement. The Withdrawal Agreement ("WA") is an international treaty, concluded between the UK and the European Union (on behalf of its Member States), that formalises the UK's exit from the EU. The Agreement was signed on 24 January 2020 and entered into force on 1 February 2020. Built into the Agreement was a transition period, whereby it was agreed that EU law would remain applicable in the UK until 23:00

hrs on 31 December 2020. The detail of the transition period is set out in Part 4 of the Agreement. For present purposes, it suffices to say that the key date emanating from the Agreement is 31 December 2020, the date on which the general corpus of EU law ceased to have effect in the UK. That is the operative date which frames this discussion.

[56] Contained within the Agreement is an obligation on the UK to give full effect to applicable EU law. The relevant provision here is article 4, which reads as follows:

> "**Methods and principles relating to the effect, the implementation and the application of this Agreement**
>
> 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.
>
> 5. In the interpretation and application of this Agreement, the United Kingdom's judicial and

> administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period."

[57] The import of article 4 can hardly be overstated. As made clear in paragraph 1, certain Union law continues to apply in the circumstances mandated by the WA. In addition, provisions of the WA itself are to have the same legal effects as they produce within the EU. Those laws and provisions of the WA shall be capable of being relied upon directly so far as they have direct effect and may give rise to the remedy of disapplication of primary legislation.

[58] Whilst the WA is a treaty, it was incorporated into domestic law by the European Union (Withdrawal) Act 2018 ("EUWA 2018") and the European Union (Withdrawal Agreement) Act 2020 ("EUWAA 2020") which are primary Acts of the sovereign parliament. The question is whether their provisions should result in a disapplication of provisions of a further Act of Parliament, the 2023 Act, based on inconsistency with EU law or with the provisions of the WA itself. This concept is not new and was addressed by the House of Lords in *R v Secretary of State for Transport ex parte Factortame* [2000] 1 AC 524. However, post-Brexit the ongoing application of EU law, whether as an unintended or intended consequence of the WA, has proven somewhat controversial. We do not intend to enter that debate, nor would it be appropriate for the court to do so. Our role is simply to address the legal question put before us by means of interpretation of the WA and the relevant statutory provisions. We do so as set out below.

[59] The text of article 4 WA informs the interpretation of subsequent provisions in the Agreement. Indeed, article 4 shines a light on article 2(1) of the Protocol on Ireland/Northern Ireland – now known as the WF. In general, and as expressly noted in its preamble, the WF recognises that it is "necessary to address the unique circumstances on the island of Ireland through a unique solution in order to ensure the orderly withdrawal of the United Kingdom from the Union." Indeed, the preamble also expressly mentions the B-GFA and affirms the intention of the signatories to protect that Agreement in all its parts.

[60] Specifically, article 2(1) WF provides for the rights of individuals resident in Northern Ireland. It imposes a state obligation on the UK to ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled RSE occurs post withdrawal from the EU.

[61] On reading the text of article 2(1) (set out at para [26] herein), it is evident that the obligation upon the UK is broken down into a general part, and a specific part. The general obligation is to ensure that no diminution of rights, safeguards or equality of opportunity arises from the UK's withdrawal from the EU. The specific

obligation then focuses in on the protection from discrimination, as enshrined in the EU law instruments set out in Annex 1 to the WF.

[62] Owing to the dualist nature of the UK constitutional approach, the WA had to be incorporated into domestic law to have direct legal effect in the jurisdictions forming the UK's legal order. As indicated above, this was done by way of two Acts: the EUWA 2018 and the EUWAA 2020. The present case is primarily concerned with section 7A of the 2018 Act. As its long title makes clear, the EUWA 2018 repeals the European Communities Act 1972 ("ECA 1972") and makes other provision in connection with the withdrawal of the UK from the EU. However, section 7A itself was inserted into the 2018 Act by the EUWAA 2020, which was "An Act to implement, and make other provision in connection with, the agreement between the United Kingdom and the EU under article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom's withdrawal from the EU." The dovetailed purpose of those two Acts was to bring about the UK's exit from the EU and, in furtherance of that, to implement the WA. That informs any reading of section 7A.

[63] In this spirit, section 7A sets out what has become known as the "conduit pipe" that incorporates EU law with ongoing effect into UK domestic law post-exit. (The term 'conduit pipe' was adopted as a metaphor by Professor John Finnis and was referred to in the majority's judgment in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61. It has since become part of the lexicon of that case and related legal debate). So far as is relevant, section 7A provides:

> "(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)."

[64] To our mind it is not a coincidence that section 7A closely resembles section 2 of the 1972 Act, which read as follows:

> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly …"

[65] In essence, then, section 7A transfers, by way of 'conduit pipe', the relevant provisions of EU law deemed applicable into the domestic law of the UK. This includes rights, obligations, remedies, etc. arising "by or under" the WA. The WA itself has essentially replaced the Treaties as the means by which EU law obligations may arise and/or continue to apply within the UK, either arising from the terms of the WA itself or under its provisions. This includes, article 4 WA, article 2(1) WF and variety of other obligations arising in or under the WA. The condition in section 7A(1) is simply that the relevant obligations "in accordance with the withdrawal agreement are without further enactment to be given legal effect." Whether that is the case in relation to a particular obligation will have to be answered by considering its wording and construing the withdrawal agreement, particularly by reference to articles 2 and 4 WA. The key question, pursuant to article 4(1) WA, will be whether the relevant obligation meets the conditions for direct effect under EU law.

[66] This court had cause to address section 7A in *Re Allister and Others v Secretary of State for Northern Ireland* [2022] NICA 15, [2023] NI 107. In *Allister*, the Court of Appeal concluded that, taken as a whole, the EUWA 2018 represented a "modern statute which utilises clear language to achieve its purpose which is essentially subjugation in the event of any conflict with a previous enactment" (*Allister*, NICA, at para [194]).

[67] Equally, when the same case was heard before the Supreme Court ([2023] UKSC 5), Lord Stephens observed at para [74] of the court's ruling:

> "The 2020 Act made provision for the Withdrawal Agreement to form part of UK law and give rise to legal rights and obligations in domestic law. This was achieved by section 5 of the 2020 Act which inserted section 7A into the 2018 Act. Again, it is obvious that for the Withdrawal Agreement to form part of UK law the Government must first make that agreement. Again, the clear intention of Parliament was to authorise the Government to exercise the prerogative to make Withdrawal Agreement, including the Protocol."

[68] The omnibus conclusion of both courts in *Allister* was that the Northern Ireland Protocol (here, the WF) was given effect by section 7A of the EUWA 2018.

[69] Of course, the context of *Allister*, which asked whether section 7A displaced article VI of the Union with Ireland Act 1800 and which was principally concerned with trade, was different from the context of the instant case, where we are concerned about the potential diminution of human rights protections. However, the pronouncements made in *Allister* clearly illustrate the potential legal effect of section 7A and, as a result of it, the WF. The *Allister* case proceeded on the basis that section 7A gave effect to the WF and, in turn, gave effect to the will of Parliament that the WF should have powerful legal effects within the UK, including the possibility of prevailing over primary legislation. This starting point is of intrinsic value to the analysis in the present case.

[70] Having set out the governing provisions, we now proceed to address each of the issues raised above in turn.

[71] The first question which we have been asked to answer is whether article 2(1) has direct effect. Having canvassed the matter with all counsel we are satisfied that this issue was not argued in any meaningful way at first instance and was implicitly accepted. That explains why the first instance judgment is effectively silent upon it. The SOSNI has raised the issue on appeal either as an entirely fresh issue or as one which was given little or no emphasis below. Therefore, the trial judge cannot be faulted for failing to deal with the point.

[72] The position adopted by the parties (including the SOSNI) at first instance was of course consistent with correspondence dated 26 February 2020 from the Northern Ireland Office ("NIO") sent by Robin Walker, Minister of State, after a roundtable discussion, to Professor Christopher McCrudden. This correspondence –

sent a matter of mere weeks after the EUWAA 2020 was passed – states *inter alia*, in response to a request for clarification on the Government position as to various provisions of the EUWAA, that:

> "New section 7A of the European Union (Withdrawal) Act 2018 (EUWA) gives effect to the UK's obligations under Article 4 of the Withdrawal Agreement and provides for provisions of the Withdrawal Agreement to flow into UK law. It also provides for the disapplication of provisions of domestic law which are incompatible or inconsistent with the Withdrawal Agreement. Accordingly, Article 2(1) of the Protocol will flow into domestic law by virtue of section 7A, and a court could disapply domestic legislation that is incompatible with the commitment in Article 2(1). We consider that Article 2(1) of the Protocol will have direct effect and that individuals (not just the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland) will, therefore, be able to rely directly on this Article before domestic courts. This includes in proceedings against the UK Government. Ultimately, however, the direct effect of individual provisions of the Withdrawal Agreement will be a matter for the courts."
>
> [underlined emphasis added]

[73] The unambiguous clarification offered above by the NIO makes the robust submissions on this point advanced by Mr McGleenan KC on the SOSNI's behalf all the more surprising. Given what we have said, we are dealing with a new argument. Despite Mr McGleenan's attempts to explain the change of approach this has not been explained satisfactorily. Perhaps the position is that this is simply an example of argument being refined on appeal. In any event, given the importance of this case and the potential significance of the point we will not dismiss the argument on the basis that it was not properly argued at first instance. Whilst we are concerned that the point was not fully or properly canvassed before the trial judge an appellate court has a wide discretion to determine matters to achieve a just result in any case. We proceed on that basis.

[74] The question of direct effect of article 2(1) WF arises because, as noted above, section 7A(2) of the EUWA 2018 applies to, and makes effective, only those rights and obligations, etc., "as in accordance with the Withdrawal Agreement are without further enactment to be given legal effect or used in the United Kingdom."

[75] There are divergent views on whether the Vienna Convention on the Law of Treaties ("VCLT") applies as an aid to interpretation of the WA and, at a subsequent

point in the analysis, the B-GFA. The VCLT is raised because it may permit the court to engage in a more purposive interpretation exercise as opposed to adopting a stricter textual approach. In this vein in *R (on the application of ST Eritrea v Secretary of State for the Home Department* [2012] 2 AC 135 Lord Hope stated that "reflecting principles of customary international law the VCLT 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."

[76] The governing provisions on the interpretation of treaties as set out in the VCLT are contained in article 31 as follows:

> "**Article 31 General rule of interpretation**
>
> 1. 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.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

[77] Article 32 then provides for supplementary means of interpretation:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

[78] The WA is plainly an international treaty to which the VCLT could apply. Both the UK and Ireland are parties to the VCLT. Furthermore, it is well-recognised that articles contained in this treaty on treaties represent a codification of the norms of customary international law. The position as regards the B-GFA is less clear-cut.

[79] 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. However, we are persuaded by the contrary view that the VCLT applies to the interpretation exercise to be carried out by the court in relation to the RSE section of the B-GFA. The British and Irish governments were involved in, and facilitated, the talks between the parties. However, they were also parties to the agreement which those talks produced. The governments agreed to obligations which were set out in the text of the B-GFA (including in the RSE section). Significantly also, the British and Irish governments simultaneously entered into an international agreement ("the British-Irish Agreement) welcoming the B-GFA and for the purpose of implementing it. The B-GFA was annexed to the text of this agreement. The text of the B-GFA was, and remains, part of an agreement which was reached between the two governments, notwithstanding the obvious point that the political parties in Northern Ireland also contributed to its development and were required to sign up to it for it to have any prospect of achieving its purpose.

[80] At this point we mention the argument advanced by Mr McCrudden on behalf of ECNI that the WF is to be interpreted not as a matter of pure international law but as part of EU law. That, ECNI says, is the correct position not only to ensure consistent interpretation but because the WA is itself EU law in Member States – and has been agreed between the EU and the UK to be properly treated as EU law – by virtue of Article 2(a)(iv) WA. Thus, the argument goes, as EU law, it must be interpreted according to EU law principles of interpretation (see also Article 4(3) WA). Viewed in that way, the VCLT interpretative provisions could essentially be displaced by the interpretative approach dictated by the express terms of the WA itself. As EU law, the primacy principle would apply, as would the requirement to interpret the WA in light of EU law general principles, including the principle of effectiveness. Mr McCrudden also referenced Article 5 WA and the principle of sincere cooperation that imposes a good faith obligation.

[81] We note that the trial judge found that the VCLT was applicable. We tend to agree with that approach, on the basis that Article 2 WA sets out definitions "for the purposes of this Agreement" but was not seeking to define the required interpretative approach to the WA itself. The text of Article 4(3) is also consistent with parts ("provisions") of the WA referring to Union law, where EU law interpretative principles would apply, but the full WA itself not being treated in that way. However, in either event, we think that the same result would be reached in this case for the reasons we will now give.

[82] Staying with EU law concepts, direct effect means that an EU law provision becomes an immediate source of law for the national court to administer. In 1963 in the seminal case of *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, 5 February 1963, Case 26-62, when interpreting a Treaty Provision, the ECJ found that it may produce direct effects in a Member State if it is clear, unconditional (in the sense of not allowing for any reservations on the part of the Member States) and not dependent on any subsequent further implementation measures to be adopted by the Member State or the Community. To quote from the court's ruling on that reference:

> "The wording … contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between member states and their subjects.

The implementation of article 12 does not require any legislative intervention on the part of the states. The fact that under this article it is the member states who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation."

[83] In his oral submissions, Mr McGleenan accepted that article 2(1) WF could, in some circumstances, have direct effect where it operated in a way which was sufficiently precise. He did not contend that it could never have direct effect. In his oral submissions he contended that direct effect could arise where *all three* of the text of article 2(1), the relevant part of the RSE Chapter of the B-GFA *and* the underpinning EU law norm simultaneously were sufficiently clear, precise and unconditional to satisfy the requirements for direct effect. Leaving aside the fact that this submission was at odds with the SOSNI written case (which suggested that article 2(1) was never capable of having direct effect), we reject this analysis. The important point is that the non-diminution obligation the applicants sought to enforce has direct effect, meaning it can be relied upon directly. It is then a question of law for the court considering whether there has been a breach of that obligation whether the relevant right or safeguard falls within the RSE Chapter of the B-GFA. Assuming so, the court will then address the remaining questions set out in the *SPUC* case or the Government Explainer.

[84] The question of whether the underpinning EU law norm itself had direct effect may be relevant to the question of diminution (if the claimed diminution relates to the remedy available for breach of the right rather than a reduction in the substance of the right itself). However, it is not necessary that all three 'levels' simultaneously have direct effect, as the SOSNI contended, particularly in circumstances where (as Mr McGleenan correctly submitted) the B-GFA was not drafted with that type of precision in mind.

[85] Having considered all of the above, we find that article 2(1) WF is directly effective. First and foremost, the non-diminution guarantee is expressed in clear and unambiguous terms. The UK "shall ensure that no diminution of rights … results from its withdrawal from the Union." As in *van Gend & Loos* this is a straightforward negative obligation assumed by the UK. The meaning of this provision speaks for itself. In addition, the nature of the prohibition on diminution of rights makes it ideally adapted to produce direct effects in the legal relationship between the state and its citizens. Although the questions of whether there has been a diminution in rights and whether, if so, this can be said to have resulted from the UK's withdrawal from the EU, will require a degree of detailed analysis on the concrete facts in any given case, the key obligation assumed by the UK in article 2(1) is a clear and unconditional obligation of result.

[86] This being so, article 2(1) was incorporated through section 7A EUWA 2018. We also consider that to have been the UK's understanding, and indeed the

intention of Parliament, at the time when section 7A was introduced to achieve (in the words of the section heading of section 7A) the "general implementation of [the] remainder of [the] withdrawal agreement." Furthermore, there is nothing to be gained from the argument that article 2(1) is not itself subject to the jurisdiction of the Court of Justice of the European Union ("CJEU"). Given the characteristics and purpose of the article we can see why this would be so. It will be a matter for the UK courts to determine in any given case whether there has been a diminution in rights – contrasting the current position in national law with what went before – and whether the diminution can be said to have resulted from the UK's withdrawal from the EU. These are classically matters for consideration by national courts.

[87] Of course this is not the end of the matter given the nature of article 2(1) just described. Self-evidently, this article does not articulate each relevant right or safeguard in itself. Rather, it is an obligation of result. It highlights a state obligation regarding established rights which must not suffer diminution post-withdrawal. Moving to this stage of the analysis, the key questions are therefore those that flow from the 'Explainer' three-stage test, which is elaborated upon and enhanced by the approach set out in *Re SPUC*

[88] Turning first to the 'three-stage test' for diminution, the approach preferred by the SOSNI. That test is set out in a Government Explainer document entitled, "UK Government commitment to 'no diminution of rights, safeguards and equality of opportunity' in Northern Ireland: What does it mean and how will it be implemented?" The Explainer was published on 7 August 2020. The pedigree of this document is that it grew out of discussions between the NIO, the dedicated mechanism and civil actors in Northern Ireland society. Paras [3]-[5] provide the context to the test:

> "3. The UK is committed to ensuring that rights and equality protections continue to be upheld in Northern Ireland. The key rights and equality provisions in the Agreement are supported by the European Convention on Human Rights (ECHR), which has been incorporated into Northern Ireland law pursuant to the commitment in the Agreement to do so. The Government is committed to the ECHR and to protecting and championing human rights. However, the Government also acknowledges that, in Northern Ireland, EU law, particularly on anti-discrimination, has formed an important part of the framework for delivering the guarantees on rights and equality set out in the Agreement.

> 4. As such, in the December 2017 UK-EU Joint Report, the UK committed "to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law." It also committed to "facilitating the related work of the institutions and bodies, established by the 1998 Agreement, in upholding human rights and equality standards."
>
> 5. This commitment is now reflected in Article 2 ("Rights of individuals") of the Ireland/Northern Ireland Protocol to the Withdrawal Agreement. It is therefore binding on the UK Government and Parliament, the Northern Ireland Executive and the Assembly as a matter of international law. Our international obligations under the Withdrawal Agreement became UK domestic law when Parliament passed the EU (Withdrawal Agreement) Act 2020 in January 2020.
>
> …
>
> 6. The Protocol commitment means that the UK Government must ensure that the protections currently in place in Northern Ireland for the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Agreement are not diminished as a result of the UK leaving the EU. We do not envisage any circumstances whatsoever in which any UK Government or Parliament would contemplate any regression in the rights set out in that chapter, but the commitment nonetheless provides a legally binding safeguard. It means that, in the extremely unlikely event that such a diminution occurs, the UK Government will be legally obliged to ensure that holders of the relevant rights are able to bring challenges before the domestic courts and, should their challenges be upheld, that appropriate remedies are available (see para. 29 below for more detail)."

[89] It is noteworthy that the Explainer not only recognises in para 5 that article 2 WF is binding as a matter of international law but proceeds on the basis that the introduction of section 7A in the EUWAA 2020 made the no-diminution obligation, amongst others, binding in domestic law also. That is spelt out even more clearly in paras 6 and 29 of the Explainer. (This is consistent with the position set out in the

NIO letter referred to in para [72] above. We consider that, taken together, it is arguable that these statements could be said to amount to subsequent practice on the part of the UK in the application of the treaty which establishes the agreement of the parties regarding its interpretation – namely that article 2 WF was understood and intended to be directly effective – in accordance with article 31(3)b) VCLT. However, our conclusion has been reached independent of any such reliance.)

[90] Following on, the Explainer then sets out the Government's proposed test for establishing a diminution of rights, safeguards or equality of opportunity. The test set out at paragraph [10] asks:

> "(i) that the right, safeguard or equality of opportunity provision or protection is covered by the relevant chapter of the Agreement;
>
> (ii) that it was enshrined or given effect to in the domestic legal order in Northern Ireland on or before the last day of the transition period; and
>
> (iii) that the alleged diminution occurred as a result of the UK's withdrawal from the EU, or, in other words, that the alleged diminution would not have occurred had the UK remained in the EU."

[91] The SOSNI has adopted this three-stage test, although it has also recognised the '*SPUC* test' set out below. The advantage of the three-stage test, the SOSNI says, is that it is straightforward and more closely mirrors the text of article 2 WF.

[92] There is nothing materially contradictory between the two approaches as was ultimately accepted by all parties. The approach set out in *Re SPUC* simply expands upon the test set out in the Government Explainer and presents a more structured way of addressing essentially the same questions, particularly consideration of whether the diminution of rights would or could not have occurred but for the UK's withdrawal from the EU. This test originated in the context of a concrete challenge to the Abortion (Northern Ireland) Regulations 2021, made under the Northern Ireland (Executive Formation etc) Act 2019.

[93] The 2019 Act was itself a response to the Supreme Court's decision in *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27, in which the court unanimously held that the restrictions on abortion in Northern Ireland which prevailed at the time offended article 8 ECHR. The 2021 Regulations implemented recommendations made in a report by the Committee on the Elimination of Discrimination against Women regarding the de-criminalisation of, and access to, abortion in Northern Ireland. The applicant in that case challenged

the Regulations on, inter alia, the basis that they were contrary to article 2(1) WF since EU law would have prevented the provision of abortion on the ground of disability.

[94] The Court of Appeal in *Re SPUC* adopted the following approach at paras [54] and [55] of its judgment:

> "[54] The appellant, in making this challenge, has to establish a breach of Article 2 satisfying the six elements test, namely:
>
> (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.
>
> [55] Each one of these elements described above must be demonstrated for the ground to succeed."

[95] The conclusion in *Re SPUC* was a simple one: the appellant's challenge failed as the provision of abortion is not a matter within EU competence (see *Re SPUC*, paras [58], [60] and [71]-[72]). Accordingly, EU law could not have underpinned any right which may be said to have been removed or diminished.

[96] Plainly, the *SPUC* questions were designed to assist the analytical exercise in a case where direct effect was not in issue and abortion was not an EU competence. This formulation is an aid and not a binding or rigid code. In certain cases, it may be appropriate to address the questions in a different order: for instance, if it is clear that there has been no diminution in rights, a determination may not be required in

relation to some of the other questions. However, we turn now to how the criteria identified in *SPUC* were applied by the trial judge. He found as follows:

(a) *SPUC* (i): Articles 11 and 16 of the VD were engaged through the commitment to civil rights and to victims in paras 11 and 12 of the RSE Chapter of the B-GFA (**para [561]**). The trial judge reached this conclusion having found that he was entitled to rely on a generous and purposive interpretation of the BIA through the VCLT. He further held that victims' fundamental rights were within the notion of "civil rights" and are protected through the commitment to victims in para 11 RSE.

(b) *SPUC* (ii): the trial judge was 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 VD; articles 2, 3, 6 and 14 ECHR; and articles 1, 2, 4 and 47 CFR (**para [570]**).

(c) *SPUC* (iii): the trial judge found the rights of victims were underpinned by the VD. Specifically, "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" (**para [578]**).

(d) *SPUC* (iv): the trial judge addressed this issue along with limbs (v) and (vi).

(e) *SPUC* (v): here the court refined its previous comments in the *Angesom* case and found that "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" (**para [586]**). On articles 11 and 16 VD specifically, the trial judge found that the Directive "pre-supposes the possibility of a prosecution. Any removal of this possibility is incompatible with the Directive" (**para [608]**). He further held that the Directive had direct effect following *Marks and Spencer,* Case C-62/00. In all the circumstances then, the court concluded 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 (**para [610]**).

(f) *SPUC* (vi): here the court concluded 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" (**para [612]**).

[97] As a consequence of this analysis the trial judge's conclusion on remedy was forthright, namely that "the remedy in respect of sections 7(3), 8, 12, 19, 20, 21, 22, 39, 41, 42(1) of the 2023 Act is disapplication" (**para [613]**). However, we note that the trial judge did not analyse in particular detail a number of issues we have identified and discuss below as to the precise content of the right in issue, flowing from the VD, its direct effect and the effect of the CFR. This was presumably based upon the level of argument he received. We propose to address these issues in some further detail in this judgment.

[98] On appeal the SOSNI pursues a more detailed argument and frames it in the following way:

(a) The starting point in this analysis must be that EU law will not apply to the UK (article 1 WA). The WF exists as an exception to that rule. The obligation imposed by article 2(1) is one of result: to ensure no diminution of RSE rights. That result can be achieved through rights' protections enshrined in other instruments (ie the ECHR). Such a reading of article 2(1) aligns with the objective of the WA.

(b) There is a normative difference between article 2(1) WF and, for example, article 5(4) WF, which is specific in effect. The result is that the overarching purpose of the WA will be achieved by: (i) enabling the UK to diverge from EU law, (ii) whilst avoiding a hard border, and (iii) avoiding a sea border. Articles 5(4)-(5), 7(1), 8, 9 and 10(1) WF are specific and limited derogations from aim (i) in order to achieve aims (ii) and (iii). By contrast, article 2(1) is not specific; nor is it subject to the jurisdiction of the CJEU.

(c) The B-GFA is aspirational and should not be considered justiciable in the ordinary course of events. In any case, the RSE Chapter included provisions on reconciliation (which is the purpose pursued by the 2023 Act).

(d) B-GFA RSE is entirely inconsistent with the requirements for direct effect: the language is at a high level of abstraction, without any specific grounding in human rights instruments, and the UK has never sought to create justiciable rights in this context.

[99] Going through the elements of the *SPUC* test (although the SOSNI resisted a rigid application of this test), the SOSNI argued that:

(a) The right relied upon has no link to the B-GFA. The court below was wrong to hold in blanket fashion that the VD was within the scope of victims' rights: the rights relied upon within the RSE were aspirational and the VD was not within its scope. The rights relied upon do not bear upon the clearly expressed right of victims to remember or to contribute to a changed society.

(b) The scope of the right in the VD was not in effect on or before 31 December 2020.

(c) The SOSNI takes limbs (iii)-(v) of *SPUC* together and argues that:

(i) There has been no diminution in rights because the provisions of the VD implemented by the Justice (NI) Acts 2002 and 2015 and the Victim Charter remain untouched by the 2023 Act. In any event, prosecutorial processes are still possible (where immunity has not been earned or has been revoked).

(ii) It is wrong to find that the VD underpinned Northern Irish law. It is further wrong to find that the rights in the B-GFA were underpinned by the CFR. Reliance on the *Rugby Union* case was misplaced.

(iii) The court cannot rely on the ECHR as being a right within RSE; all the RSE required was that the HRA be implemented in domestic law, which the UK Government has done.

(iv) In any case there has been no diminution at all. Article 11 VD does not create substantive obligations and there is nothing in the 2023 Act that prevents the standards for access to information by victims, and victims' involvement in the body's investigative processes, to be at least equivalent to those which apply to ordinary criminal investigations. The Directive only applies if the conduct in question is criminalised and prosecutable. Nor does article 11 VD have direct effect; its language is not clear, precise or unconditional in the *Van Gend en Loos* sense.

(d) Any alleged diminution has not resulted from the UK's withdrawal from the EU as it was always open to Parliament to make the provision made by this Act, both before and after EU withdrawal. In any case, there was no underpinning by EU law in the first place.

[100] As regards remedy, the SOSNI urged a cautious approach. Mr McGleenan cited the fact that the court merely has the "power" to disapply (as opposed to the duty to do so) and pointed to instances where the Court of Appeal in England and Wales and Divisional Court in that jurisdiction have declined to make immediate orders of disapplication as it would be a "recipe for chaos" to do so.

[101] Utilising the *SPUC* test, the applicants maintain as follows:

(a) The civil rights of the applicants are engaged (which in turn brings the CFR into play). If they are not, a generous and purposive interpretation of RSE (using VCLT principles) ensures that the RSE rights are justiciable in the article 2(1) sense. The rights that the respondents rely upon are articles 2, 3, 6 and 14 ECHR, as particularised and enhanced by the VD and the CFR.

(b) The right to challenge a decision not to prosecute was given effect before withdrawal. However, applying the *Marks and Spencer* authority referred to above, it is no barrier to the direct effect of the provisions of the VD that the content thereof had been implemented, at least partly, in domestic law.

(c) There is abundant EU law underpinning the right to request a review of a 'no prosecution' decision. In any case it need not be shown that the right itself was entirely created by or derived from EU law. Article 11 VD is inconsistent with any statutory removal of the possibility of prosecution for any defined category of case such as has purportedly been achieved by the Act. The CFR further extends both the right to dignity and the right to life to victims.

(d) The EU law underpinning these rights has been removed.

(e) There has been a diminution of the rights in various respects: between them the applicants have been deprived of access to inquests, police and Police Ombudsman investigations, criminal prosecutions of offenders and civil remedies against perpetrators. All of these are consequent upon the removal of protections contained in EU law.

(f) The diminution would not have occurred but for withdrawal: on this the applicants say 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 Charter of Fundamental Rights."

[102] As regards remedy, the applicants agree with Humphreys J's analysis in *Re NIHRC's Application* [2024] NIKB 44 in which he held as follows at para [17]:

> "The remedy of disapplication … is entirely orthodox and in keeping with established principles set out in *Liberty* … Disapplication of domestic law which is inconsistent with superior EU law has been part of our legal system and understanding for well over a generation."

[103] So far as is relevant, the other parties have made the following submissions on the WF point.

[104] Mr Southey on behalf of Mrs Gilvary submits that she enjoyed sufficient interest to bring a challenge in respect of article 2(1) WF. As a result, the court erred in failing to apply this finding to the SOSNI's case and in failing to grant relief accordingly.

[105] In addition to the submission referred to at para [80] above as to the application of EU law Mr McCrudden submitted that the UK Government "committed to a position that is precisely the opposite to what the SOSNI now submits to this court" and that it is self-evident that article 2(1) WF has direct effect. He also contended that the B-GFA, as an annex to the British-Irish Agreement, should be regarded as "an integral part of that international agreement unless there are reasons to suppose that this was not the intention (VCLT, Article 31(2))." Relatedly, he maintained that the principles of customary international law codified in the VCLT should be utilised when interpreting the relevant parts of the B-GFA. Accordingly, he maintained that the generous and purposive approach adopted by Colton J was beyond reproach.

[106] The ECNI also urged the court to interpret the term "civil rights" within the RSE Chapter of the B-GFA broadly. Considering the application of direct effect of the CFR in the instant case, ECNI submits that the EU's competence is clear:

> "Article 82(2)(c) of the Treaty on the Functioning of the European Union provides for an explicit EU competence to set minimum standards on the rights of victims of crime."

Its argument continues:

> "Even where there is no violation of specific Directives, the CFR will apply to Member State activities that are nevertheless 'within the scope' of EU competences in other respects, applying the judgment of the CJEU in *CG*."

(The *CG* case is referred to further below in the context of the NIHRC's submissions.) Finally, on remedy, the ECNI argues that disapplication should only be delayed in the most exceptional circumstances, and that no compelling interests have been advanced by the SOSNI in this case.

[107] The NIHRC considered that the trial judge erred in failing to find that a greater number of provisions of the Act were ECHR non-compliant. Mr Mercer KC advanced the following arguments. In relation to application of the *SPUC* questions, (i) the NIHRC submitted that the trial judge correctly highlighted the breadth of "civil rights" in which victims' rights are engaged, including articles 2, 3, 6 and 14

ECHR. As to *SPUC* (ii), it was correct to hold that the rights in question were given effect before withdrawal.

[108] The NIHRC also emphasised the following points. First, the point was made that the Victim Charter affirms that victims are entitled to "be updated at key stages and given relevant information", including decisions not to continue with or to end an investigation and not to prosecute an alleged offender. Where a decision is made not to prosecute an alleged offender, the victim is "entitled to be notified of the reasons why this decision was made … and how you can seek a review of the decision if you are dissatisfied with it, in accordance with the review scheme." A victim has "a right to request a review of a decision not to prosecute":

> "(i) The Charter confirms victims' rights to 'participate in criminal proceedings.'
>
> (ii) A victim of crime has a right to receive compensation (subject to certain time limits), with rights of review/appeal where compensation is refused."

[109] In any event, the NIHRC advanced the proposition that the rights in articles 11 and 16 VD satisfy the conditions for direct effect and formed part of national law prior to Brexit on that independent basis. Furthermore, the CJEU Grand Chamber judgment in C-709/20, *CG v The Department for Communities in Northern Ireland* at [88]–[89] established that, where the UK is acting within the sphere of EU law, in that case under a Treaty provision, it has to comply with relevant substantive obligations under the CFR.

[110] Turning back to *SPUC* (iii), the NIHRC made the case that the Victim Charter is clearly underpinned by the Directive which is to be interpreted in accordance with the CFR and general principles of EU law by virtue of article 4(3) WA and section 7A EUWA 2018. The NIHRC also submitted that, in relation to *SPUC* (iv), the underpinning was removed, and that the 2023 Act has resulted in diminution for the purpose of *SPUC* (v). Finally, the NIHRC supported the trial judge's reasoning in relation to *SPUC* (vi); that the diminution in rights would have been unlawful and therefore would not have been impossible had the UK remained in the EU.

[111] On remedy, NIHRC submitted that, under section 7A EUWA, disapplication is the correct remedy as:

> "(i) Article 2(1) falls within the description that section 7A(2) is to apply to "all such rights, powers, liabilities, obligations and restrictions from time to

time created or arising by or under the withdrawal agreement."

(ii) Article 2(1) has direct effect.

(iii) A statutory provision which is incompatible with Article 2(1) WF can have effect only subject to Article 2(1); in other words, it must be disapplied (ie stripped of 'effect') to the extent of the incompatibility."

[112] At this point we pause to observe that ECNI and NIHRC are dedicated mechanisms established to monitor human rights in this jurisdiction pursuant to the B-GFA. Their views therefore carry considerable force, albeit that they cannot be determinative of any issue of law involved in the proceedings.

[113] We have set out the arguments in some detail above in order to explain the full context of this appeal point. Having considered all of the above we reach the following conclusion. Using the six *SPUC* questions as a guide we find as follows.

[114] First, we consider that in a broad sense the "civil rights" of the applicants are engaged. Article 2(1) of the WF references the B-GFA "Rights Safeguards and Equality of Opportunity" provisions. The broad statement within the opening paragraph of that section refers to the parties affirming their commitment towards "the mutual respect, the civil rights and religious liberties of everyone in the community." The RSE also refers to victims, given the historical context, in its parts entitled "reconciliation and victims of violence." Further, this part refers as follows:

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

[115] In our view, the trial judge correctly highlighted the breadth of "civil rights" in the RSE chapter of the B-GFA. Para 1 of that section affirms the parties' commitment to the "civil rights and religious liberties of everyone in the community." Some individual rights are then mentioned "in particular", which are designed to illustrate rights of potentially special significance in the context in which the B-GFA was reached. Some of these rights, such as freedom of thought and religion, were and are well-known and well-recognised fundamental human rights. However, it is clear that the commitment to rights and safeguards encompassed

within the RSE chapter was intended to extend much further than those rights specifically listed in para 1. The import of that chapter is that a broad suite of rights which had been recognised by the participants in the talks, and which were to be given further effect in the mechanisms to be established pursuant to the B-GFA (such as the incorporation into Northern Ireland law of the ECHR), would provide a baseline for individual rights-protection in the new arrangements which were to follow. The new arrangements for Northern Ireland's governance were to be founded on the protection of citizens' rights. There is no reason, in our view, to construe the broad language of the RSE chapter restrictively. That applies whether or not the VCLT interpretative approach applies or not.

[116] It is also correct that victims' rights were specifically recognised; and it is unsurprising that this is so given that the B-GFA was designed to address, to a large degree, the legacy of the Troubles. We do not accept the SOSNI's submission that the victims' rights which are recognised in the RSE are limited to a vague "right to remember." Importantly, the suffering of victims of violence was to be acknowledged and addressed. An element of this is plainly addressing these issues by means of legal remedies and avenues which have long been recognised as securing a measure of justice for victims.

[117] We consider that the trial judge was also right to identify that victims' rights are promoted and given effect by civil rights available to all victims of crime, including articles 2, 3, 6 and 14 ECHR (**para [561]**). The trial judge was also correct in our view to consider that the rights provided within articles 11 and 16 of the VD were encompassed within the notion of victims' rights addressed within the RSE Chapter (paras. 11–12) in the statements highlighted at para [114] above. An application of the *SPUC* tests requires the court to consider rights protections which applied at 31 December 2020, many years after the making of the B-GFA and determine whether those protections were within the corpus of rights envisioned as warranting protection within the RSE Chapter. The nature of the victims' rights in issue in this case are such that we consider that that question should be answered in the affirmative, as they are closely linked to acknowledging and addressing the suffering of victims.

[118] As the NIHRC submissions pointed out, the Government's Explainer Document also confirms that victims' rights are protected by article 2 WF (at section 13). In fact, the Explainer itself says that individuals will also be able to bring challenges in relation to the article 2(1) commitment before domestic courts. The SOSNI's argument in considering the RSE Chapter does not address para 11 of that section adequately or at all; and limits itself to asserting that the relevant provisions of the VD are not within the scope of B-GFA. However, it gives no principled reason for departing from the trial judge's reasoning. We consider that both the victims' rights relied upon (within the VD) and the Convention rights relied upon fall within

the scope of the rights set out within the RSE chapter of the B-GFA. The first *SPUC* hurdle is, therefore, passed.

[119] The specific rights upon which the applicants rely are articles 2, 3, 6 and 14 ECHR. These rights are mirrored in the CFR, which we discuss further below. They are particularised to some extent and enhanced by the VD specifically by the right to challenge a decision not to prosecute. It is argued that article 11 VD is inconsistent with any statutory removal of the possibility of prosecution for any defined category of case such as has purportedly been achieved by the Act.

[120] We have referred to the case of *Van Gend & Loos* above, which sets out the principles in play in relation to a Treaty provision as regards direct effect. In *Van Duyn* [1974] ECR 1337 the CJEU held that directives may also be vertically directly effective. In that case, the CJEU stated that individuals may rely on a directive's provisions to vindicate their rights against a Member State. In order to do so the provision of the directive must be sufficiently clear, precise and unconditional and the implementation period the Member State had for transposing the directive into the national legal order must already have passed.

[121] It may be said that much in the VD (and the Victim Charter which was introduced in this jurisdiction in order to give effect to it) relates to participatory rights of victims within related proceedings. We return to this issue below. However, to our mind the rights provided by the VD go further than the SOSNI has argued. They are clearly substantive in nature insofar as they pre-suppose the possibility of prosecution in respect of behaviour which constituted an offence at the time it was committed. The procedural rights afforded to victims are also important.

[122] Applying the authority of *Marks & Spencer plc v Commissioner of Customs and Excise* [2003] QB 866 it is no barrier to the direct effect of the provisions of the VD that the content thereof had been implemented, at least partly, in domestic law. In that case 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 directly rely on the provisions of the Directive.

[123] We consider that a number of provisions of the VD had direct effect but, in any event, they were implemented in Northern Ireland. According to section 2.1 of the Explanatory Memorandum to the Victim Charter (Justice Act (Northern Ireland) 2015) Order (Northern Ireland) 2015, made pursuant to sections 28 and 31(3) of the Justice Act (Northern Ireland) 2015, the Victim Charter implements the VD.

[124] As the NIHRC submissions state:

> "The Victim Charter affirms that victims are entitled to "be updated at key stages and given relevant

> information", including decisions not to continue with/to end an investigation and not to prosecute an alleged offender ([1]–[2]). Where a decision is made not to prosecute an alleged offender, the victim is "entitled to be notified of the reasons why this decision was made … and how you can seek a review of the decision if you are dissatisfied with it, in accordance with the review scheme." A victim has "a right to request a review of a decision not to prosecute" ([79]). The Charter confirms a victims' right to "participate in criminal proceedings" ([17]). A victim of crime has a right to receive compensation (subject to certain time limits), with rights of review/appeal where compensation is refused ([129]-[132])."

[125] To the extent not included within the Victim Charter, the relevant rights in articles 11 and 16(1) of the VD in any event satisfy the conditions for direct effect and formed part of national law prior to Brexit on that independent basis. The Convention rights relied upon also plainly had effect, both through the Northern Ireland Act 1998 and the HRA. Thus, as to the second limb of the *SPUC* test, we find that the trial judge (at **paras [562]-[570]**) correctly held that the rights in question were given effect in Northern Ireland on and before 31 December 2020.

[126] As to the third limb of the *SPUC* test, the Victim Charter is clearly underpinned by the Directive which is to be interpreted in accordance with the CFR and general principles of EU law. Therefore, there is sufficient EU law underpinning of the right to request a review and the other relevant rights contained within the Charter. As we discuss elsewhere in this judgment, we agree with the trial judge's view that article 11 VD is inconsistent with any statutory removal of the possibility of prosecution for any defined category of case such as has purportedly been achieved by the Act.

[127] By contrast the Convention rights cannot, in our view, be said to have an EU law underpinning. Insofar as the applicants' case relies upon fundamental human rights outside the scope of the provisions of the VD, this must be on the basis of breach of the CFR. There is, of course, an overlap between the rights guaranteed by the Convention and the rights set out in the CFR. Specifically, article 52(3) states that "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning of the 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." We discuss further below whether the CFR rights prayed in aid by the applicants can be relied upon directly and independently of a specific measure of EU law which is being implemented (see paras [132]-[135] below).

[128] As to the fourth limb of the *SPUC* analysis, the EU law underpinning of the relevant rights has been removed further to the general removal of legal effect of EU law norms set out in the EUWA 2018.

[129] Answering the fifth question, it is self-evident that there has been a diminution of the rights enjoyed by the applicants in various respects dealt with elsewhere in this judgment. Between them, the applicants have been deprived of access to inquests, police and Police Ombudsman investigations, the potential of criminal prosecutions of offenders and civil remedies against alleged perpetrators. Thus, the Legacy Act has resulted in a diminution of the rights of victims. Of particular significance are the rights provided under the VD (as interpreted in light of the ECHR, the CFR and general principles of EU law).

[130] In granular terms, the judgment below, at **paras [603]–[608]**, highlights the fact that victims of crime have no right to review a decision not to prosecute. We agree with the trial judge's analysis in this regard. In cases where immunity is granted or where crimes are not defined as "serious" or "connected", no prosecution is possible at all under the 2023 Act (see sections 39 and 41, leaving aside for a moment the limited possibility of immunity later being revoked). Even where a prosecution is theoretically possible, it may occur only where the ICRIR chooses to make a referral under section 25 of the Act. Although a person could potentially seek judicial review of a decision of the ICRIR not to make a referral, this would necessarily be limited to a review of the legality of the decision-making process and not a substantive review of the merits of the decision.

[131] We broadly agree with the ECNI submission that these constraints are incompatible with a 'right' to review of a decision not to prosecute. Given the wide scope of 'decisions not to prosecute' which should be reviewable (excluding only decisions made by courts) as set out in Recital 43 to the VD, the right to request a review should apply to decisions of the ICRIR which amount to 'no prosecution' decisions. A decision to grant immunity is tantamount to a decision not to prosecute, as no prosecution can lawfully follow a grant of immunity, and thus this decision should be subject to the same requirement of a review being available. The victim involvement and participation required by the VD is entirely removed in cases where immunity is granted or simply statutorily conferred. We cannot accept the submission on behalf of the SOSNI that this right is unaffected because it only applies where there is a possibility of prosecution. The 2023 Act does not amend the criminal law; rather, it provides a guarantee of no prosecution in many cases (albeit in some of those cases that guarantee may be conditional and potentially revocable), even in circumstances where the evidential and public interest tests for prosecution would otherwise be met.

[132] At **para [590]** of the judgment the trial judge rejects the complaint in respect of article 16 VD concerning a decision on compensation from the offender. While the trial judge is correct that article 16 is limited to compensation from the offender, we consider that reliance solely on the possibility of compensation orders by criminal courts was in error. Article 16(1) provides that member states must 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."

[133] Where no criminal proceedings are possible, the prospect of receiving compensation from the offender by that means is obviously removed. However, that might be permissible if national law still provided for such an offender to be ordered to pay compensation in other legal proceedings. The result of the 2023 Act, however, would be that there is no possibility of victims of Troubles-related offences receiving compensation, either through criminal proceedings or other proceedings, from the offender. As such there is no effective remedy by way of compensation from the offender, since there is no access in practice to a legal means of achieving this.

[134] Overall, it is tolerably clear to us that the diminution of rights would not (and could not, compatibly with EU law) have occurred but for withdrawal. On this the applicants say that had the UK remained in the EU it could not have acted incompatibly with the VD. We agree. The conferral of immunity in the manner proposed by the 2023 Act and the extinguishment of routes to compensation from the offender – both in the course of criminal proceedings where immunity is conferred and in civil claims – would have been in breach of the VD's provisions.

[135] As to the sixth limb, the Explainer Document at para 10 supports the trial judge's conclusion (at **para [611]**) as to the appropriate test. As to its application in this case, the Legacy Act (enacted following the UK's withdrawal from the EU) prevents the enjoyment by victims and their family members of the rights which would otherwise be available to them under the VD. The diminution in rights would have been unlawful and therefore would not have been possible had the UK remained in the EU. In that scenario, the rights under the VD would have remained available, as would other remedies (such as *Francovich* damages), under which circumstances it is inconceivable that the UK Parliament could or would have enacted the Legacy Act. It has (subject to the restrictions imposed by the WF, the WA and EUWA 2018) been possible to enact the Legacy Act in its present terms only because the UK is no longer an EU Member State.

[136] Our analysis means that the SOSNI fails on the first ground of appeal as we agree with the outcome reached at first instance by the trial judge. We so find on the basis of the VD and the rights contained therein, which have suffered a diminution. The EU competence derives from article 82(2)(c) of the TFEU which provides for an explicit EU competence to set minimum standards as to the rights of victims of crime.

The VD provided rights in pursuance of that competence which have now been diminished. Although those rights were largely procedural in nature and may not have been considered of great moment other than to those directly affected, they exist on the basis that prosecution is possible for criminal offences and decisions whether to prosecute will be made with the potential for victim involvement and review. That is no longer the case under the scheme envisaged by the 2023 Act.

[137] It is only in one respect that we depart from the trial judge in relation to this appeal. Insofar as he did so by proceeding on the basis that any breach of Convention rights found was equivalent to a breach of the CFR (presumably within an EU competence) which, in turn, would give rise to a remedy of disapplication through section 7A of the EUWA 2018 we disagree. The trial judge rightly (and in our view correctly) dealt with this to some extent when finding that the CFR right to human dignity contained within article 1 was too imprecise to be justiciable in its own right. We will not add to an already lengthy judgment by examining this question of the content of CFR rights any further given that the VD avails the applicants in this case. However, it is necessary to state our conclusion that to say that the CFR provides a freestanding justiciable right in this way goes too far. Rather, we adopt the position that the CFR acts as an aid to interpretation of relevant EU law provisions.

[138] Article 51 of the Charter, dealing with its field of application, makes clear that it is addressed "to the Member States only when they are implementing Union law." The Charter rights infuse and flow through positive measures of Union law; but require to be anchored in a provision which is being implemented. Article 51 CFR was considered by the Grand Chamber of the CJEU in Case C-617/10, *Fransson v Sweden* (26 February 2013), in which it said at para [19] that:

> "The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations *governed by* European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law." [our emphasis]

[139] The above-mentioned case goes on to discuss when a state's actions will be within the scope of EU law for that purpose. We do not consider that this test is met simply because an EU competence is or may be (arguably) engaged. The state must be *implementing* Union law for the Charter rights to apply. In this case the exercise is relatively straightforward. That is because the relevant Charter rights do apply within the bounds of the rights set out in the VD discussed above. Thus, the pure Charter argument is not strictly in play this case. However, our view is that outside

of the field of implementation of the VD, some other anchoring EU-law measure would likely be required.

[140] Although the ECNI and NIHRC sought to advance arguments to the effect that Charter rights were engaged and capable of being directly effective provided an appropriate over-arching EU law competence could be identified (here, article 82 TFEU) on the basis of case-law such as the *CG* case and *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, these arguments were rightly advanced with a degree of diffidence. We cannot see that this could provide sufficient EU law underpinning for engagement of the non-diminution guarantee in article 2 WF for the reasons which follow.

[141] First, as noted above, the content of article 51(1) CFR makes clear that the Charter is addressed to Member States "only when they are implementing Union law." Article 51(2) makes clear that the Charter does not extend the field of application of EU law. Although Lord Kerr in the *Rugby Union* case (*Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd) (In liquidation)* [2012] UKSC 55) suggested that the rubric "implementing EU law" was to be "interpreted broadly" and in effect meant whenever a member state was acting within the material scope of EU law, we accept the SOSNI's submission that this is at odds with subsequent CJEU case-law decided prior to the end of the implementation period.

[142] In particular, in Case C-198/13, *Julián Hernández v Reino de España*, the CJEU held that the concept of implementing EU law in article 51 CFR "presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other"; and that fundamental EU rights could not be applied in relation to national legislation "because the provisions of EU law in the area concerned did not impose any specific obligation on Member States with regard to the situation at issue…" (see paras 34-35). To similar effect, the judgment of the Grand Chamber in Case C-609/17, *Terveys-ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry* [2020] 2 CMLR 11 reaffirms that the provisions of EU law must "govern" an aspect of a given situation, imposing specific obligations on the member state with regard thereto, for the matter to fall within the scope of the Charter (see para 53).

[143] In truth, no counsel could provide us with clear and definitive authority on this point from any of the cases cited. The high point of the applicants' case (and that of NIHRC and ECNI) in relation to this issue was the decision of the CJEU in *CG*. We note that that decision was given in July 2021, some seven months *after* the key date for the purposes of article 2(1) WF, namely 31 December 2020. The full implications of this decision remain to be seen. However, insofar as it might suggest a broader approach to what is within the scope of EU law for this purpose – whereby

the application of the CFR may be determined by reference to EU law competences rather than the implementation of specific EU legal instruments – we do not consider that, at the critical date for the purposes of article 2(1) WF, the CFR underpinned or was understood as underpinning RSE rights in that way.

[144] We also did not consider the limited discussion of the issue in the Supreme Court in the *Benkharbouche* case to be of much assistance to us given that, in that case, the Secretary of State conceded, on the facts of the case, that if there was a breach of article 6 ECHR there was also a violation of article 47 CFR (see para [79] of the judgment of Lord Sumption). That concession was treated as relevant to the issue of remedy – and disapplication of the Act of Parliament at issue – but meant that there was no real discussion of the extent to which CFR rights could be relied upon in a free-standing way.

[145] In addition, upon questioning by this court no party was able to satisfactorily explain why, if the applicants' analysis was correct, disapplication of primary Acts of the Westminster Parliament had not occurred much more frequently during the UK's membership of the EU where there had been a finding of Convention incompatibility which would or could be mirrored in breach of a CFR right.

[146] We have also considered section 5(4) of the EUWA 2018 which expressly provides that the CFR is no longer part of domestic law. Although this provision must itself take effect subject to section 7A, to our mind it indicates a Parliamentary intention that the CFR is not intended to operate on a free-standing basis and ought to be restricted in its application as far as possible consistent with the meaning and intention of section 7A and article 2 WF.

[147] We further note that Humphreys J has recently reached a similar conclusion in *Re Esmail's Application* [2024] NIKB 64, at paras [35]-[43] when dealing with the application of the CFR.

[148] In any event, in this case there are concrete rights found in the VD which meet the required standard as we have explained above. The significance of our departure from the trial judge's reasoning, discussed above, is that only those provisions of the 2023 Act which result in diminution of rights set out in the VD fall for disapplication. Where a declaration of incompatibility has been made under section 4 HRA, a concomitant breach of the CFR only arises where EU law was being implemented, not automatically.

[149] Whilst we agree with the trial judge that a diminution prohibited by article 2 WF might occur either by reducing the substance of a right (as here) or by reducing the efficacy of available remedies, it would be incorrect to proceed on the basis that any breach of the ECHR within an EU competence without more equates to a breach

of the CFR and therefore a breach of article 2 WF, giving rise to the disapplication remedy.

[150] Next, we turn to the legal consequences of the 2023 Act's incompatibility with the WF in this case. The trial judge had no doubt that "the effect of any breach [of article 2 WF] established results in the disapplication of the offending provision" (judgment, at **para [518]**; and see also **para [527]**). This was based on section 7A of the EUWA 2018, which "mirrors … section 2 of the ECA and replicates the position in terms of remedy under that statute", as is made explicit in the Explanatory Notes accompanying section 7A (see **paras [524]–[525]**). Section 7A mimics the "conduit pipe" which section 2 ECA created, in that it is the vehicle by which the UK's obligations under the WA "flow into domestic law", providing for "disapplication of inconsistent or incompatible domestic legislation where it conflicts with the Withdrawal Agreement" (**para [525]**, quoting the Explanatory Notes).

[151] The trial judge relied, at **para [526]**, on the finding in *Re Allister's Application for Judicial Review* at para [66] that "[t]he answer to any conflict between the Protocol [now the WF] 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)." The trial judge also cited, at **para [596]**, the Court of Appeal of England and Wales' decision in *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307; [2024] 2 WLR 967, at [106], that "provisions finding their way into domestic law via the [WA] 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."

[152] By virtue of article 4(2) WA, the UK is obliged to ensure compliance with article 4(1), including by empowering its judicial authorities to "disapply inconsistent or incompatible domestic provisions." Section 7A EUWA 2018 is the domestic primary legislation by which the UK has fulfilled that obligation, and this provision clearly mandates disapplication of an offending provision. Accordingly, as Humphreys J stated at para [175] of the *Re NIHRC* judgment:

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

the will of Parliament as articulated in the Withdrawal Act."

[153] This remedy is distinguishable from the discretionary remedy of a declaration of incompatibility under section 4 HRA which may "afford Parliament an opportunity to rectify a defect or fill a lacuna" without affecting the provision's validity.

[154] It follows that under section 7A EUWA 2018, disapplication appears to us to be the correct remedy in this case. We reach this view for the following reasons:

(a) Section 7A(1) states that section 7A(2) is to apply to, inter alia, "all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement." Article 2(1) WF clearly meets this description.

(b) Section 7A(1) further stipulates that such rights, powers, liabilities, obligations and restrictions fall within section 7A(2) if they "in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom." For the reasons set out above and elaborated upon below, article 2(1) falls within this description because it has direct effect.

(c) By virtue of section 7A(2), the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 7A(1) are to be: "(a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly." Pursuant to section 7A(3), every enactment — which, naturally, includes the Legacy Act — "is to be read and has effect subject to subsection (2)." Accordingly, a statutory provision which is incompatible with article 2(1) WF can have effect only subject to article 2(1). Presumptively, therefore, it must be disapplied (ie stripped of 'effect') to the extent of the incompatibility.

[155] In contrast to the aforementioned analysis, the SOSNI seeks to argue that the CFR and the VD do not fall within the scope of article 4(1) WA (and thus do not attract disapplication as a remedy), stating that "article 2 WF does not purport to, and does not, directly apply the EU law in Annex 1, or any other EU law, in the UK." Thus, the SOSNI distinguishes article 2 WF from article 5 which refers to laws contained in Annex 2 WF which are to "apply" in the UK.

[156] We cannot agree with this analysis. Under article 4(1) WA, *both* the provisions of the Agreement itself *and* "the provisions of Union law made applicable by this Agreement" are to produce in the UK "the same legal effects as those which they produce within the Union and its Member States." The non-diminution guarantee

referred to in article 2(1) WF falls within the first of these categories. Article 2(1) being a provision of the WA itself, the reference to Union law "made applicable" by the Agreement is therefore irrelevant. It merely applies to provisions of Union law made applicable through the Agreement but by a different legal route.

[157] Article 2(1) is plainly an extremely important provision within the Ireland/Northern Ireland Protocol, coming immediately after article 1 which sets out the objectives of the protocol, including that the arrangements set out in the protocol are "necessary… to protect the 1998 Agreement in all its dimensions." It would have been unrealistic to seek to set out an exhaustive list of each of the measures of EU law conferring rights in Northern Ireland at the time of the UK's exit from the EU which fell within the purview of the RSE Chapter of the B-GFA and in respect of which the non-diminution guarantee may be engaged. The important point is that the non-diminution guarantee itself is set out in clear and express terms within the WF.

[158] Where disapplication is the correct remedy (as it is here for the reasons set out above), a UK court has no obligation to suspend the order for disapplication. As the Supreme Court stated in *Miller*, at para [67], "EU law has primacy as a matter of domestic law, and legislation which is inconsistent with EU law from time to time is to that extent ineffective in law." Indeed, section 7A mandates disapplication to the extent of any inconsistency with the WA.

[159] Thus, we retain a concern with the SOSNI's description of disapplication as a discretionary remedy. The residual discretion to withhold effective relief, if any, must be highly circumscribed. As to the domestic case-law cited by the SOSNI on this issue, this court does not have to "devise an alternative scheme of voting eligibility" (as in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63; [2014] 1 AC 271, at [74]); disapplication has not "caused chaos … which would damage the public interest" (as in *R (National Council for Civil Liberties) v Secretary of State for the Home Department* [2018] EWHC 975 (Admin); [2019] QB 481, at [75]–[77], [83]–[85] and [92]); and it cannot be said that the interests of legal certainty are so "compelling that it is necessary for them to take priority over the need to implement the dominant legal provision, and disapply the subordinate law" (as in *R (Open Rights Group) v Secretary of State for the Home Department (No. 2)* [2021] EWCA Civ 1573; [2022] QB 166, at [32]). Disapplication of the provisions relating to immunity in fact simply return the legal position to the status quo ante.

[160] Finally, we are not convinced that Mr McGleenan's reliance on *Abortion Services (Safe Access Zones), reference by the Attorney General for Northern Ireland* [2022] UKSC 32 which dealt with the potential making of declarations of incompatibility under section 4 HRA has any application to the WF argument. We reject the argument, insofar as it was made, that diminution contrary to Article 2 WF cannot be found by virtue of provisions of an Act, in an *ab ante* challenge, unless there would

be a diminution in rights in all or almost all cases affected. We also reject the argument that, where a CFR right is mirrored in the ECHR, there can be no diminution in rights. As the trial judge held, and as noted at para [149] above, in our judgment a diminution in rights can occur not only where the substance of the right has been modified but where the available remedies to vindicate the right have been reduced. However, in light of our conclusion as to the limited reliance which can be placed on the CFR in an Article 2 WF claim in the absence of some other anchoring measure of EU law, the appellant's concern about disapplication frequently arising by virtue of reliance on the CFR ought to be reduced.

[161] We acknowledge the submission by Mr McGleenan that, when disapplication of primary legislation is contemplated, a court may have to consider the grant of a stay before immediately disapplying provisions of the Act if exceptional circumstances arise. Given the SOSNI's concessions as to the impugned immunity provisions, we assume that there is no issue with disapplication of the provisions relating to immunity which were disapplied by the trial judge. However, if we are wrong about that there is liberty to apply. Accordingly, for the reasons given above, which only differ from the trial judge in one respect, we dismiss this ground of appeal. In light of our conclusion in relation to the CFR, we consider that the trial judge's disapplication of sections 8 and 43(1) under Article 2 WF – which appear to have been based on CFR rights alone, rather than any provision of the VD – cannot stand. We therefore decline to grant a disapplication remedy in relation to those provisions; otherwise, the trial judge's orders in relation to the WF ground remain intact.

2. Conclusion: Compatibility with the European Convention on Human Rights

[162] The declarations of incompatibility are now conceded and so this appeal point is not pursued. However, having heard full argument on the issues we consider the SOSNI's concession in relation to the Convention-compatibility of the conditional immunity scheme to be well-founded. We briefly set out our reasons for that conclusion. We are again mindful of the SOSNI's recent statement to Parliament indicating that the new government formed after the recent general election already intend to bring forward legislation to remedy the illegality found by the court below as regards conditional immunity.

[163] By way of reminder the relevant aspects of the decision at first instance are:

(a) In relation to immunity from prosecution and prohibition from criminal enforcement action (**paras [144]-[241]**), the court considered the Strasbourg authorities and found that the European Court of Human Rights ("ECtHR") has "articulated strong opposition to the granting of amnesties in the context of articles 2/3" (**para [183]**). Immunity from prosecution under section 19 and the related provisions of sections 7(3), 12, 19, 20, 21, 22, 39, 42(1) of the 2023

Act are in breach of articles 2 and 3 ECHR (**para [187]**). The same conclusion was reached in relation to section 41, though the court recognised that the number of actual cases impacted by section 41 may well be very small (**paras [207]-[208]**). (We also observe, however, that investigation and prosecution for more minor offences may be important because it is often in the course of such investigations that evidence of more significant criminal activity is gleaned, particularly in circumstances where those guilty of lower offending determine that it is in their interests to assist the investigating authorities.)

(b) In relation to section 43 (**paras [371]-[418]**), the court did not consider that the essence of the article 6 right was impaired (**para [385]**). Nor did it find that the prospective application of section 43 was incompatible (**paras [403]-[405]**). However, the court found, following *Vegotex* and *Legros*, that there were insufficient grounds of general interest to substantiate section 43's retroactive effect (**paras [407]-[413]**).

(c) In relation to section 8 (**paras [435]-[461]**), the court found 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 (**para [458]**). Further, a fair balance was not struck regarding proportionality (**para [461]**).

[164] On the core argument as to the compatibility of the immunity provisions we found no reason to depart from the conclusion reached by the trial judge (and see *JR87* at paras [57] and [58]). Applying the *Ullah* principle and having read all of the Strasbourg jurisprudence on this issue, we consider that we can reliably anticipate how the European Court would be expected to decide this case. Specifically, in the absence of some special circumstance (which it has not been suggested arises in this case) the domestic courts should follow any clear and constant jurisprudence of the ECtHR. This reflects the fact that the ECtHR is the specialist forum in which Convention law is developed. In addition, we must pay regard to the "mirror principle" that it is "the duty of national courts to keep pace with Strasbourg jurisprudence as it evolves over time, no more, but certainly no less." The judgment which the trial judge reached, with which we agree, which is now conceded by the SOSNI holds true to these principles and applies the ECHR jurisprudence on this issue as it stands.

[165] It is worth reiterating that in the case of *Marguš v Croatia* (App. no. 4455/10) of 27 May 2014 the Grand Chamber found the specific amnesty to be contrary to A4P7 of the Convention (which codified the *ne bis in idem* principle): see para 139. In this regard if any general statement of principle is to be taken from *Marguš*, it is the court's strong observation at para 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 arts 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 by under arts 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." (see also: *McCann v United Kingdom* (1996) 21 EHRR 97 at [146]).

[166] It is also significant that the position in *Marguš* has been consistently upheld in a subsequent line of cases: see *Mocanu; Kavaklıoğlu and Others v Turkey* (App. no. 15397/02); *Hasan Kose v Turkey* (App. no. 15014/11); *Vazagashvili and Sahanva v Georgia* (App. No. 50375/07); and *Makuchyan and Miasyan v Azerbaijan and Hungary* (App. No. 17247/13).

[167] To our mind, the clear emphasis of the law promulgated by the ECtHR is that breaches of articles 2 and 3 must be investigated and should not go unpunished. In *Nikolova v Bulgaria* (2009) 48 EHRR 40, the court held that ineffective criminal proceedings would amount to a breach of article 2 ECHR. Having affirmed the importance of the article 2 duty to ensure an effective criminal investigation, the court stated at para 63 that:

> "[…] the court cannot overlook the fact that, while the Bulgarian Criminal Code of 1968 gave the domestic courts the possibility of meting out up to 12 years' imprisonment for the offence committed by the officers, they chose to impose the minimum penalty allowed by law—three years' imprisonment—and further to suspend it. In this context, it should also be noted that no disciplinary measures were taken against the officers. What is more, until 1999, well after the beginning of the criminal proceedings against them, both officers were still serving in the police, and one of them had even been promoted (he stopped being on the force only because he later chose

> to resign), whereas the Court's case law says that where state agents have been charged with crimes involving ill-treatment, it is important that they be suspended from duty while being investigated or tried and be dismissed if convicted. *In the court's view, such a reaction to a serious instance of deliberate police ill-treatment which resulted in death cannot be considered adequate. By punishing the officers with suspended terms of imprisonment, more than seven years after their wrongful act, and never disciplining them, the state in effect fostered the law-enforcement officers' 'sense of impunity' and their 'hope that all [would] be covered up', noted by the investigator in charge of the case*." [emphasis added]

[168] This position was reiterated in *Mojsiejew v Poland (*App no 11818/02), and in *Öneryildaz v Turkey* (2005) 41 EHRR 20 at para 96:

> "It should in no way be inferred from the foregoing that Art.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.* 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 Art.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." [emphasis added]

[169] Moreover, the position is, quite unsurprisingly, mirrored in domestic jurisprudence. In the article 3 case of *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, Lord Kerr identified at para [24] the requirement that "laws which prohibit conduct constituting a breach of article 3 must be rigorously enforced and complaints of such conduct must be properly investigated."

[170] The ECtHR has to our mind dealt squarely with the issue of immunities and amnesties. Without repeating the entirety of the case-law opened to this court, we observe the following from it. In *Yamman v Turkey* (2005) 40 EHRR 49, the second section of the court found at paragraph 55 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 that the granting of an amnesty or pardon should not be permissible."

[171] In a similar vein in *Okkali v Turkey* (2010) 50 EHRR 43, the court held at para 76 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." Again, in *Association "21 December 1989" and Others v Romania* (2015) 60 EHRR 25, which concerned the response to the anti-government demonstrations around the time that Nicolae Ceauşescu's regime was overthrown, the court found that statutory limitations of criminal liability could not be considered Convention compliant:

> "106. The court has already emphasised the importance of the right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the right to life, which implies the right to an effective judicial investigation and a possible right to compensation. For that reason, in the event of widespread use of lethal force against the civilian population during anti-Government demonstrations preceding the transition from a totalitarian regime to a more democratic system, as in the instant case, *the court cannot accept that an investigation has been effective where it is terminated as a result of the statutory limitation of criminal liability*, when it is the authorities themselves who have remained inactive. Moreover, as the court has already indicated, an amnesty is generally incompatible with the duty incumbent on the States to investigate acts of torture and to combat impunity for international crimes. This is also true in respect of pardon)." [emphasis added]

[172] Suffice to say that the Strasbourg jurisprudence was not on the SOSNI's side in this appeal for the reasons we have summarised above. We are confident that the ECtHR has set its face against amnesties and immunity in a fashion which would result in the 2023 Act being held to be incompatible with the Convention, notwithstanding the point made by Mr McGleenan that immunity was conditional and could be revoked. In addition, we were struck by the clear message from the Committee of Ministers that the introduction of an amnesty provided for by the 2023 Act was likely to be incompatible with the Convention. We endorse the trial judge's conclusion found at **para [187]** of his judgment. It follows that we dismiss the appeal against the decision of the trial judge that the provisions under sections 40, 7(3), 12,

19, 20, 21, 22, 39, 42(1) of the 2023 Act are in breach of rights pursuant to article 2 and 3 of the ECHR, which has now (rightly) been conceded by the SOSNI.

[173] In addition, following persuasive submissions by Ms Quinlivan we endorse the trial judge's finding on section 41 which relates to the prosecution of less serious offences. The policy basis for this section is well explained at **paras [191]-[193]** of the first instance judgment. In *Jordan's* specific case the alleged perjury of police officers at the time of the most recent inquest is not a Troubles-related offence within the meaning of the 2023 Act. However, we have been persuaded through argument that other serious potential offences such as misconduct in public office or perversion of the course of justice related to Troubles incidents would not be investigated if this provision remained intact. Therefore, we make a declaration of incompatibility in relation to this section as well.

3. Conclusion: Independence of the ICRIR/issues raised by the cross-appeal

[174] In this section of the judgment we will deal with matters which emerge from the cross-appeal and the broad challenge to the independence of the ICRIR, in particular whether it has sufficient independence to carry out the investigative functions which the trial judge considered it could (or potentially could) compatibly with the Convention. We do so with an introductory observation that we believe some of these points were clearly not argued as fully at first instance as they were before us. The *Dillon* cross-appeal raises the following issues which we will deal with in turn:

(a) The five-year limit on reviews;

(b) The independence and effectiveness of the ICRIR;

(c) The prohibition on civil actions under section 43 of the Act; and

(d) Article 14 of the Convention.

The five-year time limit

[175] The core question in relation to this discrete issue is whether the five-year limit on requesting reviews (see sections 9(8) and 10(3) of the Act) is incompatible with article 2 ECHR. The trial judge dealt with this issue at **paras [242]-[252]** of the judgment. The headline conclusion he reached is a provisional one, expressed as follows:

> "[i]t 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."

[176] The applicant *Dillon* maintains that the trial judge made a "straightforward error of law" by failing to find the five-year time limit on Commission "reviews" incompatible with article 2. Their argument arises from *Brecknell*, 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.

[177] In this respect, it is argued that the Act is incompatible with article 2. If new evidence comes to light after the five-year period, there will be no further review (if a review has not been initiated within the five-year period).

[178] In response, the SOSNI argues that under section 37 of the Act, it will only be permissible to close the ICRIR when SOSNI is satisfied that the need for it to exercise its functions has ceased. In any event, it is argued that the limit for review is consistent with recommendations in the Eames-Bradley Report.

[179] We have not found this the most straightforward question to resolve. That is because, on the one hand, some limit to reviews may be permissible. Against that, if some information arises in one case which impacts on another case a review may be barred in the latter case. This could result in an injustice given the linkages between Troubles-related events in Northern Ireland which experience shows do frequently arise.

[180] The trial judge dealt with this issue comprehensively. We share his concerns contained within the question of what, then, would the position be if a plausible or credible allegation, piece of evidence, or piece of 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? The Act could have built in a residual discretion on the part of, for instance, one of those persons mentioned in section 9(3)-(6), including the Attorney General, Advocate General and/or a coroner, to request a review even after the five-year period where this is required in exceptional circumstances. That approach has not been taken.

[181] It is important to note, however, that the time limit relates to *requests* for review, rather than a guillotine on the ICRIR's work where review requests have been made. Given the historic nature of the events which will be reviewed, the five-year limit on making requests for a review appears to us to be sufficient. It also

allows the ICRIR some considerable time to commence its work before the deadline arrives. The issue properly identified by the trial judge below is the case where something new emerges after that five-year period.

[182] As the trial judge stated at **para [248]**, "The concept of a time limited investigation into legacy deaths is not novel." As noted above, 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 has been the ambition to deal with the past but also 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." In addition, we point out that in *The Matter of an Application by Rosaleen Dalton* [2023] UKSC 36 the Supreme Court also endorsed a temporal limit of 10/12 years on the obligation to conduct article 2 compliant inquests, relative to the coming into force of the Human Rights Act 1998 ("HRA").

[183] Having considered the matter this court agrees with the first instance court that it should not make a declaration to the effect that the five-year time limit on review requests is incompatible with the Convention without a concrete example before it. It may be that if a concrete example is presented, if the facts are sufficient and if the structure of the ICRIR remains as it currently is, then a declaration *could* be made. This will not arise at present but may in future. Such an issue is best addressed on the concrete facts of an individual case. The applicants who are bereaved relatives of deceased persons in the cases before us are obviously quite at liberty to make a request for a review. We, therefore, agree with the trial judge's pragmatic and sensible approach on this issue.

Replacement of inquests: the ICRIR's independence and effectiveness

[184] A central question raised by the cross-appeal is whether the ICRIR can discharge the State's obligations under articles 2 and 3 ECHR, particularly in the area where inquests would previously have performed this role. This issue was dealt with by the trial judge from **paras [253]-[370]** of the judgment. In summary, he found that:

(a) Whilst the court is not dealing with a "specific case", the proposed statutory arrangements, taken together with the policy documents published by the Commission, inject the necessary and structural independence into the ICRIR (**para [284]**).

(b) 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 (**para [305]**).

(c) Powers of disclosure within the Act are compliant with articles 2 and 3 (**para [319]**).

(d) The ICRIR's policies and procedures bring the Commission's obligations to victims and next of kin into compliance with the Convention (**para [356]**).

(e) A fair reading of the ICRIR's policy documents tilted the balance in favour of effectiveness concerning the issues of legal aid and public hearings (**paras [358]-[360]**).

[185] Mr Bunting KC on behalf of *Dillon* strongly argued that the ICRIR will not be able to carry out an article 2 compliant investigation in several respects but focussed his submissions on the question of disclosure of information by the Commission. In support of this argument, he referenced the essential ingredients of an article 2 compliant investigation which can be distilled from the Strasbourg case-law and specifically the *Jordan* decision. These are that (i) the investigation must be initiated by the State itself; (ii) the investigation must be prompt and carried out with reasonable expedition; (iii) the investigation must be effective; (iv) the investigation must be carried out by a person who is independent of those implicated in the events being investigated; (v) there must be a sufficient element of public scrutiny of the investigation or its results; and (vi) the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interest.

[186] Therefore, the applicants argued that there is incompatibility with article 2 for five reasons:

(a) An investigation by the ICRIR is not initiated by the State: the Commission can only commence a review if requested to do so.

(b) The Commission is not sufficiently independent and is effectively a creature of, and subject to the control of, SOSNI since:

    (i) SOSNI appoints the Commissioners;

    (ii) Its performance is reviewed by SOSNI, its funding is controlled by SOSNI, and SOSNI is responsible for winding up the Commission;

    (iii) SOSNI is entitled to request reviews, and, in cases of non-serious harm, it is only SOSNI who may request a review; and

    (iv) SOSNI controls what information can or cannot be disclosed by the Commission.

(c) The Commission is unable to complete an effective investigation because:

(i) The ICRIR's review process cannot lead to the punishment of wrongdoers as they only have the power to "look into" the circumstances (section 13(5)) and to prepare a report;

(ii) The ICRIR is not required to carry out a criminal investigation to the standards of a police investigation, which is clear from section 13(7) which gives the Commission a discretion as to whether a criminal investigation is to form part of a review; and

(iii) The effect of the Act generally, the applicants submit, will be to prevent the identification of wrong-doers, to hinder the public attribution of responsibility, and to prevent lessons being learned.

(d) There is inadequate public scrutiny: the Commission enjoys no inherent jurisdiction and gathers its information in private. It cannot conduct public hearings if it does not have the power to do so. This contrasts with the principles of transparency and open justice found in inquiries and inquests.

(e) The next of kin of the victim are not adequately involved: a private investigation carried out by a public body, without disclosure of materials to the next of kin or legal aid to enable them to be represented, will not comply with article 2. The Act makes clear that:

(i) the victim/next of kin may request that particular questions be asked (but that there is no requirement to answer these questions);

(ii) The Commissioner for Investigations may reject such a request; and

(iii) The Commission is ultimately only required to produce a final report and to provide a draft copy to the person who requested the review, a relevant family member, or a person or public body who will be criticised (so as to give them an opportunity to make representations about it).

There is no other provision in the Act giving a victim any wider role in the review. Further, there is no provision for disclosure to them other than in terms of the final report, for the victim/next of kin to engage with witnesses, or for them to receive legal aid.

[187] During oral submissions, it was also contended that any attempt by the ICRIR to 'fill the gaps' would not work. Specifically, a submission was made that a secondment of families' legal representatives to the ICRIR – to enable them to put

questions as officers of the Commission – would "fly in the face of the Bar Code of Conduct." Also, the point was advanced that there is no statutory procedure to permit a CMP, which must have a statutory basis.

[188] In response to the above, Mr McGleenan advanced the following points which we summarise:

(a) In an *ab ante* challenge, the test is whether the legislation is capable of being operated in a manner which is compatible with Convention rights, in that it will not give rise to an unjustified interference with those rights in all or almost all cases. As such, the trial judge was correct to conclude that the Act permitted an investigation which would be compliant with article 2. If that is correct, the challenge to section 44 (which precludes inquests) falls away entirely.

(b) The ICRIR's reviews can be initiated by a wide number of State bodies, and, in any event, section 9(3) provides a 'backstop' mechanism or safety net whereby, if a review is not sought by a family or any other State body, but there is an article 2 obligation to investigate the case, the SOSNI may request a review. In this way, the obligation for an investigation to be instigated by the State itself could be satisfied.

(c) The ICRIR is effective since:

    (i) It has the power to make referrals to the Public Prosecution Service ("PPS");

    (ii) The statutory language is broad enough to facilitate article 2 compliance, and the obligation will fall on the ICRIR to carry out its functions in a manner compliant with article 2 (see **para [369]** of the judgment below);

    (iii) Where article 2 requires it, the ICRIR has all the necessary investigative powers to carry out a criminal investigation;

    (iv) There is no obligation on police, for example, to 'gather as much information as possible.' Rather, there is a clear line of cases which emphasise the wide area of discretionary judgment which a court should appropriately allow police in operational decision-making, which is in accordance with article 2 – see *Osman v United Kingdom* (2000) 29 EHRR 245;

    (v) *Dillon* contends that there are likely to be a significant number of Troubles-related incidents that did not lead to death or 'serious' injury,

in which case there will be no review at all. Under the status quo preceding the introduction of the Act, however, no investigative body was undertaking any investigation into such incidents, so that the passing of the Act does not represent a reduction in the amount of investigations which will be undertaken. In fact, the ICRIR reviews relating to incidents not involving deaths would be an improvement for victims on the preceding position. (We interpose that, although this may be correct as regards police investigations and inquests, it does not adequately reflect investigations undertaken by PONI or matters which may be covered in civil claims, each of which is also proposed to be ended. We also wonder whether it is proper for the SOSNI to rely upon the absence of investigations in relation to non-fatal incidents when this is likely to have arisen merely through a lack of resources provided to the relevant investigative bodies.)

(d) The ICRIR is sufficiently independent because:

(i) SOSNI already makes public appointments in relation to other independent roles (for example, NIHRC Commissioners) and this is not viewed as undermining the independence of the person appointed. It should not be surprising that the terms of appointment will also be set by SOSNI. Review of the performance of an independent body set up by the lead Department which brought the legislation forward establishing it is, furthermore, not only reasonable but desirable.

(ii) Under section 33 the SOSNI's powers to make (non-binding) guidance relate not to operational decision-making by the body in the context of criminal investigations, but rather to the identification of sensitive information (section 33(1)) and the exercise by the ICRIR of its functions in accordance with the duty not to prejudice national security under section 33(3) and 4(1)(a).

(iii) SOSNI does not have control over the information disclosed by the Commission. He merely has a power to prevent national security sensitive information from being released.

[189] Further, Mr McGleenan made the argument that the 2023 Act is designed to give the ICRIR a significant degree of operational independence, contrary to the applicants' submission. In this regard reliance is placed upon the ICRIR's emerging policies exhibited to the affidavit of Mark Murray to demonstrate the scope for oral hearings to take place.

[190] In relation to public scrutiny, it was contended that what is necessary to ensure the involvement of the next of kin or victim sufficient to safeguard their

legitimate interests will vary from case to case: see *McQuillan, McGuigan & McKenna* [2022] AC 1063, at para [109] (v). The ICRIR is designed not to need representation. The documentation provided by the ICRIR sets out in detail how it will engage with the next of kin and ensure they are properly involved in the review process. The clear priority is answering the questions of victims. Under section 16, the consultation provisions require the Chief Commissioner not only to share a draft with the person who requested the review but relevant family members, and permit representations about the report. This it was said goes far beyond the Maxwellisation process which forms part of public inquiries, inviting submissions on the report from those who are affected by or properly interested in its content, but not criticised therein.

[191] We have considered these competing arguments. We also bear in mind what Mr O'Donoghue KC has said on behalf of the ICRIR and the public-facing material published by it which we have read.

[192] In summary, the ICRIR, a body corporate, was established by Part 2 of the 2023 Act. It consists of a Chief Commissioner, a Commissioner for Investigations and up to five other Commissioners (hereafter all referred to as "the Commissioners"). Its principal stated objective is to promote reconciliation. The considerable reach of the ICRIR in dealing with a wide range of cases is illustrated by its original six statutory functions all related to events occurring during the Troubles. These are (a) to carry out reviews of deaths that were caused by conduct forming part of the Troubles, (b) to carry out reviews of other harmful conduct forming part of the Troubles, (c) to produce reports ("final reports") on the findings of each of the reviews of deaths and other harmful conduct, (d) to determine whether to grant persons immunity from prosecution for serious or connected Troubles-related offences other than Troubles-related sexual offences, (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, and (f) to produce a record of deaths that were caused by conduct forming part of the Troubles. Function (d) is now clearly overtaken in light of the findings and relief in the court below and the SOSNI's recent position in relation to his withdrawal of that aspect of the appeal. In the discharge of its functions, the ICRIR is statutorily required to have regard to the general interests of persons affected by Troubles-related deaths and serious injuries.

[193] We note the self-stated aims of the ICRIR which are unequivocally provided in its written submissions as follows:

(a) Compliance with the ECHR;

(b) Respect for the principles of the 1998 B-GFA; and

(c) To focus on providing useful information to those affected by the Troubles.

[194] Following from the above we can see that the ICRIR has stated its commitment to Convention compliance. However, the real question is whether that essential compliance is or can be achieved within the current statutory structure. It is not simply enough that the ICRIR contains the word independent in its title. This must be substantively established. Nor are proper and worthy intentions sufficient if the ICRIR lacks legal power to deliver article 2 compliant investigations.

[195] During this appeal the ICRIR made clear that it was not its intention to adopt any position other than to submit to the court that the 2023 Act enables the ICRIR to discharge its functions in a manner that is article 2/3 ECHR compliant; and that it sees no legislative impediment within the 2023 Act preventing it from discharging its functions in such an article 2/3 compliant manner. As noted above, this position has now been overtaken to a degree by the SOSNI's concessions. However, the Commission's commitment remains as regards whatever revised structure is put in place. Thus, we preface the comments we make below about the ICRIR with a recognition of its and its commissioners' commitment to achieving a Convention-compliant, workable system for Troubles victims which may complement other legal remedies.

[196] When debating the issue of the ICRIR's independence the applicants took the court to several helpful passages from *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 AC 653. *Amin* concerned the State's article 2 investigative obligation in the context of a prisoner who had been murdered by his cellmate. The House of Lords held that the ECHR laid down minimum standards of investigation that had to be met in order to discharge the article 2 obligation. The investigations that had preceded the decision of the House of Lords were set out at paras [8]-[13] of Lord Bingham's judgment. The context of this case was a death in prison.

[197] Paras [31]-[37] set out the conclusions reached which should be read in full:

> "31. The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life, in the sense that it only arises where a death has occurred or life-threatening injuries have occurred: *Menson v United Kingdom*, page 13. It can fairly be described as procedural. But, in any case where a death has occurred in custody it is not a minor or unimportant duty. In this country, as noted in paragraph 16 above, effect has been given to that duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure

so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.

32. Mr Crow was right to insist that the European Court has not prescribed a single model of investigation to be applied in all cases. There must, as he submitted, be a measure of flexibility in selecting the means of conducting the investigation. But Mr O'Connor was right to insist that the Court, particularly in *Jordan* and *Edwards*, has laid down minimum standards which must be met, whatever form the investigation takes. Hooper J loyally applied those standards. The Court of Appeal, in my respectful opinion, did not. It diluted them so as to sanction a process of inquiry inconsistent with domestic and Convention standards.

33. There was in this case no inquest. The coroner's decision not to resume the inquest is not the subject of review and may well have been justified for the reasons she has given. But it is very unfortunate that there was no inquest, since a properly conducted inquest can discharge the state's investigative obligation, as established by *McCann*. It would overcome the problems exposed by this appeal if effect were given to the recommendations made in "Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review 2003" (Cm 5831) (June 2003), and no doubt that report is receiving urgent official attention.

34. The police investigations into the criminal culpability of Stewart and the Prison Service were, very properly, conducted in private and without participation by the family. The Advice Report on which counsel based his advice not to prosecute the Prison Service or any of its members was produced in evidence during these proceedings but not before. It is written in an objective and independent spirit, but it raises many unanswered

questions and cannot discharge the state's investigative duty.

35. The trial of Stewart for murder was directed solely to establishing his mental responsibility for the killing which he had admittedly carried out. It involved little exploration, such as would occur in some murder trials, of wider issues concerning the death.

36. There is no reason to doubt that Mr Butt set about his task in a conscientious and professional way. He explored the facts, exposed weaknesses in the Feltham régime and recommended changes which, it is understood, have been and are being implemented. It is however plain that as a serving official in the Prison Service he did not enjoy institutional or hierarchical independence. His investigation was conducted in private. His report was not published. The family were not able to play any effective part in his investigation and would not have been able to do so even if they had accepted the limited offer made to them.

37. The CRE report, which was not before the judge or the Court of Appeal, brings additional facts to light (although some of these, such as the discovery of a handmade wooden dagger under Stewart's pillow after the murder, raise many further questions). The report has been published. But the CRE inquiry, conducted under the Race Relations Act 1976, was necessarily confined to race-related issues and this case raises other issues also (as did Edwards, where there was no race issue). Save for a single day devoted to policy issues, the inquiry was conducted in private. The family were not able to play any effective part in it and would not have been able to do so even if they had taken advantage of the limited opportunity they were offered. Whether assessed singly or together, the investigations conducted in this case are much less satisfactory than the long and thorough investigation conducted by independent Queen's Counsel in Edwards' case, but even that was held inadequate to satisfy article 2(1) because it was held in private, with no opportunity for the family to attend save when giving evidence themselves and without the power to obtain all relevant evidence."

[198] The above quotation from *Amin* explains what the requirements are for an article 2 compliant investigation. It follows that, if the underpinning is not there in terms of the necessary powers, independence and participation of the next of kin, no matter how well intentioned those tasked with an investigation, the investigation will be liable to fail in article 2 compliance.

[199] In Northern Ireland there are many incidents which occurred during the Troubles which remain unresolved. Inquests have been a model of enquiry which has been utilised into Troubles-related deaths in some of these cases, mostly by virtue of Section 14 of the Coroners Act (Northern Ireland) 1959 on the direction of the Attorney General for Northern Ireland. Section 14(1) states:

> "Where the Attorney General has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner (whether or not he is the coroner for the district in which the death has occurred) to conduct an inquest into the death of that person, and that coroner shall proceed to conduct an inquest in accordance with the provisions of this Act (and as if, not being the coroner for the district in which the death occurred, he were such coroner) whether or not he or any other coroner has viewed the body, made any inquiry or investigation, held any inquest into or done any other act in connection with the death."

[200] At this point we briefly refer to the relevant coronial rules to provide some context. These are contained within the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963. Rule 15 states that 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 27 Births and Deaths Registration Acts (Northern Ireland) 1863 to 1956 to be registered concerning the death. Rule 16 states that 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 Rule 15, provided that nothing in Rule 16 shall preclude the coroner or the jury from making a recommendation designed to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held.

[201] Within the domestic law framework the obligation on the Coroner in accordance with Section 31 of the Coroners Act (Northern Ireland) 1959 is to:

> "Give, in the form prescribed by rules under section thirty-six, (his) verdict setting forth, so far as such particulars have been proved to (him), who the deceased person was and how, when and where he came to his death."

[202] In addition, obligations arise by virtue of article 2 of the ECHR. In order to comply with the Article 2 ECHR procedural obligation to carry out an effective official investigation into the circumstances of the death of the deceased "how" the deceased came by his death means not only that the Coroner has the obligation to investigate "by what means" but also to investigate "in what broad circumstances" the deceased came to his death: see *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182. The nature of the Article 2 ECHR procedural obligation was considered by the ECtHR in *Jordan v UK* (2003) 37 EHRR 2 and in *Nachova & others v Bulgaria* (2006) 42 EHRR 43.

[203] In summary, the essential purpose of an investigation is "to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility"; and that the investigation is also to 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. Furthermore, that there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.

[204] In *Jordan v UK* the ECtHR found that inquest proceedings in Northern Ireland did not meet the required standard to satisfy article 2 of the ECHR. The Grand Chamber found a lack of independence of the police officers investigating the incident from the officers implicated in the incident; a lack of public scrutiny, and information to the victim's family, of the reasons for the decision of the DPP not to prosecute any police officer; that the police officer who shot Pearse Jordan could not be required to attend the inquest as a witness; that the inquest procedure did not allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed; the absence of legal aid for the representation of the victim's family and non-disclosure of witness statements prior to their appearance at the inquest prejudiced the ability of the applicant to participate in the inquest and contributed to long adjournments in the proceedings; and that the inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

[205] Importantly, at paras [143] and [144] of this ruling the Grand Chamber also said this, when recognizing that national authorities have scope to define their own procedures and what this might mean where methods of investigation are shared between different organisations:

> "143. It is not for this Court to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. While reference has been made for example to the Scottish model of enquiry conducted by a judge of criminal jurisdiction, there is no reason to assume that this may be the only method available. Nor can it be said that there should be one unified procedure providing for all requirements. If the aims of fact finding, criminal investigation and prosecution are carried out or shared between several authorities, as in Northern Ireland, the Court considers that the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner. In the present case, the available procedures have not struck the right balance.
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> 144. The court would observe that the shortcomings in transparency and effectiveness identified above run counter to the purpose identified by the domestic courts of allaying suspicions and rumours. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. Lack of such procedures will only add fuel to fears of sinister motivations, as is illustrated, inter alia, by the submissions made by the applicant concerning the alleged shoot-to-kill policy."

[206] Post *Jordan* the ECtHR has continued to have a significant impact upon the conduct of inquests in Northern Ireland. As the trial judge recorded at para **[255]** of his judgment the Supreme Court judgment in *McQuillan* [2022] AC 1063 sets out the said 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* 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 *Gü*."

[207] Previously, Stephens LJ had also summarised the relevant principles which applied to investigations of this nature in *Jordan's Application* [2014] NIQB 11 at para [78] and I added to the list when hearing the *Inquest into a series of deaths that occurred in August 1971 at Ballymurphy, West Belfast* [2021] NI Coroner 6, as follows:

> "[67] To this comprehensive and instructive summary of principle provided by Stephens LJ I would simply add another point which is this: legacy inquests in Northern Ireland should be conducted in a proportionate way. The Coroner must decide what enquiries are

> required to answer the core questions, with reference to inter alia the scope of the inquest, the feasibility of the investigation, and the need to conclude investigations of a historical nature within a reasonable time."

[208] Having discussed how inquests operated in Northern Ireland before the 2023 Act we turn to consider the replacement of inquests by the ICRIR process of reviews. The cross-appeal challenges this new system on three fronts namely a lack of structural independence, inability to provide an effective investigation and inadequate victim participation all of which it is said militate against the ICRIR's capacity to discharge its article 2 and 3 obligations. The relevant provisions of the 2023 Act are sections 2(7)-(9), 2(11), 9(3), 10(2), 30, 31, 33, 34, 36, 37(1); Schedule 1, paras 6, 7, 8, 10; and Schedule 6, para 4.

[209] The trial judge did not grant any form of declaratory relief in relation to this aspect of the challenge. He clearly examined the 2023 Act, and the policy documents generated by the ICRIR in reaching a conclusion. He remarked at para **[238]** of his judgment when analysing the conduct of reviews "that the difficulty for the court is that much is left unsaid." We agree. The trial judge was understandably influenced by the fact that the Chief Commissioner has a wide discretion as to how the organisation would run and that there was the potential for compatibility. He said that was as much as he could say, he thought, without a concrete example of where victim's rights may have been breached. We are being asked to adopt a different approach and declare various provisions incompatible with Convention rights at this stage.

[210] We will not repeat all of the evidence which the trial judge has set out so comprehensively in relation to ICRIR operations as this is found at paras **[253]-[370]** of his judgment. We have considered the new provisions for reviews under the 2023 Act. In alignment with the trial judge, we recognise the wide powers of ICRIR and the benefit of having investigations placed within one body which is well-resourced and committed to providing outcomes within a reasonable time frame. We further note that the ICRIR has unfettered access to all information, documents, and materials as it reasonably requires in connection with a review. These are powers akin to those exercised by the Police Service of Northern Ireland ("PSNI") and PONI when conducting legacy investigations and cannot be criticised, nor should they be underestimated.

[211] Furthermore, we note that within the ICRIR structure a relevant authority is required to make available to the ICRIR such information, documents or other materials as may be required by the Commissioner for Investigations for the purpose of conducting a review. This is without prejudice to the right of the relevant authority to make disclosure of such further information, documents, materials as it considers appropriate to the conduct of the review. In making available any such

information, the relevant authority has immunity from suit. Finally, we note that the ICRIR can require certain statutory agencies to assist the ICRIR in understanding and making effective use of the information provided.

[212] However, we must address some distinct aspects of the ICRIR which are impugned as follows. The first claim made by Mr Bunting was that the operational structure of the ICRIR denotes a lack of independence. We have considered all of the points made in support of this claim. Having done so, we do not depart from the trial judge's findings on this issue. We also consider that the appointment terms for commissioners or funding arrangements are not unlawful or unusual. Whilst it might arguably be possible to improve the arrangements to strengthen the ICRIR's independence or the appearance of it, in agreement with the trial judge, we find that these arrangements do not of themselves offend the principle of independence given the fact that the ICRIR ultimately made up and staffed by independent investigators and decision makers including the commissioners.

[213] In our view it is not unreasonable that the SOSNI should set the terms of appointment for Commissioners when he appoints them. Review of the performance of an independent body set up by the lead Department which brought forward the legislation is also not unusual nor, of itself, fatal to the independence of the body concerned. We accept the submission made by the SOSNI that independent bodies are similarly required to report to Secretaries of State on their performance. That does not make them any less independent of the department which set them up. We dismiss this aspect of the cross appeal.

[214] The second aspect of this challenge relates to the effectiveness of the ICRIR as regards victim participation. To our mind this argument has traction in relation to the more in-depth investigations which are contemplated in order to comply with the procedural obligations under article 2 and 3 which we have discussed above.

[215] These procedural obligations apply to any investigatory body tasked with investigation as the decision in *Re Hawthorne* [2018] NIQB 94 on the role of the Police Ombudsman demonstrates:

> "60. I have also been referred to a number of cases which deal with the application of human rights in this sphere and in particular Article 2 of the European Convention on Human Rights ("the Convention") - the right to life. In the case of *Barnard* [2017] NIQB 82 Treacy J refers to the fact that following the *McKerr* group of cases the UK Government set up measures to remedy identified breaches of the Article 2 procedural obligation to investigate suspicious deaths. He refers at paragraph [15] to the Joint Committee on Human Rights 7th Report of

Session 2014/15 in the context of the establishment of the HET. However, these materials also refer to PONI reference at paragraph 3.3 of that report which states as follows:

> 'The Government has adopted a number of general measures to give effect to these judgments, including reforms to the inquest procedure in Northern Ireland and the establishment of bodies to carry out investigations, including the Police Ombudsman of Northern Ireland and the Historical Enquiries Team (HET). The Committee of Ministers closed that supervision of a number of implementation issues as a result of these measures, but a number of outstanding issues remain …
>
> 3.4 The effective investigation of cases which are the legacy of the Troubles in Northern Ireland has proved a particularly intractable problem in practice because it is so intimately bound up with a much larger question of dealing with the past in a post conflict society. The process is established to provide the effective investigations which Article 2 ECHR requires, through the institutions of the Police Ombudsman and the HET has been beset with difficulties and have also been the subject of critical independence reviews which have called into question their compliance with the requirements of Article 2.'

61. During the course of the hearing there was no issue taken with the role of the Ombudsman in satisfying the obligations placed upon the State to facilitate effective investigations in compliance with the procedural obligation under Article 2. Of course, the Ombudsman has an obligation to act in a Convention compliant way as a public authority. Section 3 of the Human Rights Act 1998 also enjoins the court to ensure that legislation is interpreted in a Convention compliant way.

62. Article 2 is cast in absolute terms as it enshrines a core value of the democratic societies making up the Council of Europe. The Court of Human Rights has also held that the procedural obligation under Article 2 requires that an effective and independent investigation is conducted. The procedural obligation includes the right to an independent, effective investigation which involves the next of kin where there is alleged involvement by state actors. This is an obligation of means not of result, however it is clear that any inefficiency in the investigation which undermines its ability to establish the circumstances of a death will risk falling foul of the required standard of effectiveness. The independence of PONI is critical in the satisfaction of this obligation. Also, the broad function of accountability and ventilation is supported by Strasbourg authority, see *El Masri v Macedonia* [2013] 57 EHRR 24, *Al Nashiri v Poland* [2015] 60 EHRR 16, *Jelic v Croatia* [2014] EHRR 601 and *Mocanu v Romania* [2015] 60 EHRR 19.

63. In this vein I have been referred to the case of *Regina (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 in which reference is made to this obligation to ensure an effective investigation where Article 2 is engaged. At paragraph [20] of this decision a number of important propositions are found including point (8) which reads:

> 'While public scrutiny of police investigations cannot be regarded as an automatic requirement under Article 2 (*Jordan*) para [121], there must (*Jordan*), para [109] be a sufficient element of public scrutiny of the investigation or its results to secure accountability and practice as well as in theory. The degree of public scrutiny required may well vary from case to case.'"

[216] The above quotation illustrates the fact that the article 2 and 3 investigative obligations can be satisfied by a range of investigative means. Specifically, article 2 compliance does not require an inquest in every case and an inquest is not the only method which may be deployed by a national authority. As the *Hawthorne* and *Barnard* decisions point out, the Police Ombudsman can perform the investigatory function and satisfy the article 2 obligation in some cases. So too might a criminal

investigation and prosecution in some cases. Thus, deaths may be examined by different means by national authorities. There is also a measure of discretion allowed to national authorities in the conduct of these enquiries. It follows that applying the law that we have just discussed the ICRIR has the capability to replicate investigations that were previously with PONI and the police. And provided the necessary safeguards are in place, we think that it has the capability to fulfil article 2 obligations in those cases.

[217] In addition, whilst we have some concerns in this regard, we are prepared to accept the trial judge's analysis on the transparency of the ICRIR, given the ongoing iterative process, led by the Chief Commissioner, to seek to ensure that this aspect of the article 2 requirement is met. Whilst it may be difficult for the ICRIR to replicate the public hearings one would expect in an inquest, there is no single model which must be adopted in this regard, and we recognize that the ICRIR is actively seeking to improve its processes in this respect.

[218] However, we think that a difficulty presents itself in relation to effective participation by the next of kin under the 2023 Act in circumstances where the ICRIR purports to replace inquests. As this court knows collectively from its own experience of hearing inquests, these are complicated historical cases which require oral evidence, the examination of witnesses and in-depth focus on disclosure (this is not an exhaustive list) to be effective. Furthermore, these cases also require the expertise and participation of lawyers in what has been described as a quasi-inquisitorial setting with adversarial aspects. Anticipating the point, we note that the ICRIR has suggested different procedures including an enhanced inquisitorial procedure in some cases. To our mind this is plainly indicative of the Commission's own concerns about ensuring necessary and appropriate participation and representation of victims and next of kin. However, the question remains as to whether proper involvement of the next of kin would or could be facilitated in that instance under the current ICRIR structure which is dependent on the provisions of the 2023 Act.

[219] The DOJ's submission on the absence of provision for legal aid as advanced by Mr Coll KC is a clear contra indicator to effective participation of the next of kin in these cases. It reads:

> "The Northern Ireland (Legacy and Reconciliation) Act 2023 ("the 2023 Act") makes no express provision for legal aid funding for representation in relation to the ICRIR processes. Similarly, the 2023 Act does not seek to alter the existing statutory framework relating to legal aid provision in Northern Ireland. As such, legal aid funding for representation may only be available in circumstances

where a request for funding falls within the footprint of the legislative scheme concerning civil legal aid:

- At present, there is some, limited information available regarding the potential operating models that might be adopted by the ICRIR in certain circumstances.

- It is the Department's position that an ICRIR review would not appear to constitute "proceedings" for the purposes of the Access to Justice (NI) Order 2003 ("the 2003 Order") or the existing statutory framework concerning legal aid provision in Northern Ireland. Based on this analysis, it is the Department's position that a person engaging with the ICRIR could not avail of funding for services consisting of representation."

[220] We are not attracted by Mr O'Donoghue's argument that the above legislation can simply be read down to capture the ICRIR processes. Such an approach does too much violence to the clear words, and intended purpose, of the 2003 Order. In addition, we do not consider that the obvious gap in terms of legal representation can be saved by the novel suggestion of lawyers being seconded into the ICRIR, as Commission officers, to represent the next of kin in a particular case. To our mind that proposal offends the principle that families should be able to choose their own lawyers and that they should be independent of the adjudicatory body.

[221] We also consider that the regulatory implications of such an arrangement are likely to be extremely difficult, if not impossible, to overcome, particularly in terms of members of the independent Bar. Thus, we are driven to the view that the clear position set out by the DOJ, with which we agree, militates against the necessary effectiveness requirements for the ICRIR at present in conducting some investigations and replacing inquests. Although inquisitorial by nature, in our jurisdiction these inquests have an adversarial aspect in practice, involving the next of kin who are represented by lawyers of their choosing and for which funding is provided. Mr Bunting's submissions also highlighted that there is no provision in the 2023 Act requiring disclosure of materials to the next of kin during the review process, nor a formal role for questioning on behalf of the next of kin.

[222] We do not believe it wise to take a 'wait and see' approach on this particular issue, not least because it also engages another agency responsible for legal funding. That is why we consider the aforementioned approach would be counter-productive and has the potential to lead to more litigation in individual cases. To our mind, it is preferable and would be of assistance to all concerned to make a declaration on this issue now, particularly as it affects an entire class of cases.

[223] A final issue of significant concern to us is in relation to disclosure and the role in this of the SOSNI as defined by the 2023 Act. This is a vexed area which has delayed many inquests, and which is rightly of high concern to bereaved families who believe that the truth is being, or may be being, withheld by State agencies. We note Colton J's reference **at para [308]** to Mr McGleenan's submissions before him that the ICRIR has more powers than a coroner; and his assessment at para **[319]** that disclosure powers are an improvement on inquests. However, we do not think these observations are fully explained or set in the context of how delays have actually come about in the provision of relevant material by State agencies. It may be that the ICRIR can impose a greater financial penalty for non-compliance with requirements to attend to provide information; but that is not a particularly persuasive enhancement. It may be that there is a greater ability for the ICRIR to take into account information which would previously have been subject to a claim for PII which would be upheld. That is undoubtedly an enhancement, and one which might reduce the instances where a coroner was unable to properly conduct an inquest with a significant amount of PII material (resulting in a recommendation for a public inquiry instead).

[224] Nonetheless, to our mind none of the purported differences which are relied upon undermine the coroner's powers as an independent judicial officer holder or the inquest process which was operating in Northern Ireland to deal with legacy cases prior to the new legislation. More importantly, they also do not overcome the issues identified in the cross-appeal that – where the ICRIR process is designed to replace an inquest as the mode for Article 2 compliance – there is insufficient victim involvement, and the SOSNI has an effective veto over whether and how the ICRIR can share any such information. This last feature it is said by the applicants strikes at the heart of the independence of the process in cases where significant amounts of sensitive information are involved.

[225] Mr Bunting presented a compelling argument on this point as follows. In a nutshell, the 2023 Act as currently framed the SOSNI effectively appears to have a veto over sensitive material being disclosed by the Commission to the next of kin (and others) by virtue of the legislation. Also, whatever the practical outworkings of this, the perceived effect of this power of veto viably raises a valid query as to independence.

[226] It is also clear that the ICRIR has at its disposal a different process for dealing with PII material. As such we remind ourselves of the role of a coroner in deciding in a PII balancing exercise whether sensitive material could be disclosed in a gist or otherwise. The judicial role just mentioned is to carry out a balancing exercise between two potentially competing aspects of the public interest, namely:

(i) The public interest in open justice and the availability of evidence; and

(ii) The public interest in preventing harm being caused to national security.

[227] The law in this area is well known from cases such as *R v Chief Constable of West Midlands Police ex parte Wiley* [1995] 1 AC 274; *Al Rawi v The Security Service* [2011] UKSC 34; and *Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin) (the *Litvinenko* case). It has also been discussed recently by this court in *The Secretary of State for Northern Ireland v Fee: Re an Inquest into the death of Liam Paul Thompson* [2024] NICA 39.

[228] Mr O'Donoghue sought to persuade us that the ICRIR had the freedom to release a gist of sensitive material to the next of kin of its own volition, but we are far from sure that this is correct based on the statutory provisions which govern this area. This is not expressly provided for unlike section 8(1)(d) of the Justice and Security Act 2013. As appears below, the provisions of the 2023 Act focus on the disclosure of "information" rather than the disclosure of particular documents.

[229] Section 30 of the 2023 Act sets the ICRIR's general power of disclosure:

> "30(1) The ICRIR may disclose any information held by the ICRIR to any other person."

[230] However, in the ICRIR written submission, the fact that this general power is subject to various limitations is highlighted in the following terms:

> "Firstly, there is the general prohibition under section 4(1) that the ICRIR must not do anything which—
>
> (a) would risk prejudicing, or would prejudice, the national security interests of the United Kingdom,
>
> (b) would risk putting, or would put, the life or safety of any person at risk, or
>
> (c) would risk having, or would have, a prejudicial effect on any actual or prospective criminal proceedings in any part of the United Kingdom.
>
> Secondly, the rule in section 30(1) is subject to Prohibitions A to F set out in the remainder of section 30. Prohibitions A and B relate to sensitive information. The Secretary of State may give guidance to the ICRIR and other named bodies as to the identification of sensitive information. The Secretary of State may also make

regulations concerning the holding and handling of information by the ICRIR.

Schedule 6 to the 2023 Act sets out the procedure by which disclosure of sensitive information can be made by the Commissioner for Investigations to identified third parties."

[231] Schedule 6 makes specific reference to the SOSNI as follows:

"**4 Disclosure of sensitive information notified in advance to the Secretary of State**

(1) A disclosure of sensitive information by the ICRIR is permitted if—

(a) the Commissioner for Investigations notifies the Secretary of State of the proposed disclosure, and

(b) the Secretary of State notifies the Commissioner for Investigations that the proposed disclosure is permitted.

(2) The Secretary of State must respond to a notification by the Commissioner for Investigations under this paragraph within the relevant decision period, by notifying that Commissioner that the proposed disclosure either—

(a) is permitted, or

(b) is prohibited.

(3) But the Secretary of State may notify the Commissioner for Investigations that the proposed disclosure is prohibited only if, in the Secretary of State's view, the disclosure of the sensitive information would risk prejudicing, or would prejudice, the national security interests of the United Kingdom.

(4) If the Secretary of State notifies the Commissioner for Investigations that the proposed disclosure is prohibited—

(a) the Secretary of State must consider whether reasons for prohibiting it 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 those reasons to the Commissioner for Investigations."

[232] When fully analysed we are satisfied that that this regime goes beyond the current coronial practice previously discussed as it provides the SOSNI with a much greater role. "Sensitive information" is defined as a much wider category than PII material. The definition is also wider than that under the Justice and Security Act as it includes material which is categorised as sensitive at its source rather than its effect on national security. There also appears to be a lower threshold to permit the withholding of information from the public than currently applies on an application for a closed material procedure under the Justice and Security Act.

[233] Furthermore, the SOSNI, through the provision of guidance (which we have not seen) which must be taken into account, has a role in what is identified as sensitive information; and, thereafter, the ICRIR must effectively seek permission to share that information. That is likely to cover a significant amount of material in many cases where State involvement in a Troubles-related death is alleged.

[234] Given the breadth of the provisions set out in Schedule 6, we share the applicants' concern that the 2023 Act clearly places the final say on disclosure in the hands of the SOSNI. That is something which is outside the control of the Chief Commissioner of the ICRIR. The SOSNI can prohibit the ICRIR from sharing sensitive information – which, as we have said, is defined in terms which could and would go much wider than material over which PII is asserted – with the next of kin and others in a final report. The SOSNI can prohibit disclosure even without giving reasons to the ICRIR, let alone others, in certain instances. There is also no provision for a merits-based appeal (although there is review akin to judicial review); and it appears that the court cannot itself permit disclosure of any sensitive material where the SOSNI's permission has been withheld. Overall, we find that this regime has the potential to offend the proper aim of the ICRIR expressed in its written submissions that "the organisation is made up of personnel that are able to conduct their work free of State interference" and could give rise to an unhelpful perception which could hinder progress in this area.

[235] In addition, we think that the submission made by NIHRC validly raises an issue of perceived imbalance in that SOSNI has a wider power to request reviews of deaths and other harmful conduct than any other person including the families who

are directly affected. This is so comparing the powers vested in family members under section 9(1) and SOSNI's powers under section 9(3) and the power vested exclusively in SOSNI under section 10(2).

[236] Finally, we are unattracted by Mr McGleenan's argument in reliance upon the *Abortion Services (Safe Access Zones)* decision that the legislation can satisfy the test of Convention compliance (or, at least, cannot be said not to be Convention non-compliant to the required standard). The law is not straightforward in this area. However, it suffices to say for present purposes that, applying the appellant's rubric that in an *ab ante* challenge the test is whether the legislation is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference in "all or almost all cases", the argument also fails in substance. That is because we consider that the problematic elements we have identified simply apply to all or almost all cases where inquests are to be replaced by the ICRIR under the 2023 Act and so relate to an entire category of cases. (For similar reasons, we disagree with the trial judge's approach of waiting to see how the provisions would operate in practice.) In addition, we are not dealing with qualified rights such as article 8 which was at issue in the *Abortion Services* case and *JR123*. Rather, article 2 and article 3 ECHR are absolute rights where no proportionality balance need be struck. As such we also question the applicability of this argument to the facts of this case.

[237] Accordingly, we allow the cross-appeal in part. We consider that declaratory relief should be granted in relation to participation of the next of kin and a declaration of incompatibility should be made pursuant to section 4 HRA in relation to all relevant disclosure provisions.

Civil Actions under section 43

[238] The question on this limb of the argument is whether the prohibition on civil proceedings, so far as it is prospective as a bright line rule, is incompatible with article 6 ECHR. The trial judge considered the competing arguments at **paras [371]-[418]** of the judgment. He found that:

(a) The essence of the right had not been impaired (**para [385]**).

(b) Applying the proportionality principle, section 43 pursues a legitimate aim (**para [394]**), and that the case-law supports the submission 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 (**para [403]**).

[239] The *Dillon* applicants present the following points in support of this limb of the cross-appeal:

(a) Contrary to the conclusion of Colton J at **para [376]**, the Act does not create a limitation period, but rather a blanket law preventing further damages claims issued on or after 17 May 2022 (a date which potential litigants will not have known would be significant in advance):

(i) "The purpose of section 43 is to create an immunity from further suit for categories of case which are already subject to a limitation period."

(ii) "Even where there is good reason for a failure to issue a claim before that date (such as an absence of probate in Lynda McManus' case), a court cannot permit the claim to continue."

(iii) "To give a further example, even if new information came to light as a result of a "review" by the Commission, which would otherwise found a damages claim, the Act prohibits such a claim. This is unfair and disproportionate."

As such, the applicants maintain that the essence of the article 6 right is infringed.

(b) Even if a proportionality assessment is required, the applicants further submit that the correct balance has not been struck for the following reasons:

(i) The right of access to a court is not an area where Parliament has a greater expertise than the court. Any margin of appreciation ought to be narrow.

(ii) There is no justification for the retrospective application of this immunity from civil suit: *Legros v France* (App no. 72173/17).

(iii) Article 6 does not permit the state to deprive a litigant of the very essence of their right: *Nait-Liman*, para 113.

(iv) The immunity from civil suit in section 43 only applies to cases which are already subject to limitation cut-off periods. There are already mechanisms in place for the courts to rule stale claims out of time.

(v) This creation of blanket immunity from suit is all the more problematic given that the reason why many victims of the Troubles have been unable to bring claims sooner is that State bodies have failed to disclose

relevant information or have sought to hide relevant information: see *Escalano v Spain* (2002) 34 EHRR 24.

(vi) The real purpose of section 43 is to protect officers of the state. Insofar as this played a role in the passage of the Act, it was an illegitimate aim. It is an aim that undermines rather than promotes the rule of law.

[240] The SOSNI disputes this case and makes the following points in reply:

(a) The 2023 Act does not curtail all pending civil claims. The limited degree of retrospectivity in the Act is compatible with article 6 having regard to:

(i) The aim pursued of promoting peace and reconciliation in Northern Ireland.

(ii) The risk of the Act proving ineffective in achieving its aims if there had been a period of time between its announcement and commencement in this respect, given that many claims would likely have issued in the intervening period. The limited degree of retrospectivity provided for ensures that the intention of Parliament is not frustrated in the context of affected claims relating to matters which, by definition, occurred more than 20 years ago (i.e. before 10 April 1998), which would on any view already be very stale and could have been brought years ago.

(b) Troubles victims have already had between 25 and 57 years to issue proceedings, many of which are already time-barred, and which would be highly unlikely to meet the criteria for an extension of time.

(c) Further, other elements of the article 6 right remain intact: criminal prosecutions can still be initiated after referral by the ICRIR against individuals without immunity in the circumstances where the test for prosecution is met, and compensation orders remain a potential outcome of those proceedings.

[241] We have considered the competing arguments and having done so we prefer the applicants' arguments based upon article 6 for the following reasons. First and foremost is the fact that section 43, properly construed, does not introduce a limitation period but a blanket prohibition upon access to a court. This engages a fundamental right of citizens seeking redress against the state (or, indeed, against others) pursuant to ECHR. Furthermore, a limitation period currently exists in our domestic law and is one against which all historical claims are tested where that is put in issue by the defendant.

[242] In *Stubbings & Others v The UK* (App. No. 22083/93, 22095/93) the ECtHR also referred to the margin of appreciation afforded to States as follows:

> "55. The Contracting States properly enjoy a margin of appreciation in deciding how the right of access to court should be circumscribed. It is clear that the United Kingdom legislature has devoted a substantial amount of time and study to the consideration of these questions. Since 1936, there have been four statutes to amend and reform the law of limitation and six official bodies have reviewed aspects of it (see paras [28]-[34] above). The decision of the House of Lords, of which the applicants complain (see paras [15] and [47] above), that a fixed six-year period should apply in cases of intentionally caused personal injury, was not taken arbitrarily, but rather followed from the interpretation of the Limitation Act 1980 in the light of the report of the Tucker Committee upon which the Act had been based (see para [31] above).
>
> 56. There has been a developing awareness in recent years of the range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation of actions applying in member States of the Council of Europe may have to be amended to make special provision for this group of claimants in the near future. However, since the very essence of the applicants' right of access was not impaired and the restrictions in question pursued a legitimate aim and were proportionate, it is not for the court to substitute its own view for that of the State authorities as to what would be the most appropriate policy in this regard.
>
> 57. Accordingly, taking into account in particular the legitimate aims 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 (see paragraphs 50-51 above), the court finds that there has been no violation of article 6 para. 1 of the Convention taken alone (article 6-1)."

[243] *Stubbings* involved a situation markedly different from the one that that arises here, as it was concerned with limitation. We agree with the argument advanced that whilst article 6 does not prohibit the application of limitation periods it does not

permit the removal of entire categories of recognised cases (where there may otherwise be a good substantive claim) from the court entirely. *McElhinney v Ireland* [2002] 34 EHRR 13 contains a powerful articulation of this principle as the Grand Chamber said at para 24 that:

> "… it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) – namely that civil actions must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons …"

[244] The above quotation captures the heart of this debate concerning access to courts, and we apply those principles. Thus, we disagree with the conclusion reached by Colton J on this point. The legislation as it currently stands provides a blanket prohibition on civil claims which to our mind is not proportionate or justifiable. This applies not only in relation to the retroactive element of the legislation, as Colton J found, but also to the prospective prohibition on claims.

[245] In reaching our conclusion we have noted the SOSNI's policy paper on this issue which the applicants raised in argument. This refers to the proposal to prohibit civil claims because:

> "Legacy civil cases place a considerable strain on UKG and continue to undermine public confidence in the state (as well as affecting public perception of the police and armed forces)."

The paper added that:

> "It may be difficult to argue that an absolute bar on current civil claims is proportionate and compliant with Article 6… As such, prohibiting new civil litigation in legacy cases is unlikely to be capable of commanding consensus."

[246] The reality is that a restraint is placed upon historic claims by the limitation periods already set out in domestic law. As matters stand several hundred civil claims are already before the courts in this sphere and we consider it would be invidious and unfair if otherwise valid claims were barred in the same area, especially where (if this be the case) the claim could only reasonably have been

commenced or pursued after additional information came to light which had been concealed from the plaintiff, particularly by the defendant or state bodies.

[247] Furthermore, the State parties can seek acceleration of the adjudication of these claims by raising the time bar or by simply seeking a hearing date. It may well be that, in many cases, a limitation defence will be successful in light of the potential prejudice to the defendant or defendants. Therefore, we find that the trial judge's ruling on this issue is too narrow since, save in the limited category of cases where the time limit operated retrospectively, his conclusion would still permit new claims to be excluded from any judicial consideration whatever.

[248] As to remedy, the compensation element of the VD is specifically concerned with compensation as an adjunct of criminal proceedings against an offender as we have set out at para [34] herein. Thus, it seems to us that, civil proceedings – particularly where these are likely to be against state bodies which are not themselves "the offender" in relation to the incident – are not underpinned by EU law as we have found with other provisions addressed in this judgment. The civil proceedings brought in relation to Troubles-related incidents span much wider than that given that they rely for example upon claims based in tort, contract and misfeasance in public office. These claims are disconnected from criminal proceedings and therefore outside the scope of article 16 VD. Therefore, this is not an instance where there should be disapplication. We will make a wider declaration of incompatibility than Colton J did in relation to section 43, which prohibits civil claims without any qualification.

Article 14 of the Convention

[249] The question arising in relation to article 14 is whether the applicants, in having the various redress mechanisms previously available to them suspended, have suffered from discrimination. Following the case-law, this entails deciding, inter alia, whether (i) the applicants have a relevant status; and (ii) whether any alleged difference in treatment can be justified.

[250] The trial judge dealt with this point from **paras [462]-[517]** of his judgment. He found that:

(a) It was not necessary to determine whether the provisions which relate to immunity from prosecution, the retrospective prohibition on existing civil proceedings, and the restriction of use of protected material in civil proceedings were incompatible with article 14 as they were already found to be in breach of articles 2 and 3 ECHR (**para [471]**).

(b) The applicants enjoy an "other" status as being "either a victim or a relative of a victim of the Troubles as defined in the Act." This status is not personal or

immutable, however certain legal rights flow from that status which come within the ambit of substantive Convention rights (**para [482]**).

(c) That the applicants were at least arguably in analogous situations to relevant comparators (**para [485]**), but that the difference in treatment could in any case be justified as "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" (**para [515]**).

[251] Having set out the relevant test in *Stott* [2020] AC 51, at para [8], the *Dillon* litigants argue that the Act is incompatible with article 14 because:

(a) There has been a difference of treatment in that Troubles victims are treated differently to victims of state violence after 1998;

(b) The applicants are members of an ageing cohort;

(c) The difference in treatment has no reasonable justification, nor does it pursue a legitimate aim;

(d) The SOSNI's affidavit evidence makes no attempt to engage with the article 14 claim; and

(e) The trial judge at first instance erred in accepting that discrimination pursued a legitimate aim of reconciliation and bringing an end to conflict.

[252] In response, and in support of Colton J's assessment, the SOSNI relies on the following:

(a) In each instance the status relied upon is not a core status and not a personal or identifiable characteristic, but rather is simply a description of the difference in treatment and therefore not properly relied upon.

(b) Even if status is established in these cases, it is on the basis of an "other status" which is at the outer orbit of Lord Walker's concentric circles as described in the *RJM* case at para [5].

(c) In any event, if that point of the analysis is reached, justification is established for the following reasons:

    (i) The question for the court is whether there is any reasonable foundation for the impugned provisions/alleged treatment;

(ii) The more peripheral the status, the lesser the intensity of the court's scrutiny of justification. The statuses relied on by the applicants, although not matters of choice, are certainly not personal or immutable; and

(iii) The justification for any difference in treatment is to promote peace and reconciliation and, in any case, the Act is not designed to protect veterans.

[253] Article 14 ECHR contains the prohibition of discrimination:

> "The enjoyment of the rights and freedoms set forth in this 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."

[254] At para [37] of *R (SC and Others) v Secretary of State for Work and Pensions* [2021] UKSC 26 Lord Reed set out the approach adopted in relation to article 14 by the ECtHR applying *Carson v UK* [2010] 51 EHRR 13. Lord Reed explains how an article 14 claim should be addressed as follows:

> "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."

[255] In *SC*, Lord Reed also observed that the ECtHR generally proceeds to consider whether a person in an analogous situation has been treated differently and whether there is an objective justification for that. In this case the comparators are simply victims of state violence where the event happened after 10 April 1998.

[256] By virtue of the principles set out in *SC* there must be justification objectively provided for differential treatment. This court has also recently considered article 14 in the case of *Lancaster* [2024] NICA 63.

[257] Applying the law to this argument we consider that the trial judge rightly found that 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.

[258] In addition, we agree with the conclusion reached by the trial judge on the applicants' satisfaction of the status requirement. We do not consider that the relevant status is based upon national identity, which was discussed and dismissed, albeit in a different context, in *Lancaster*. The status in this case, which applies to victims of all communities, is simply that they or their loved one was killed or injured in a Troubles-related incident within the definitions set out in the Act. We endorse **para [482]** of the first instance judgment which states that:

> "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."

[259] In our view, in line with that of the trial judge, those who are the victims of murder or manslaughter, torture or serious assault by state agents or by paramilitaries before 10 April 1998 (as part of the Troubles) and those who are such victims after that date are arguably in an analogous or relatively similar situation. We also conclude that those who have been victims of state violence/torture and paramilitary killings/violence 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 to those who could have availed of those remedies but for the Act.

[260] Whether the trial judge's conclusion can be sustained really comes down to justification and the margin of appreciation afforded to the state to justify the differential treatment which is established by virtue of the provisions of the Act. The contracting state enjoys a margin of appreciation to justify differential treatment. The scope of this margin will vary according to the circumstances, the subject matter, and the background.

[261] Whether it is accepted or not the stated aim of the measures which are challenged is to promote reconciliation. This is expressly stated as the "principal objective" of the ICRIR in section 2(4) of the 2023 Act. In bringing forward these measures, it was hoped to bring an end to an aspect of the conflict in Northern Ireland that has proved elusive over a protracted period of time namely, how to deal with the legacy of the Troubles. The aim of promoting reconciliation, as in an effort to transition from the past to the future (in the words of Eames/Bradley), is in principle a legitimate aim. In various talks between the parties in Northern Ireland, including the SHA, it has been accepted on all sides that some process is required in order to deal with the legacy of the Troubles and that this may require new models or processes which are different from those applicable to non-Troubles-related issues. That is both in order to assist victims but also in pursuit of a wider public interest of allowing society to move on from the wounds of the past to a more stable and peaceful society.

[262] The provision of information, the report on all the circumstances of a death, in addition to referral for prosecution should sufficient information be obtained, and immunity not be granted, is the means by which Parliament in passing the Act has chosen to deal with the legacy of the past. In doing so, the SOSNI argues, it is fulfilling the requirement of paragraph 11 of the RSE chapter of the B-GFA (as a necessary element of reconciliation).

[263] There is understandably some scepticism expressed by those affected as to this stated aim given what has already been said in this judgment, particularly the drive to protect veterans which foreshadowed the Act and the substantial lack of support for it from the political parties here. However, when examining article 14 we must deal with legitimate aim at face value given the margin of appreciation afforded to the State.

[264] It is also argued that, for many, justice has not been achieved, particularly due to delays and disclosure issues within current court-based processes. These are valid concerns, and the court is sympathetic to the broad aim that processes for Troubles victims should be much less beset with delay. This is partly an issue of resources,

but the streamlining of processes is also, in principle, another means of dealing with the issue. However, what the court must examine is the justification for the difference in treatment between those who have been defined as victims of the Troubles on the one hand and, on the other hand, others who are victims of state violence or paramilitary violence and also those victims of the Troubles who have already had recourse to the mechanisms which are now being brought to an end.

[265] 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.

[266] In relation to the temporal parameters established by the 2023 Act there clearly is a rational basis for the dates chosen. The year 1966 is recognised as a 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. Regarding the end date, 10 April 1998 is the date that the B-GFA was signed. It seems to us that the dates chosen to reflect the period of the Troubles have a rational basis and can readily be justified.

[267] That is not, however, the real debate in this article 14 claim. The substantive issue in the context of the article 14 challenge is whether treating the victims of the Troubles during that period differently from other analogous victims can be justified in law. 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. We accept, as a matter of logic and commonsense, that the prospect of legal redress in those circumstances is receding in many cases. Nonetheless, this does not provide a justification in those cases where legal redress in some of the forms affected by the Act may well be possible and justified.

[268] We note that the court has been supplied with an affidavit sworn by Mr Patrick Butler, Head of the Legacy Inquest Unit and Legal Adviser to the Coroners, dated 17 November 2023. 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.

[269] There are ten Year 4 and 5 cases which have not yet been assigned to a coroner. However, six of those unallocated ten are not subject to the 2023 Act since the deaths did not occur within the defined period of the Troubles. 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.

[270] 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. The process is difficult and protracted as the experience of other countries has shown us. As noted above, we consider that in principle this is an entirely legitimate aim in a society which is trying to emerge from conflict as in this jurisdiction. However, the aim can realistically only be achieved upon consultation and with a degree of buy-in from all those affected.

[271] The real question is whether Parliament is entitled to devise a mechanism by which investigations into killings or ill treatment during the Troubles can be investigated in a coherent way via bespoke mechanisms. It seems to us that there is an objective and reasonable justification for doing so, even though it may involve 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 acting in a Convention compliant way. Mr McGleenan also made a powerful point in this context, namely that, after the SHA, the Northern Ireland political parties were not themselves able to formulate agreed mechanisms to deal with the past, so that the First Minister and deputy First Minister passed the matter back to the Westminster Parliament.

[272] The assessment of proportionality ultimately resolves itself into the question as to whether Parliament made the correct judgment. As the trial judge said, this proportionality element is largely a matter of political judgment. 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. We adopt Lord Reed's comments in *SC* that "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."

[273] Thus, we are not inclined to upset the trial judge's assessment that the discrimination claims cannot be upheld on the basis that Parliament has made a political choice with which the court should not interfere, unless and insofar as the Act violates other substantive Convention rights. Put another way, the redress for victims is through the Convention claims which we have upheld.

[274] In any event where (as in this case) a Convention right has been found to be violated, the article 14 claim adds nothing. The breach of Convention rights cannot

be justified merely on the basis that those affected are Troubles victims. We have taken into account the context of the Troubles in reaching our conclusions on the Convention arguments (many of which are now conceded in any event). Where a Convention right has not been violated, the difference in treatment would be justified on the basis that Parliament is entitled to seek to deal with the legacy of the past in a way which treats Troubles victims, rationally defined, as a separate cohort.

4. Conclusion: Jordan and application of article 8

[275] The *Jordan* case succeeded below as regards article 2 ECHR compatibility. However, the remaining issue on appeal was whether article 8 ECHR was engaged and, if so, whether section 41 was incompatible with article 8(2). The trial judge made orders issuing a declaration of incompatibility to the effect that section 41 of the Act was incompatible with article 2 ECHR and article 2(1) WF, and that it should be disapplied pursuant to section 7A EUWA 2018. However, 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. As such, no order was made in respect of article 8 (**paras [713]-[714]**).

[276] The article 8 ECHR points were dealt with by the trial judge from **paras [216]-[241]**. Essentially, the trial judge found that article 8 was not engaged in the *Jordan* case. That applicant wished to rely upon her article 8 rights, in addition to article 2, in relation to the ongoing prospect of potential prosecution of police officers arising out of the incident and the findings in the latest inquest. The court concluded that "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." (**para [240]**)

[277] On the article 8 point, Ms Quinlivan KC advanced the following arguments:

(a) Article 8 is engaged because:

  (i) The concept of private life can be invoked by relatives of the deceased as it is to be broadly interpreted – see *Pretty v UK* (2002) 35 EHRR 1 at para 65;

  (ii) In *Zorica Jovanović v Serbia* (Application No 21794/08), the ECtHR held that "[t]here 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";

  (iii) In the more recent case of *Zăicescu and Fălticineanu v Romania* (Application No 42917/16), the court concluded that article 8 was engaged in a case concerning Holocaust denial; and

(iv) Overall, there is "nothing artificial about viewing the impact of section 41 through the distinct prism of article 8, in addition to article 2… The court should consider the issues that arise under article 8 ECHR independently of those that arise under article 2 ECHR."

(b) Section 41 constitutes a violation of the applicants' rights under article 8 because:

(i) In the *Jordan* case specifically, the bar on the criminal investigation, prosecution and punishment of Officers M and Q by virtue of section 41 amounts to a clear violation of the applicant's rights under article 8(1);

(ii) There is no basis upon which it can be said that the blanket amnesty for offences which fall within section 41 is justifiable on the basis of any of the legitimate aims identified within article 8;

(iii) The provision is not necessary as it is not in any of the outlined limitations under article 8(2); and

(iv) In any event, there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

[278] We have considered the competing arguments and can answer this ground succinctly. That is because the cases referred to by Ms Quinlivan with characteristic skill are plainly not on point when the facts of those cases are fully examined. *Zorica Jovanović v Serbia* is the first example Ms Quinlivan cited. The facts of that case are that in 1983, the applicant gave birth to a healthy baby boy in a state-run hospital. Three days later, she was informed that her son had died. The baby's body was never handed over to the applicant or her family and she was not provided with an autopsy report. No indication was given of cause of death, and nor was the death registered with the municipality. There was considerable doubt as to whether the applicant's son was in fact dead or had just been removed.

[279] The relevant legislation was changed in 2003. A subsequent report by the Ombudsman found serious shortcomings both in the legislation applicable in the 1980s and in the procedures and statutory regulations that applied when a newborn died in hospital (the prevailing medical opinion being that parents should be spared the pain of having to bury their child). Article 34 of the Serbian Constitution made it impossible to extend the applicable prescription period for the prosecution of crimes committed in the past, or to introduce new, more serious, criminal offences and/or harsher penalties. The applicant's son had allegedly died or gone missing on 31 October 1983, but the Convention had not entered into force in respect of Serbia

until 3 March 2004. Nevertheless, the respondent State's alleged failure to provide the applicant with any definitive and/or credible information as to the fate of her son had continued to date. In such circumstances, the applicant's complaint concerned a continuing situation and the Government's objection of lack of jurisdiction ratione temporis had to be dismissed.

[280] The considerations the court had noted in *Varnava and Others v Turkey* (App. No. 16064/90) with respect to a State's positive obligations under article 3 of the Convention to account for the whereabouts and fate of missing persons were broadly applicable, mutatis mutandis, to the very specific context of positive obligations under article 8 in the instant case. The applicant still had no credible information as to what had happened to her son. His body had never been transferred to her or her family, and the cause of death was never determined. She had never been provided with an autopsy report or informed of when and where her son had allegedly been buried; his death had never been officially recorded. The criminal complaint filed by the applicant's husband appeared to have been rejected without adequate consideration. The applicant had thus suffered a continuing violation of her right to respect for her family life on account of the respondent State's continuing failure to provide her with credible information as to the fate of her son (who might well have still been alive). Self-evidently this case is distinguishable from *Jordan* on its facts.

[281] In *Zăicescu and Fălticineanu v Romania* the two applicants were Jewish survivors of the Holocaust. In 1953, high-ranking members of the Romanian military were convicted of war crimes and crimes against humanity for having directly participated in the deportation of Jews from Bessarabia and Burkovina. That judgment was subsequently quashed in respect of the soldiers GP and RD and the Supreme Court of Romania acquitted the pair in 1998 and 1999. In 2016, the applicants found out about the acquittals. They unsuccessfully sought to obtain the acquittal files.

[282] The court held that the applicants did not need to establish a direct connection between themselves, and the acts committed by GP and RD. As Jews and Holocaust survivors, they could claim to have personally suffered from an emotional distress when they had found out about the reopening of the criminal proceedings and the acquittals. They could be seen as having a personal interest in proceedings aimed at establishing the responsibility of high-ranking members of the military for the Holocaust in Romania of which they had been victims.

[283] Significantly, the authorities had never officially brought to the attention of the public the acquittals and the applicants had found out about them by accident, many years after they had taken place. Furthermore, the judgments given as a result of the retrials had not been accessible to the public and the applicants had initially been refused access to them. Those elements, coupled with the findings and the

Supreme Court of Justice's reasoning for its acquittal decisions, could have legitimately provoked in the applicants' feelings of humiliation and vulnerability and caused them psychological trauma.

[284] Accordingly, in the light of the case as a whole, the domestic authorities had failed to adduce relevant and sufficient reasons for their actions that had led to the revision of historical convictions for crimes connected with the Holocaust in the absence of new evidence and by reinterpreting historically established facts and denying the responsibility of State officials for the Holocaust (in contradiction with principles of international law). Their actions had thus been excessive and could not be justified as "necessary in a democratic society." Again, these are stark facts which differ markedly from the case we are dealing with.

[285] Furthermore, if there is any support for the application of the principles in play in these cases (which we do not find) it does not translate to the factual scenario of this case where article 2 redress is available. Where article 2 is applicable, it occupies the field. Thus, in our view it is not necessary or appropriate to rely on article 8 in *Jordan*'s case. However, we are additionally not persuaded by the argument that, as article 8 is not subject to a temporal limit in the same way that article 2 is, it should apply as a matter of principle. This is not a valid reason for engaging a convention right in the *Jordan* case.

[286] Overall, we do not consider that article 8 operates to replicate almost identical rights to those which would arise on the part of a next of kin of a deceased person if article 2 ECHR was engaged. If that were so, the temporal limit in relation to the application of article 2 would be devoid of effect. Whether article 8 arises in any other case also depends on the particular facts. We are not prepared to make a wide-ranging finding that article 8 is engaged in cases of this nature particularly as we find that it is not so engaged in *Jordan's* case. We, therefore, uphold the trial judge's finding on this cross-appeal ground.

5. The Fitzsimmons case

[287] The *Fitzsimmons* appeal is now conceded and so we confirm the declarations of incompatibility made by the trial judge. This case can be treated discretely. The court found and granted a declaration pursuant to section 4 HRA that the provisions in the 2023 Act relating to interim custody orders, namely sections 46(2), (3) and (4) and 47(1) and (4) are incompatible with the applicant Fitzsimmons's rights under article 6 ECHR. Additionally, the court held that a claim in tort for false imprisonment represented an asset within the meaning of A1P1 (**paras [694]-[698]**). A breach of that provision was therefore found (**paras [699]-[703]**).

[288] It follows from the SOSNI's concession that he now accepts that the interference with the applicant's possession effected by retroactive legislative

intervention does not pursue a legitimate aim and/or does not strike a fair balance between the general interest and the protection of the respondent's fundamental rights. Again, we consider the concession properly made in the *Fitzsimmons* case. Although we have obvious sympathy with the basic constitutional position that Parliament is entitled to change the law to correct what it perceives to be errors or unintended consequences flowing from court decisions, it will rarely be permissible in Convention terms to do this with retrospective effect where it interferes with citizens' property rights. This court was, of course, constrained to follow the reasoning of the Supreme Court in the *Adams* case. It would only be open to that court to determine that its previous decision was wrongly decided. However, the amendments to the Bill which became the ICO provisions were not introduced by the government; and we found the justification offered, namely that these were required in order to restore the *Carltona* principle to its rightful place, to be unconvincing. The *Carltona* principle is broadly unaffected by the conclusion of the Supreme Court in *Adams*, which was essentially that, as a matter of construction of the relevant emergency provisions, that principle was excluded from operation in those particular cases.

[289] There is one remaining issue as the applicant has appealed the trial judge's finding refusing standing in relation to a claim based upon article 7(1) ECHR. This article provides that: "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

[290] The relevant parts of the court's decision are from **paras [704]-[709]**. Here, the court found that this particular applicant did not have standing to bring a claim under article 7 ECHR. As noted above, 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 nor 47(2) (which must be read together for the purposes of the article 7 challenge) have the effect of overturning that ruling (**para [709]**). In short, Mr Fitzsimmons has had his conviction overturned and cannot therefore be said to have been held guilty of a criminal offence in light of the content of the 2023 Act.

[291] The applicant argues that the effect of ICO provisions is that any person who was convicted and who now seeks to advance an appeal against conviction on the basis of *R v Adams* will now not obtain a determination from the court but will, in article 7 ECHR terms, be 'held guilty' of a criminal offence on account of an act 'which did not constitute a criminal offence under national or international law at the time when it was committed' (applying the Supreme Court decision in *Adams*). The argument is therefore advanced that section 46, which produces this result, is thus incompatible with article 7 ECHR. Further, the prohibition on criminal proceedings in the 2023 Act operates only to prevent the quashing of convictions.

The 2023 Act contains no safeguard against the prosecution of any of the small cohort of individuals for whom the other elements of the offence of attempting to escape from detention are satisfied.

[292] The issue in dispute between the parties is whether the court may so declare in proceedings brought by Mr Fitzsimmons as applicant, given that his conviction for attempting to escape from detention had been quashed before the impugned provisions came into force. As regards standing, Fitzsimmons makes the following observations:

(a) A section 4 declaration is not affected by an applicant's standing or lack thereof.

(b) Similarly, section 7(3) restricts standing under the individual remedy provisions requiring that in judicial review the applicant must satisfy section 7(7) to have 'sufficient interest.' No such narrowing appears in respect of section 4.

(c) As such, on a proper reading of section 4, there is no section 7(7) qualification, and the concept of standing arises under it only in the sense that the petitioner must have sufficient standing in public law terms to have brought the proceedings in which the issue arises, rather than victim status under the Convention. Lack of section 7(7) standing under the provisions providing for individual redress itself raises no prohibition on a section 4 declaration of incompatibility.

[293] Mr Fitzsimmons then challenged the court's conclusion that his compensation claim was not an asset within the meaning of A1P1 (**para [702]**). Here, he submits that the status of the appeal in *Re Adams* at the time of judgment in the present case at first instance is more accurately reflected at **para [658]**.

[294] The SOSNI avers that the court was correct to dismiss the applicant's challenge under article 7. They rely on *Taylor* [2022] NICA 21, which at para [19] cited *Senator Lines GMBH v Austria and Others* [2006] 21 BHRC 640 as follows:

> "[i]n order to claim to be a victim of a violation, a person had to be directly affected by the impugned measure. The ECHR did 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 considered, without having been directly affected by it, that it might contravene the convention. It was, however, open to a person to contend that a law violated his rights, in the

> absence of an individual measure of implementation, if he was required either to modify his conduct or risk being prosecuted or if he was a member of a class of people at "real risk" of being directly affected by the legislation."

[295] Obviously, a qualitative assessment must be made in any case of "real risk" of a person being directly affected by a breach of human rights (thereby becoming a potential victim). This flows from the Grand Chamber decision in *Senator Lines GMBH v Austria & Ors*. The point was also discussed in *Re Ewart's Application* [2019] NIQB 88 where on the facts the court found the applicant to have met the test of real risk of being directly affected in relation to the restriction of abortion services in Northern Ireland.

[296] Section 4 HRA does not itself create a freestanding right to bring proceedings seeking a section 4 declaration, in contrast to section 7(1). Section 4 only arises in the context of live "proceedings", that is either in some other type of proceedings (for example criminal proceedings) in which a particular point arises, or in proceedings brought under section 7 HRA in which a particular point arises.

[297] It is, therefore, necessary for *Fitzsimmons* to demonstrate some particular interest in the article 7 argument in order to demonstrate sufficient interest and the required standing. We do consider that the compensation claim is an asset for the purposes of A1P1. That is because Mr Fitzsimons can establish that the claim has a sufficient basis in national law, and he has a legitimate expectation that he may recover (*Kopecký v Slovakia* [GC no 44912/98]. However, we do not consider that Mr Fitzsimons has sufficient interest for the purpose of an article 7 claim bearing in mind the particular circumstances of his case where his conviction had been quashed. Read as a whole, the HRA requires a litigant seeking a section 4 declaration of incompatibility to satisfy the victim status requirement in order to rely upon the Convention right in the first place. We, therefore, dismiss this cross-appeal.

6. Conclusion - the Gilvary case

[298] At first instance, the *Gilvary* application was also refused for lack of standing. Technically, *Gilvary* is therefore an appellant. However, for now it is easier to deal with this case thematically within the cross-appeal.

[299] The most immediate issue is whether the applicant has leave to raise the arguments she has. Leaving that aside, the applicant essentially says:

(a) The Convention values test is engaged in her case, and the procedural duty that flows therefrom ought to apply;

(b) Failing that, article 14 ECHR applies; and

(c) The prohibition against torture has special implications for the WF and constitutional arguments raised.

[300] The trial judge's treatment of *Gilvary* is set out from **paras [715]-[737]** of the judgment. Leave was refused as the court found it "difficult to state confidently that the applicant's circumstances meet the Convention values test" as there was a "lack of concrete evidence available to sustain a claim of state-sponsored torture" (**para [730]**).

[301] The applicant maintains that the trial judge was wrong to consider that the Convention values test was not met. Essentially, it is argued that the applicant does not have to establish state involvement in the substantive triggering event to satisfy the Convention values test and that the SOSNI does not have to provide "concrete evidence" of the substantive triggering event in order to satisfy the Convention values test.

[302] The applicant sets out the scope of the Convention values test and the need for "concrete" evidence in the following way:

(a) Following *Janowiec v Russia* (2014) 58 EHRR 30, the purpose of the test is to "ensure the real and effective protection of the guarantees and the underlying values of the Convention." The test is, therefore, whether 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.

(b) Torture, an allegation which was on its face accepted by the trial judge at first instance, is within the group of serious crimes under international law (thus satisfying the test). The information provided by Operation Kenova shows that that there is good reason to believe that the state played a role in the appellant's torture.

(c) The court applied the wrong evidential threshold in requiring "concrete evidence." The purpose of the Convention values test is to establish whether a procedural duty to investigate a substantive triggering event is within the Convention's temporal jurisdiction. It would be unfair to the appellant to require them to produce evidence otherwise in the State's possession (see *Klass v Germany* (1979-80) 2 EHRR 214; and *Jordan v UK* (2003) 37 EHRR 2).

(d) Rather, the procedural duty to investigate is triggered where there are arguable grounds (*X v Bulgaria* Application No. 22457/16), reasonable suspicion (*Re McQuillan*), or where there is a plausible or credible allegation, piece of evidence or item of information (*Brecknell v UK*).

[303] The applicant also makes a discrimination argument along the lines set out by the *Jordan* case. Additionally, the applicant adopts the WF arguments put forward by *Dillon* but adds that the argument ought to apply especially in the context of torture. This argument includes a "*Jackson*" Parliamentary sovereignty point, but it was indicated that the argument would only be seriously pursued if this case is heard at the Supreme Court at some point: see *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262. We agree with that approach. Any suggestion that the doctrine of Parliamentary sovereignty in our constitution should be limited in the manner suggested is properly a matter for the Supreme Court.

[304] In response, the SOSNI highlights that the High Court granted leave to apply for judicial review to this applicant "solely on the article 3 issue", on the ground that this case raised the issue as to whether the Act was compatible with article 3 ECHR, which the court found not to have been raised in the lead *Dillon* case. In any event, the SOSNI highlights that the applicant lacks standing to argue that the Convention values test is engaged. This latter point is essentially another limb of an overarching prematurity argument.

[305] Having considered the competing arguments the conclusion we reach in this case can be simply stated. We see force in Mr Southey KC's point that without information (which his client seeks through the investigation she desires) he cannot advance a concrete substantive case showing that torture occurred at the hands of state agents. His case is one concerning torture which we accept requires a high level of protection in domestic law. At the same time, there is presently insufficient information which would justify a conclusion that the very high threshold of the Convention values test is met. Indeed, there is limited information at all given that this case was not one addressed by Operation Kenova.

[306] However, rather than dismiss the *Gilvary* case as the trial judge did, we consider that the correct course is to stay the case without adjudication on the merits. This is particularly apt, we think, given the legislative changes which are expected in light of the SOSNI's concession of the appeal. This might well lead to further investigative steps which, in due course, should shed light on the circumstances of Ms Gilvary's case and the argument that the Convention values test is engaged. This outcome preserves the rights of Ms Gilvary and is without prejudice to any of the arguments she makes.

Additional issues

[307] For completeness sake, we also acknowledge the applicant *Dillon's* submission that the trial judge did not address their first instance argument that section 45 of the Act was incompatible with articles 2 and 3. Section 45 of the 2023 Act inserts a new provision into section 50 of the Police (Northern Ireland) Act 1998,

to the effect that complaints relating to police conduct forming part of the Troubles shall be discontinued. We agree with the position outlined by Mr McKay in his skeleton argument that logically the cross-appeal should succeed on section 45 in light of the trial judge's findings on the effect of section 41 of the 2023 Act. This means that while ICRIR can replace PONI as an investigative body the immunity provision which prevents misconduct charges being pursued is incompatible with the Convention. We will therefore allow additional declaratory relief to cover this point.

Overall conclusion

[308] We end this judgment by commending the trial judge for the comprehensive way in which he dealt with this case at first instance and for his impressive judgment. We agree with him in many respects. We also thank all counsel and solicitors for their assiduous work in dealing with this difficult case.

[309] We dismiss the appeal on the Convention grounds in accordance with the SOSNI's revised position; but would in any event have done so. We allow the cross-appeal in part but, as indicated above, and in doing so record that we have had the benefit of much more focused argument on some elements of the cross-appeal than were presented to the trial judge below.

[310] In summary, on the appeal mounted by the SOSNI, we find as follows:

(a) Article 2(1) Windsor Framework has direct effect. Although it was unfortunate that article 2(1)'s direct effect was not raised at first instance, this was not fatal to the trial judge's ensuing analysis.

(b) Article 11 of the Victims' Directive affords victims of crime the right to request a review of a decision not to prosecute. That is a clear, precise and unconditional minimum standard set by the EU. Insofar as necessary, article 11 is found to be directly effective.

(c) The stripping away of the criminal process necessarily offends article 11 of the Victims' Directive. There has been a diminution of that right following the test set out in *Re SPUC*.

(d) In agreement with the trial judge we find that the correct remedy shall be disapplication in relation to the conditional immunity provisions as these are covered by the Victims' Directive.

[311] Turning to the issues raised in the cross-appeal, we find that:

(i) The five-year time limit on requesting reviews cannot presently be said to violate Convention rights. We do not interfere with the trial judge's finding on this.

(ii) Although we do not doubt the ICRIR's determination to conduct its affairs in a Convention-compliant manner, issues arise in relation to effective next of kin participation, and the role of SOSNI in relation to disclosure in cases where, previously, an inquest would have been required to discharge the state's article 2 obligations. This aspect of the cross-appeal succeeds.

(iii) The restriction on civil actions amounts to a breach of the Convention. We consider that this aspect of the cross-appeal should also succeed, extending the declaratory relief granted by the trial judge beyond the mere retroactive barring of civil claims.

(iv) Article 14 of the Convention has not been breached.

(v) Article 8 is not engaged in *Jordan*. The cross-appeal in *Jordan* is dismissed.

(vi) The applicant in *Fitzsimmons* does not enjoy the necessary standing at present to bring a claim under the Human Rights Act in relation to an alleged violation of article 7 ECHR. That cross-appeal is also dismissed.

[312] In respect of *Gilvary*, we consider that the correct course is to stay the case without adjudication on the merits. This case may become academic depending upon further investigative processes which might follow from the proposed amendment of the 2023 Act.

[313] We ask that an agreed draft order is filed within two weeks to reflect the judgment of the court (or, if that is not possible, a draft indicating the extent of any disagreement), which we will then finalise administratively. We also ask the parties to try to agree costs within the next two weeks in default of which we will deal with the issue administratively.