Judicial Communications Office

20 September 2024

COURT DELIVERS LEGACY APPEAL JUDGMENT

Summary of Judgment

The Court of Appeal[1] today delivered judgment in the challenge to the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the 2023 Act"). This was an appeal and cross-appeal from the decision of Mr Justice Colton ("the trial judge") on 28 February 2024[2].

Summary of conclusions

On the appeal mounted by the Secretary of State for Northern Ireland ("SOSNI"), the court found:

- Article 2(1) Windsor Framework ("WF") has direct effect.
- Article 11 of the Victims' Directive ("VD") 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.
- The stripping away of the criminal process by the 2023 Act offends article 11 of the VD and there has been a diminution of that right.
- The correct remedy shall be disapplication in relation to the conditional immunity provisions in the 2023 Act as these are covered by the VD.

In respect of the issues raised in the cross-appeal, the court found that:

- The five-year time limit on requesting reviews cannot presently be said to violate European Convention on Human Rights ("ECHR") rights. The court therefore did not interfere with the trial judge's finding.
- Although the court did not doubt the Independent Commission for Reconciliation and Information Recovery's ("ICRIR") determination to conduct its affairs in a Convention-compliant manner, as it presently stands issues arise in relation to effective next of kin participation and the role of the 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.
- The restriction on civil actions amounts to a breach of the Convention. The court considered 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.
- Article 14 of the Convention has not been breached.
- Article 8 is not engaged in *Jordan*. The cross-appeal in *Jordan* is dismissed.
- The applicant in *Fitzsimmons* does not enjoy the necessary standing at present to bring a claim under the Human Rights Act 1998 ("HRA") in relation to an alleged violation of article 7 ECHR. That cross-appeal is also dismissed.

[1] The panel was Keegan LCJ, Horner LJ and Scoffield J. Keegan LCJ delivered the judgment of the court.
[2] [2024] NIKB 11

In respect of *Gilvary*, the court considered that the correct course was to stay the case without adjudication on the merits. It said this case may become academic depending upon further investigative processes which might follow from the proposed amendment of the Act.

Background

A central question in the proceedings was whether the ICRIR is a viable alternative to deal with outstanding cases within a reasonable timescale. The court acknowledged that this case arises in the legal sphere, but it also occupies the political space and said;

> "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 as recognised both at common law and in legislation. We proceed on that basis."

THE APPEAL

The questions arising on appeal were:

(i) Was the trial judge entitled to disapply provisions of the 2023 Act under article 2(1) of the 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 its failure to comply with articles 2 and 3 of the ECHR?
(iii) Was the trial judge wrong to find no violations of the ECHR with respect to the ICRIR's ability to comply with its obligations under the ECHR.

Questions (i) and (ii) together formed the core of the appeal by the SOSNI and question (iii) formed the core of the cross-appeal by the applicants[3]. In addition, the court identified three ancillary issues which it said it would deal with:

(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?

On 29 July 2024, the court received a letter on behalf of the SOSNI, after the hearing of the appeal, which stated that he no longer sought to pursue the grounds of appeal in respect of the conditional immunity provisions[4]. The SOSNI, however, still pursued all grounds against the findings of the trial judge in relation to the interpretation and effect of article 2(1) of the WF as it had potentially wide-ranging implications for other UK legislation. The SOSNI also maintained his defence to the cross-appeals. The court commented that such an approach was unusual but welcome in a contentious case.

[3] The lead case involved four applicants: Martina Dillon, John McEvoy, Lynda McManus and Brigid Hughes. Ancillary issues were raised by three further applicants: Teresa Jordan, Gemma Gilvary, Patrick Fitzsimmons.
[4] In a statement to Parliament on 29 July 2024, the SOSNI indicated that the Labour government intended to bring forward legislation, in the form of a remedial order, to remedy the illegality found by the trial judge as regards conditional immunity.

The court outlined the trial judge's findings in paras [37] – [42] and summarised the arguments on appeal in paras [43] – [52] of its judgment. It then proceeded to set out its conclusions on the six core questions.

Conclusion: Windsor Framework

The court said the four key issues in play as regards this aspect of the appeal were:

- Whether article 2(1) WF can be relied upon.
- Whether the VD/Charter of Fundamental Rights ("CFR") contains rights which are justiciable.
- Whether there has been any diminution of rights.
- Whether the provision of a remedy mandates disapplication of primary legislation.

Article 2(1) WF imposes an obligation on the UK to ensure that no diminution of the rights, safeguards and equality of opportunity ("RSE") arise for individuals' resident in NI as a result of the UK's withdrawal from the EU. Article 2(1) WF became part of domestic law by section 7A of the European Union (Withdrawal) Act 2018 ("EUWA 2018"). The court held that article 2(1) WF is directly effective. It said the non-diminution guarantee is expressed in clear and unambiguous terms. It will be for the UK courts to determine in any given case whether there has been a diminution in rights and whether that diminution can be said to have resulted from the UK's withdrawal from the EU thereby making the domestic law incompatible with the commitment in article 2(1) WF.

The court held that the civil rights of the applicants are engaged. It said it was correct that victims' rights were specifically recognised given that the B-GFA was designed to address, to a large degree, the legacy of the Troubles. It considered that the trial judge was 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. Further, the rights provided within articles 11 and 16 of the VD were encompassed and implemented in NI by the Victim Charter (which provides 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).

The court said it was self-evident that the 2023 Act has resulted in a diminution of the rights enjoyed by the applicants as they 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. The court considered these constraints to be incompatible with a "right" to review of a decision not to prosecute:

> "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."

The court then turned to the legal consequences of the 2023 Act's incompatibility with the WF in this case and whether this should result in the disapplication of the offending provision as found by the trial judge. Section 7A of the EUWA 2018 mandates disapplication of inconsistent or incompatible domestic legislation where it conflicts with the Withdrawal Agreement ("WA"). 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 of fill a lacuna" without affecting the provision's validity. The SOSNI argued that the CFR and VD do not fall within the scope of the WA and therefore do not attract disapplication as a remedy.

The court concluded that disapplication under section 7A EUWA 2018 was the correct remedy in this case based on the VD and affirmed the trial judge's decision. It was only in one respect that it departed from the trial judge. Insofar as the judge proceeded 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 the court disagreed.

Conclusion: Articles 2 and 3 ECHR

The trial judge made a declaration that the provisions in the 2023 Act relating to immunity from prosecution are incompatible with articles 2 and 3 of the ECHR. This point was not pursued before the Court of Appeal as the SOSNI had conceded on this issue. The court said the obligation on states to prosecute acts such as torture and intentional killings is well established in the ECtHR's case-law:

> "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 … 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."

Overall the court endorsed the trial judge's conclusion on this issue.

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

The core issue in this part of the cross-appeal was whether the ICRIR has sufficient independence to carry out the investigative functions required by articles 2 and 3 of the ECHR. The trial judge found it could (or potentially could) do so but this was challenged by the applicants who raised the following issues:

- The five-year limit on reviews.
- The independence and effectiveness of the ICRIR.
- The prohibition on civil actions under section 43 of the Act.
- Article 14 of the ECHR.

The five-year time limit

The first question was whether the five-year limit on requesting reviews[5] contained in the 2023 Act is incompatible with article 2 ECHR. The trial judge concluded it was not possible to make a declaration at this stage as the provisions may be subject to amendment between now and the end of the five-year time limit (1 May 2029) and that should the scenario arise in the future the state will then be obliged to find some mechanism to deal with the issue.

The court agreed with the trial judge that it should not make a declaration to the effect that the five-year time limit on review requests is incompatible with the ECHR 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:

> "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

The court said it would preface the comments it makes 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. However, the court said it follows from case law that if the underpinning safeguards are 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. The essential purpose of an article 2 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. Furthermore, 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.

In the judgment, the court discussed how inquests operated in Northern Ireland before the 2023 Act. It then considered the replacement of inquests by the ICRIR process of reviews which was the subject of challenge by the applicants[6]. The trial judge did not grant any form of declaratory relief in relation to this aspect of the challenge. The court said the trial judge was understandably influenced by the fact that the Chief Commissioner for investigations has wide discretion as to how the organisation would run and that there was the potential for compatibility. That he said was as much as he could say he thought without a concrete example of where victim's rights may have been breached.

In alignment with the trial judge, the court recognised 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. It further noted 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

[5] Sections 9(8) and 10(3) of the 2023 Act

[6] 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.

PONI when conducting legacy investigations and cannot be criticised, nor should they be underestimated. Furthermore, the court noted 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, the court noted that the ICRIR can require certain statutory agencies to assist the ICRIR in understanding and making effective use of the information provided.

The court went on to address some distinct aspects of the ICRIR which were impugned by the applicants. The first claim was that the operational structure of the ICRIR denotes a lack of independence. Again, the court did not depart from the trial judge's findings on this issue. It considered 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, the court found 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. The court said it was 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. This part of the cross appeal was dismissed.

The second aspect of this part of the challenge related to the effectiveness of the ICRIR as regards victim participation. The court said this argument has traction only in relation to the more in-depth investigations which are contemplated in order to comply with the procedural obligations under articles 2 and 3. These 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. Deaths may be examined by different means by national authorities and the court considered that ICRIR has the capability to replicate investigations that were previously with PONI and the police. And provided the necessary safeguards are in place, it thought that it has the capability to fulfil article 2 obligations in those cases.

Whilst the court had some concerns in this regard, it was 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."

The court, however, decided 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 and utilise a different method of determining reviews. It said 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. The court noted 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."

The court found the DoJ submissions as to the absence of provision for legal aid were a clear contra indicator to effective participation of the next of kin in these cases. The court did not accept that the legal aid legislation can be read down to capture the ICRIR processes. In addition, it did 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. The court said this proposal offends the principle that families should be able to choose their own lawyers and that they should be independent of the adjudicatory body. It also considered 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.

The court also said:

> "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 said 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."

A final issue of significant concern to the court was in relation to disclosure and the role in this of the SOSNI as defined by the 2023 Act. The court said 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. It noted it may be that the ICRIR can impose a greater financial penalty for non-compliance with requirements to attend to provide information, and 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. However, the court said that these factors 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. It added that the perceived effect of the apparent veto by the SOSNI over sensitive material being disclosed by the Commission to the next of kin (and others) by virtue of the legislation viably raises concerns.

The court was satisfied that the disclosure regime in Schedule 6 to the 2023 Act goes beyond the current coronial practice as it provides the SOSNI with a much greater role. It stressed that this was outside the control of the Chief Commissioner. The court said that given the breadth of the provisions set out in Schedule 6, it shared the 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 offends against 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."

In conclusion, the court considered that the two problematic elements it identified above apply to all cases where inquests were required for article 2 compliance but are now to be replaced by the ICRIR under the 2023 Act and relate to an entire category of cases. Hence the court decided that it would grant declaratory relief.

Civil actions under section 43

The question on this limb of the cross-appeal was whether the prohibition on civil proceedings is incompatible with article 6 ECHR. The trial judge found that section 43 pursues a legitimate aim and that 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.

The applicants contended, however, that the 2023 Act creates 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). The SOSNI disputed this stating that the 2023 Act does not curtail all pending civil claims and that the limited degree of retrospectivity in the Act is compatible with article 6.

The court preferred the applicants' submissions based upon article 6 for the following reasons:

- 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.
- 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. 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.

The court disagreed with the conclusion of the trial judge on this issue. It said that the legislation, as it currently stands, provides a blanket prohibition on civil claims which is not proportionate or justifiable. This applies not only in relation to the retroactive element of the legislation but also to the prospective prohibition on claims. The court said that it may be difficult to argue that an absolute bar on current civil claims is proportionate and compliant with Article 6 and, as such, prohibiting new civil litigation in legacy cases is unlikely to be capable of commanding consensus.

The court said that in many cases, it may be that, 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."

The court commented that the compensation element of the VD is specifically concerned with compensation as an adjunct of criminal proceedings against an offender. The court said it seemed 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. 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. Therefore,the court said it would make a wider declaration of incompatibility than the trial judge did in relation to section 43, which prohibits civil claims without any qualification.

Article 14 of the Convention

The question arising in relation to article 14 was whether the applicants, in having the various redress mechanisms previously available to them suspended, have suffered from discrimination. This entails deciding whether the applicants have a relevant status; and whether any alleged difference in treatment can be justified. 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."

The applicants argued that the 2023 Act is incompatible with article 14 because there has been a difference of treatment in that Troubles victims are treated differently to victims of state violence after 1998; they are members of an ageing cohort; the difference in treatment has no reasonable justification, nor does it pursue a legitimate aim; the SOSNI's affidavit evidence makes no attempt to engage with the article 14 claim; and the trial judge erred in accepting that discrimination pursued a legitimate aim of reconciliation and bringing an end to conflict.

The court said that it was 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 2023 Act violates other substantive ECHR rights:

> "Put another way, the redress for victims is through the Convention claims which we have upheld. 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 considered 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

In the *Jordan* case the trial judge found that article 8 was not engaged. The applicant had 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." It said it was not necessary or appropriate to rely on article 8 in *Jordan*'s case, however, it was also 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:

> "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. Conclusion: *Fitzsimmons* case

The trial judge granted a declaration pursuant to section 4 HRA that the provisions in the 2023 Act relating to interim custody orders[7] ("ICO") are incompatible with the applicant *Fitzsimmons's* rights under article 6 ECHR. Additionally, the trial judge held that a claim in tort for false imprisonment represented an asset within the meaning of A1P1 and found there was a breach of that provision. This point had now been conceded by the SOSNI who 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.

The court did not consider that Mr Fitzsimons had 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. It said that, 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. The court dismissed this cross-appeal.

6. Conclusion: *Gilvary* case

At first instance, the *Gilvary* application was also refused for lack of standing 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". The applicant argued that she does not have to establish state involvement in the substantive triggering

[7] Sections 46(2), (3) and (4) and 47(1) and (4).

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.

Having considered the competing arguments, the court agreed with the trial judge that there is presently insufficient information which would justify a conclusion that the very high threshold of the Convention values test is met and there is limited information at all given that this case was not one addressed by Operation Kenova. However, the court concluded that rather than dismiss the *Gilvary* case as the trial judge did, the correct course is to stay the case without adjudication on the merits. It said this was particularly apt given the legislative changes which are expected given the SOSNI's concession of the appeal. The court said this outcome preserves the rights of Ms Gilvary and is without prejudice to any of the arguments she makes.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

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