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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY KEVIN BARRY NOLAN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF SCHEDULE 3 TO THE COUNTER-TERRORISM AND BORDER SECURITY ACT 2019

Ronan Lavery KC and Mark Bassett (instructed by Brentnall Legal Ltd) for the Applicant
Neasa Murnaghan KC and Joseph Kennedy (instructed by the Crown Solicitor's Office) for the Proposed Respondent

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SCOFFIELD J

Introduction

[1] By this application, the applicant seeks to challenge the legality of section 22 of, and Schedule 3 to, the Counter-Terrorism and Border Security Act 2019 ("the 2019 Act"). These provisions introduce border security powers, including powers to stop and question persons within the border area of Northern Ireland. The applicant does so on the basis of two grounds, namely that the legislation is contrary to his rights under article 8 of the European Convention on Human Rights (ECHR); and it is contrary to article 3 of the Ireland/Northern Ireland Protocol to the EU-UK Withdrawal Agreement (now, the Windsor Framework).

[2] A leave hearing was convened at which these two grounds were addressed in detail. In addition to opposing the grant of leave on the merits, the proposed respondent, the Secretary of State for the Home Department, the Minister of the UK Government with policy responsibility for the 2019 Act, also raised an issue as to the applicant's standing.

[3] Mr Lavery KC appeared with Mr Bassett for the applicant; and Ms Murnaghan KC and Mr Kennedy appeared for the proposed respondent. I am grateful to both parties for their written and oral submissions.

Factual background

[4] The applicant, Kevin Barry Nolan, is an Irish citizen and a resident of Belcoo, Fermanagh, a small village on the Fermanagh/Cavan border with a bridge connecting it to the village of Blacklion in the Republic of Ireland. The applicant's address, as is the most of Belcoo, is situated within one mile of the border with our neighbouring jurisdiction. In his grounding affidavit, the applicant sets out how he relies upon, and enjoys, travelling across the border into Counties Cavan, Monaghan and/or Donegal for social occasions or for running errands.

[5] The applicant is also a Registered Terrorist Offender (RTO) and is as a result subject to travel notification requirements, having been convicted on 27 January 2014 of possessing articles for use in terrorism, contrary to section 57(1) of the Terrorism Act 2000; and possession of a firearm with intent to endanger life, contrary to section 58 of the Firearms (Northern Ireland) Order 2004. For these offences, the applicant received determinate custodial sentences of three years and six years respectively. Both sentences were split so that half of the sentence was to be served in custody, with the remainder served on licence. His licence period expired on 14 June 2022. However, as a result of his offending Part 4 of the Counter Terrorism Act 2008 ("the 2008 Act") applied, placing the applicant under an obligation to notify the Police Service of Northern Ireland of travel outside of the United Kingdom for any period of three days or more. This obligation was amended by the 2019 Act to impose a more onerous obligation to notify any travel outside the United Kingdom for any period of time. Travel from Northern Ireland into the Republic of Ireland is included within the scope of the 2008 and 2019 Acts.

[6] Apart from altering the travel notification requirements applicable to the applicant, the 2019 Act also introduced powers to stop, question, search and detain a person in the Northern Ireland border area for the purpose of determining whether that person appears to be someone who is, or has been, engaged in hostile activity. "Hostile activity" is a defined concept for this purpose. It is discussed further below; but it is worth noting that it is a concept distinct from terrorism. It relates to acts which threaten national security or the economic well-being of the UK (in a way relevant to the interests of national security) and acts of serious crime where, in each instance, the relevant act is carried out for, or on behalf of, a State other than the UK (or otherwise in the interests of such a state). In other words, the provisions are primarily related to espionage and hostile state activity. This regime was introduced through section 22 of the 2019 Act, which implemented Schedule 3 of the Act. It is Schedule 3 which forms the primary target of the applicant's challenge.

[7] The applicant initially indicated an intention to pursue judicial review proceedings by way of pre-action correspondence dated 12 August 2019. At that

point, the impugned legislation had not yet come into effect. The relevant commencement was effected by way of the Counter-Terrorism and Border Security Act 2019 (Commencement No 1) Regulations 2020 made on 22 July 2020 ("the Commencement Regulations"). Following commencement, the applicant promptly initiated proceedings. However, these proceedings were stayed by the Senior Judicial Review Judge, McAlinden J, pending the outcome of the challenges to various other provisions of the 2019 Act in a number of other cases: see *Re Lancaster, Rafferty and McDonnell's Applications for Judicial Review* [2023] NIKB 12; and, on appeal, [2023] NICA 63.

[8] Following the outcome of those cases in the High Court, the stay was lifted, and the present case was listed for a leave hearing. An amended Order 53 Statement was submitted, which narrowed the grounds of challenge to the issues outlined above. The applicant filed an updating affidavit in November 2022 clarifying that he had not been stopped by police using any of the powers in Schedule 3 and neither had any member of his family, despite being regular travellers across the border.

The relevant legislation

[9] The 2019 Act was enacted against a background of heightened terrorist threat in the United Kingdom. Broadly, the provisions of the Act expand the powers of law enforcement and security agencies to prevent and disrupt the commission of terrorist attacks and to protect the United Kingdom's national security interests. Part I of the Act concerns counter-terrorism and creates a number of new offences. Part II concerns border security. The provisions impugned within these proceedings fall within Part II of the Act.

[10] Schedule 3 is given effect by section 22 of the Act, which provides: "Schedule 3 confers powers exercisable at ports and borders etc." The provisions of Schedule 3 are modelled on those set out in Schedule 7 of the Terrorism Act 2000 ("the 2000 Act"). I return to that issue below. There is a significant number of provisions with Schedule 3 addressing a range of matters. It is not necessary for present purposes to set out the text of the provisions in any great detail, save for those referred to or set out below.

[11] Paragraphs 1 to 6 of Schedule 3 confer on an examining officer powers to stop, question and detain individuals. There is a specific power to question under paragraph 1; and a more general power to question under paragraph 2. The power provided by paragraph 1 gives an examining officer the power to "… question a person for the purpose of determining whether the person appears to be a person who is, or has been, engaged in hostile activity…" This power is exercisable if either one of two conditions is met ("condition 1" or "condition 2"). Condition 1 is met where a person is present at "a port or in the border area" <u>and</u> the examining officer believes that the person's presence is connected with the person's (i) entry into, or departure from, Great Britain or Northern Ireland or (ii) travel by air within Great Britain or Northern Ireland. Condition 2 is met where the person is on a ship or

aircraft which has arrived at any place within Great Britain or Northern Ireland (whether from within or outside Great Britain or Northern Ireland).

[12] An "examining officer" is defined at paragraph 64(3) of Schedule 3 as meaning a constable, a designated immigration officer or a designated customs officer (in each case where the designation is as an examining officer for the purposes of Schedule 7 to the 2000 Act). "Hostile activity" is defined at paragraphs 1(5) and 1(6) in the following manner:

> "(5) A person is or has been engaged in hostile activity for the purposes of this Schedule if the person is or has been concerned in the commission, preparation or instigation of a hostile act that is or may be—
>
> (a) carried out for, or on behalf of, a State other than the United Kingdom, or
>
> (b) otherwise in the interests of a State other than the United Kingdom.
>
> (6) An act is a "hostile act" if it—
>
> (a) threatens national security,
>
> (b) threatens the economic well-being of the United Kingdom in a way relevant to the interests of national security, or
>
> (c) is an act of serious crime."

[13] The "border area" is defined at paragraph 64(6) of Schedule 3. In many ways, the definition of the border area appears to be the impetus for this challenge. It is defined as follows:

> "(6) A place is within the "border area" if it is in Northern Ireland and—
>
> (a) it is no more than one mile from the border between Northern Ireland and the Republic of Ireland, or
>
> (b) it is the first place at which a train travelling from the Republic of Ireland stops for the purposes of allowing passengers to leave."

[14] Paragraph 1 of Schedule 3 to the 2019 Act goes on to provide that the examining officer may exercise these powers regardless of whether he or she has grounds for suspecting any hostile activity. Further, it is immaterial whether a person is "aware that activity in which they are or have been engaged is hostile activity" or whether a (foreign) State has sanctioned the commission of the activity.

[15] The power to question under paragraph 2 gives an examining officer authority to "question a person who is in the border area for the purpose of determining whether the person's presence in the area is connected with the person's entry into, or departure from, Northern Ireland." This is obviously a broad power to assist in ascertaining why someone is within the border area. Its exercise may well be a precursor to an examining officer forming the relevant belief which is a constituent element of condition 1 for the power under paragraph 1 (allowing a more intense degree of questioning) to be exercisable.

[16] Paragraphs 3-6 provide additional clarity on the application of the preceding two paragraphs. Paragraph 3 sets out that a person questioned under paragraphs 1 or 2 must give information or documentation (including identification documentation) that an examining officer requests. Paragraph 4 allows an examining officer to stop a person or vehicle and detain a person, including authorising their removal from a ship, aircraft or vehicle, for the purpose of exercising either power to question. Paragraph 5 permits the examining officer to question a person for up to one hour or, if the person has been detained under paragraph 4 as a result of questioning, for a maximum of six hours. Paragraph 6 confirms that "any answer or information given orally by a person in response to a question asked under paragraph 1 or 2 may not be used in evidence in criminal proceedings" unless a charge is brought under paragraph 23 (i.e. a charge relating to wilful failure to comply with a duty imposed by or under certain provisions of Schedule 3 or to wilful obstruction, or attempted frustration, of a search or examination under the relevant powers).

[17] The applicant also highlights the following powers conferred on examining officers as being illustrative of the intrusive nature of the statutory scheme. Paragraph 8 confers the power to search a person who is being questioned under paragraph 1, as well as powers to search vehicles and their contents. (These powers are exercisable only for the purposes of determining whether a person is or has been engaged in hostile activity and do not extend to the carrying out of an intimate search). Paragraph 9 provides a power to examine goods; and paragraph 11 provides a power to retain property for further examination. Paragraph 17 provides a power to retain copies of documentation provided in accordance with paragraphs 3, 8 or 9.

[18] Finally, paragraph 23 creates criminal offences relating to failure to comply in the course of the exercise of the powers discussed above. It provides as follows:

> "(1) A person commits an offence if the person—

(a) wilfully fails to comply with a duty imposed under or by virtue of this Part of this Schedule, or

(b) wilfully obstructs, or seeks to frustrate, a search or examination under or by virtue of this Part of this Schedule.

(2) A person guilty of an offence under this paragraph is liable—

…

(b) on summary conviction in… Northern Ireland, to imprisonment for a term not exceeding 3 months, or to a fine not exceeding level 4 on the standard scale, or to both."

The Code of Practice

[19] Paragraph 56 of Schedule 3 to the 2019 Act imposes an obligation on the Secretary of State for the Home Department ("the Secretary of State") to issue a code of practice about the exercise of functions conferred on examining officers under the Schedule. As made clear by paragraph 56(2), this code of practice is binding on officers:

> "An examining officer must perform the functions conferred by virtue of this Schedule in accordance with any relevant code of practice in operation under sub-paragraph (1)(b)."

[20] The Secretary of State has issued such a code of practice ("the Code of Practice" or "the Code"). The original version was issued in August 2020, entitled 'Examining Officers and Review Officers under Schedule 3 to the Counter-Terrorism and Border Security Act 2019: Code of Practice.' (A further, updated version, in similar terms, was later issued in December 2023.) The proposed respondent highlighted the following aspects of the Code in the course of its opposition to the grant of leave:

(a) Paragraph 6 of the Code states:

> "The powers contained in Schedule 3 to which this Code relates must be used fairly and responsibly in accordance with the prescribed procedures and with respect for the

> people to whom the powers have been applied. They must be exercised in accordance with the Human Rights Act 1998 and with respect for the European Convention on Human Rights. Where this Code directs that an examining officer must undertake a duty or obligation in the exercise of their powers under Schedule 3, the officer will abide by that direction as far as reasonably practicable."

(b) At paragraph 22 it goes on to say:

> "The examining officer may only stop and question a person for the purpose of determining whether that person appears to be a person who is, or has been, engaged in "hostile activity" as defined in paragraph 1 of Schedule 3 (see paragraph 2 of this Code) or for the purpose of determining whether a person's presence in the border area is connected with the person's entry into, or departure, from, Northern Ireland."

(c) This is supplemented at paragraph 23:

> "The examination powers are additional to the powers of arrest available to police officers under separate legislation and must not be used for any other purpose."

(d) A variety of other provisions of the Code emphasise that the powers provided by Schedule 3 must be exercised in accordance with the Human Rights Act 1998 (HRA), with respect for the ECHR and without unlawful discrimination; that examining officers must make every reasonable effort to exercise the power in such a way as to minimise causing embarrassment or offence to the person who is being questioned; that all persons being stopped and questioned must be treated in a respectful and courteous manner, as well as in accordance with the HRA and ECHR; and that disruption to travel plans should be minimised wherever possible.

(e) Paragraphs 28 and 29 of the Code detail the "selection criteria" for questioning. They make clear that – although selection for examination is not conditional upon the existence of grounds to suspect that the person is engaged in hostile activity – selection for examination "must not be arbitrary." An examining officer's decision "must be informed by the threat from hostile activity posed to the United Kingdom and its interests by foreign States and hostile actors…" Further, it is not appropriate for individuals to be targeted by virtue of their protected characteristics. Rather, considerations that relate to the threat from hostile activity include but are not limited to the following identified factors:

- "Known and suspected sources of hostile activity;
- Persons, organisations or groups whose current or past involvement in hostile activity, or threats of it, is known or suspected;
- Any information on the origins and/or location of hostile actors;
- Possible current, emerging and future hostile activity;
- The means of travel (and documentation) that a group or persons involved in hostile activity could use;
- Patterns of travel through specific ports or in the wider vicinity that may be linked to hostile activity, or appear unusual for the intended destination;
- Observation of a person's behaviour; and/or
- Referrals made to examining officers by other security, transport or enforcement bodies."

Summary of the parties' positions

[21] For the applicant, Mr Lavery KC suggested that the impugned legislation unlawfully impinges on the applicant's free movement rights under the Windsor Framework and the Withdrawal Agreement; and that they amount to an unjustified interference with the applicant's article 8 rights under the ECHR. In relation to standing, it was accepted that the applicant had not been the subject of the exercise of any of the powers under Schedule 3. However, it was contended on his behalf that the applicant had sufficient interest to bring this challenge; that it was not an *actio popularis*; and that he "belongs to a category of citizens who will have to live, work and travel in an area in which the state has significantly reduced the level of protection afforded to other citizens."

[22] The proposed respondent resists the challenge in its entirety. Ms Murnaghan KC argued that the challenge was without an evidential basis and that the applicant can at most demonstrate only a highly attenuated *potential* of interference with his rights. She submitted that a proper challenge to the legislation would have to involve an actual victim and that this applicant necessarily lacked standing. Building on this point, Ms Murnaghan highlighted the absence of intrusion on the applicant in practice; and that there may never be any instance of the powers being

used. To both parties' knowledge, the Schedule 3 powers had not been exercised since commencement up to the time of the leave hearing in this case.

[23] The proposed respondent further highlighted this court's decision in *Lancaster* (since upheld by the Court of Appeal: [2023] NICA 63) and suggested that, as the level of interference in the present case is of a lesser scale, there was no realistic prospect of success in relation to the applicant's proposed grounds. (I interpose here that the applicant distanced himself from any comparison with the *Lancaster* case. Rather, he contends that there is a different factual matrix and that his concern in this case goes well beyond a mere *notification* requirement – which was the issue in *Lancaster* – as the Schedule 3 powers extend to *anyone* merely *present* in the border area and are considerably more intrusive. As to the quality of law issue, Ms Murnaghan relied upon the Code of Practice and submitted that the binding criteria set out in the Code are targeted and clearly set out, so as to prevent capriciousness. Finally, the proposed respondent argued that the applicant's point on the Withdrawal Agreement amounts to a 'red herring'; and that there was no interference on the right to exit the United Kingdom.

Consideration

[24] The test at the leave stage is whether there is an arguable case with a realistic prospect of success (see *Re Ni Chuinneagain's Application* [2022] NICA 56, para [42]). Having considered the arguments and the purported impact of the impugned legislation, I am not satisfied that there is such an arguable case.

Article 8 ECHR

[25] In the first instance, I do not consider that there has arguably been any violation of article 8 ECHR on the evidence before the court. Article 8 provides that:

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

[26] In my view, this aspect of the challenge falls at the first hurdle: the applicant's article 8 rights have not been interfered with; nor is there any indication that he is likely to be the subject of the exercise of Schedule 3 powers, either imminently or otherwise. The applicant himself accepts that he has at no stage been stopped,

questioned or detained under Schedule 3 powers. Of course, had he been, article 8 would have been engaged. However, I do not consider that the mere *existence* of the powers, even coupled with the applicant's residence within the border area, represents an interference with the applicant's article 8 rights. To so hold would be to expand the protection of the right in an unwarranted and unrealistic manner.

[27] On the basis that the applicant resides within the border area and might, therefore, at some point in the future conceivably be subject to the exercise of the relevant powers, I was not initially inclined to hold that he lacks standing to mount a challenge, including on the basis of article 8, by reason of that potential. Mr Lavery submits that the applicant is more likely than others to be subject to Schedule 3 powers because of his status as an RTO, by reason of which he has to notify authorities of his intention to travel and is "on their radar." Against that, Ms Murnaghan was able to indicate that, although the applicant travels frequently across the border and gives notification of this, he had not been subject to the exercise of these new powers over the course of several years.

[28] The applicant requires victim status, pursuant to section 7(1) HRA, to bring proceedings in reliance on his Convention rights. The requisite status arises where the litigant is "or would be" a victim. In turn, the term 'victim' is to be read in conformity with article 34 ECHR and the ECtHR's jurisprudence in relation to victim status (see section 7(7) HRA). It is well recognised that there is scope to bring a challenge where the applicant is potentially affected by an unlawful act. The applicant's circumstances are such that there is that potential. However, authority indicates that the court can and should make some assessment of the likelihood, or remoteness, of the litigant being affected in a manner which would render them a victim. In *Senator Lines GmbH v Fifteen States of the European Union* (2004) 39 EHRR SE3 the Grand Chamber held that for an applicant to be able to claim he is a potential victim, "he must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient." (The *Senator Lines* authority was more recently applied in the Fifth Section case of *Shorthall and Others v Ireland* (2021) (Application No 50272/18); and see also the decision of the Court of Appeal in *Taylor v Department for Communities* [2022] NICA 8, per McCloskey LJ, at paras [38]-[41]).

[29] Having reflected on these authorities, and the absence of evidence of the Schedule 3 powers having been used, much less in respect of the applicant, it seems to me that Ms Murnaghan was right to submit that there was an insufficient evidential foundation to conclude that the applicant satisfies the HRA standing requirement even as a potential victim. In this regard, it is highly significant that the powers introduced by the 2019 Act reflect a similar regime provided for by Schedule 7 of the 2000 Act, upon which Schedule 3 of the 2019 Act is modelled, by which individuals can be stopped and questioned in the border area (without the need for reasonable suspicion) for the purpose of determining whether they are or have been concerned in the commission, preparation or instigation of acts of terrorism. I have no information as to whether the applicant has been questioned under those

provisions (he has certainly not made the case that he has been); but those would appear to be much more relevant, in light of his criminal convictions, than the border security powers directed at hostile state activity.

[30] For the above reasons, I hold that the applicant does not have standing to challenge the impugned provisions in this case in the 2019 Act on the basis of article 8 ECHR. However, I nonetheless deal (briefly) with the substance of the applicant's prospective article 8 challenge below, in case I am wrong on the question of victim status.

[31] In view of the absence of any direct impact upon him, the applicant's case can only be a frontal attack on the compatibility of the legislation as a whole based on the existence and breadth of the powers. Indeed, in section 9 of the applicant's Order 53 statement, he contends that the court should issue a declaration of incompatibility in relation to the impugned provisions under section 4 HRA because they are "on their face" incompatible with article 8 ECHR.

[32] I am not persuaded by the applicant's argument, advanced in writing, that the provisions of Schedule 3 fail the 'quality of law' test (see *Big Brother Watch and Others v United Kingdom* (2022) 74 EHRR 17, at paras 333-334). Although the powers to stop and search have the potential to engage and possibly violate an individual's article 8 rights (see *Fox, McNulty and Canning's Application* [2013] NICA 19; and *Gillan v United Kingdom* (2010) 50 EHRR 45), the regime as it stands is in my view complemented to a satisfactory extent by the Code of Practice published by the Home Office to allow the requisite degree of transparency about how and when the powers will be exercised. Indeed, Mr Lavery was inclined to accept in the course of his oral submissions that the provisions of the Code of Practice were such as to render the impugned provisions "in accordance with law." Although, on its face, Schedule 3 introduces broad powers, these are not powers which can be exercised in a *carte blanche* fashion. Paragraph 56(2) of Schedule 3 imposes a mandatory obligation to produce a code of practice which covers the exercise of functions provided; and, in turn, imposes a duty on examining officers to follow the code of practice when performing their functions. Having considered the Code (and the further version published since the *inter partes* hearing), I accept Ms Murnaghan's submission that the regime in the round is sufficiently clear and foreseeable so as to satisfy the quality of law test.

[33] Turning to the proportionality of the statutory scheme, the applicant faces an extremely high hurdle in seeking to establish that it will operate in a disproportionate way such as to warrant the relief he seeks. That is, firstly, in light of the absence of any exercise of the powers in the border area (to a significant degree or at all); and, relatedly, in light of the fact that he invites the court to review the scheme wholly in the abstract.

[34] The applicant's submission that the statutory scheme "seeks to remove many of the privacy and travel rights that are taken for granted throughout the rest of the

jurisdiction of Northern Ireland" is much too sweeping. In fact, the Schedule 3 powers do not remove *any* travel rights: they make no substantive provision in relation to the right to enter or exit the United Kingdom. They simply provide the authorities with additional powers of stop and search at port or border areas. Although a stopped or detained individual's travel plans may be disrupted, the impugned provisions do not themselves in any way affect travel or immigration rights.

[35] In addition, an individual cannot be stopped and questioned under paragraph 1 of Schedule 3 merely by reason of presence within the border area (for instance, if the applicant was in his home) since, for condition 1 to be met, the examining officer must believe that their presence in the border area is connected with their entry into, or departure from, Great Britain or Northern Ireland. The Code of Practice emphasises that this belief must be justifiable and will depend on the individual circumstances. Even then, when it is clear that a person is travelling, the Code of Practice also makes clear that the power to stop and question must not be exercised arbitrarily. Selection for examination – either under paragraph 1 or 2 of Schedule 3 – will be based on the selection criteria set out in the Code, taking into account such matters as the current security threat from hostile activity (as defined in the 2019 Act), intelligence and the individual's observed behaviour. Although the threshold for the exercise of the powers is less than that required for arrest, the power cannot be exercised arbitrarily or purely on the basis of a protected characteristic.

[36] As to the 'pressing social need' for the powers, the proposed respondent has rightly pointed out that borders and ports have long been recognised as areas where the importance of intercepting, detecting and deterring terrorists has been accepted as uncontroversial (citing *McVeigh, O'Neill and Evans v United Kingdom* (1983) 5 EHRR 71, at para 192). This rationale continues to resonate. As noted above, similar powers in relation to port and border controls have been included in Schedule 7 of the 2000 Act for some time (which might well be more relevant to the applicant's circumstances but are not the subject of challenge). However, threats to national security go beyond terrorist activity. Travel into and out of the jurisdiction is as likely, if not more likely, to be exploited by those acting for, on behalf of, or in the interests of hostile foreign state actors as it is by those concerned in terrorism. The need to protect borders in these circumstances as a matter of national security is well-founded, and the courts frequently accord a margin of appreciation to Parliament which is ultimately responsible for responding to national security threats.

[37] The 2019 Act falls within the purview of the then government's review of counter-terrorism strategy, brought forward in the wake of a number of high profile and tragic terrorist attacks. At the same time, it was considered that additional border security measures were needed, not only to combat (state-sponsored) terrorism but generally to harden the UK's defences at the border against hostile state activity. In particular, this was in response to the poisoning of Sergei and

Yulia Skripal in Salisbury on 4 March 2018 using a military-grade nerve agent of a type developed by Russia (see paras 1 and 8 of the Explanatory Notes to the 2019 Act). The absence of border security powers which could be used to combat such activity along the UK's land border would leave a weakness in the border security regime which could obviously be exploited by those with hostile intent.

[38] Returning to the abstract and precautionary nature of the applicant's challenge, any complaint about the legality of any particular action taken in respect of the applicant under Schedule 3 powers, whether by way of judicial review or civil action, would be better judged in light of the concrete factual matrix in the context of which complaint was made. I am certainly not in the position where I could conclude – even arguably – that the high threshold required in a case such as the present (where the applicant seeks a declaration of incompatibility against the legislation) is met, namely that the relevant provisions will give rise to a violation of rights in all or almost all cases, either generally or as a category (see *Re JR123's Application* [2023] NICA 30, paras [78]-[82]). This area of law is not without its difficulties, as illustrated by Humphreys J's discussion in *Re NI Human Rights Commission's Application* [2024] 35, at paras [185]-[194]. However, I am bound by the Court of Appeal decision in *Re JR123*; and, in any event, even applying the more modest test of whether the legislation is bound to result in a violation of rights in a legally significant number of cases, I do not consider that the present case is suitable for the grant of leave. That is particularly so because, several years after Schedule 3 came into effect, neither party has been able to provide an instance where the powers it introduces have been exercised in the border area in Northern Ireland.

[39] Mr Lavery contended that the authorities have a range of other powers – under the Police and Criminal Evidence (Northern Ireland) Order 1989 and terrorism legislation such as the 2000 Act – such that the Schedule 3 powers are unnecessary. However, equally, that might explain why the powers appear to be rarely used in the border area in Northern Ireland. I have no information as to whether they are used, routinely or otherwise, at ports or airports either in Northern Ireland or in other parts of the United Kingdom. In any event, the powers appear to have been judged by Parliament to be necessary to fill a lacuna in relation to those acting for or on behalf of hostile states where terrorism legislation did not adequately address the mischief.

[40] The proposed respondent also submitted that the benefit of the powers would include acquiring relevant intelligence on subjects of interest; deterring those involved in hostile activity from travelling to and from the United Kingdom; and excluding individuals from further investigation. Further, it was submitted that requiring reasonable suspicion before any of the powers could be exercised would limit their availability to known individuals or those who have previously demonstrated suspicious behaviour at a port. This would impede effective investigation or prevention where, as is often the case, the authorities are in possession only of fragmented or incomplete intelligence (a matter raised with the relevant Bill Committee).

[41] In all of the circumstances, I consider that the applicant lacks the requisite standing to rely upon article 8 in relation to these particular powers; and, in any event, consider that his claim that they are in violation of article 8 on their face is unarguable.

The Windsor Framework

[42] I turn then to the applicant's challenge under the Withdrawal Agreement. This argument is not subject to the same standing restriction as applies under section 7 HRA. I proceed on the basis that the applicant has sufficient interest to raise it. The substance of the argument can, however, be dealt with briefly.

[43] The central provision in regard to this aspect of the applicant's proposed challenge is article 3 of the Windsor Framework (WF), dealing with the Common Travel Area, which provides as follows:

> " 1. The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (the 'Common Travel Area'), while fully respecting the rights of natural persons conferred by Union law.
>
> 2. The United Kingdom shall ensure that the Common Travel Area and the rights and privileges associated therewith can continue to apply without affecting the obligations of Ireland under Union law, in particular with respect to free movement to, from and within Ireland for Union citizens and their family members, irrespective of their nationality."

[44] The Supreme Court confirmed in *Re Allister* [2023] UKSC 5 that "the answer to any conflict between the Protocol and any other enactment whenever passed or made is that those other enactments are to be read and have effect subject to the rights and obligations which are to be recognised and available in domestic law by virtue of section 7A(2) [of the Withdrawal Agreement]" (per Lord Stephens, at para [66]). The applicant's contention is that his right of entry into the Republic of Ireland has been stripped away by the Schedule 3 powers; and that the creation of the 'border area' amounts to a "restriction" on free movement in the EU sense, as the possibility of being stopped and searched may dissuade an individual from crossing the border (see *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1996] All ER 189, at para [37]). In summary, the applicant submits that the Schedule 3 regime amounts to a "hard border", contrary to the article 3 WF protection of the rights of travel and residence that British and Irish citizens enjoyed prior to the UK's exit from the European Union.

[45] The respondent has labelled this argument a 'red herring.' It submits that the only impediment that the applicant suffers is by virtue of the travel notification requirements imposed upon him as a result of his offending, the legality of which was confirmed by the court, and now the Court of Appeal, in the *Lancaster* case. The right of exit, the respondent therefore says, is unimpeded by the application of Schedule 3.

[46] I accept the submissions of the proposed respondent on this point. In my judgment the applicant significantly overstates the effect of the introduction of the new powers in his submission that "the statutory creation of the 'border area'" means that "cross-border travel or presence along the border is to be equated with hostile activity or criminal activity." The factual position is that the applicant has been travelling freely across the border, on a regular basis, unmolested by the existence or exercise of the powers about which he complains. The purpose of the powers is to permit questioning, where appropriate in light of the selection criteria outlined in the Code, in order to determine whether someone travelling over the border is or has been engaged in hostile activity.

[47] I have had the benefit of reading an interesting chapter, relied upon by the applicant, in *The Law and Practice of the Ireland-Northern Ireland Protocol* (2020, Cambridge University Press): Chapter 14, Imelda Maher, entitled 'The Common Travel Area.' It provides little support for the applicant's case. The CTA itself is a departure from Union law, since it confers additional benefits, on the grounds of nationality, on Irish and UK citizens which are not available to other EU nationals. Nonetheless, it was recognised and permitted in Union law under Protocol 20 to the Treaty on the Functioning of the European Union and now in the Withdrawal Agreement. It was a largely informal arrangement, formalised to some degree in a Memorandum of Understanding (MOU) in May 2019, although the MOU is expressed to be not legally binding. Maher comments that the CTA "ensures no routine migration controls for Irish citizens at UK borders, although there may be checks for certain purposes…", with the aspects of free movement covered by the CTA "referred to only obliquely in legislation in both jurisdictions" and where "neither jurisdiction confers a positive right in these respects." The MOU itself, at para 3, says merely that the participants will "continue to ensure" that their national laws facilitate British and Irish citizens moving freely between the UK and Ireland.

[48] As noted above (see para [34]), the Schedule 3 powers do not, as a matter of law, impose any restriction or limitation upon the right to enter or leave Northern Ireland by crossing the border; nor on any of the other substantive benefits of the CTA (e.g. the rights to reside or work, or to access healthcare, social protection, social housing and education). They merely grant investigative powers such as are common at international ports and border points, including within the European Union. Importantly, the new powers also mirror counter-terrorism powers under Schedule 7 of the 2000 Act which have been available for some two decades, including during the UK's membership of the EU, which are not the subject of challenge, and which were not considered nor held to be in breach of Union law

during the period of the UK's membership. It was those provisions, rather than the 2019 Act, which might be said to have created the concept of the "border area" about which the applicant complains. In those circumstances, it is difficult to see how any challenge under article 3 WF, or indeed article 2 WF (which was also raised by the applicant), can arguably be sustained in relation to the 2019 Act.

[49] I am fortified in this conclusion by the Court of Appeal's rejection of the EU law grounds in the *Lancaster* case, which share common features with some of the arguments raised by the present applicant relating to the raising of impediments or inhibitions to the exercise of free movement rights (see paras [108]-[119] of the judgment of Keegan LCJ). In *Lancaster* the applicants (like Mr Nolan) were required to notify travel on each and every occasion of crossing the border (although there was the facility to do this in a 'block' manner in advance). In the present case, there is merely a risk that a person travelling across the border *might* be stopped and questioned, or a person in the border area might be questioned about whether they are so travelling. Both sides in the present case drew comparisons with the notification requirements, with Ms Murnaghan contending that the Schedule 3 powers were less intrusive because they will rarely (rather than routinely) be exercised; and with Mr Lavery contending that they are move intrusive because they potentially involve interference with liberty, as well as privacy. As already discussed, in practice it appears that the Schedule 3 powers are very sparingly used in the border area. They clearly do not constitute a formality equivalent to an exit visa; nor will they be used routinely, either in general or in relation to any individual, including the applicant. In my view, they do not constitute a legal restriction on the right of free movement between jurisdictions.

[50] In those circumstances, I again fail to see how this can be considered a restriction on travel which would represent a breach of obligations contained within the WF.

Conclusion

[51] The real impact on the applicant in terms of cross-border travel is a result of his prior offending, subjecting him to the travel notification requirements. There is no indication that the border security powers challenged in these proceedings have had, or will have, any material impact upon the applicant. In the event that the applicant was stopped and questioned under these provisions and wished to complain that this was in breach of his rights at common law or his Convention rights, the proper course would be for him to bring proceedings at that stage against a concrete factual background.

[52] For the reasons given above, namely lack of standing on the ECHR challenge and failure to raise an arguable case with a realistic prospect of success on both grounds, the application for leave to apply for judicial review is dismissed.