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COURT RULES IMMUNITY PROVISIONS IN NI TROUBLES (LEGACY AND RECONCILIATION) ACT 2023 INCOMPATIBLE WITH ECHR AND SHOULD BE DISAPPLIED

Summary of Judgment

Mr Justice Colton, sitting today in the High Court in Belfast, made the following declarations in respect of some provisions in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the 2023 Act"):

- A declaration that the immunity from prosecution provisions[1] are incompatible with articles 2 and 3 of the European Convention on Human Rights ("ECHR") and article 2 of the Windsor Framework ("WF") and should therefore be disapplied.
- A declaration that section 43(1) (Troubles-related civil actions brought on or after 17 May 2022 may not be continued on or after 18 November 2023 and that no new Troubles-related civil claims may be brought after 18 November 2023) is incompatible with article 6 ECHR and article 2 of the WF and should therefore be disapplied.
- A declaration that section 8 of the 2023 Act (exclusion of evidence in civil proceedings) is incompatible with articles 2 and 3 ECHR and article 2 of the WF and should be disapplied.
- A declaration that sections 41 of the 2023 Act (prohibition of criminal enforcement action) is incompatible with article 2 ECHR and article 2 of the WF and should be disapplied.
- A declaration that sections 46 and 47 (interim custody orders) are incompatible with article 6 and A1P1 of the ECHR.

Mr Justice Colton concluded that the ICRIR is capable of carrying out an article 2/3 compliant investigation into Troubles-related deaths and offences.

BACKGROUND TO THE 2023 ACT

The 2023 Act creates the Independent Commission for Reconciliation and Information Recovery ("the ICRIR") which will be the sole body responsible for investigations into deaths and other harmful conduct caused during the Troubles. The ICRIR, whose work will be time limited to five years, will have the power to grant immunity to those involved in criminality in certain defined circumstances.

The judgment outlines the history leading up to the 2023 Act starting with the Belfast/Good Friday Agreement ("B-GFA") in 1998, the Eames/Bradley Report in 2009, the Stormont House Agreement ("SHA") in 2014, and the New Decade, New Approach Deal in 2019. In March 2020, a statement by the UK Government marked a shift in focus away from criminal justice outcomes to information recovery. In July 2021, it published a paper setting out proposals to establish a new independent body (the ICRIR), an oral history initiative and a statute of limitations to apply equally to all Troubles-related incidents. In January 2022, the Government decided to replace the statute of limitations model in the proposed Legacy Bill with a "conditional immunity" model which would

[1] Sections 7(3), 12, 19, 20, 21, 22, 39, 41 and 42(1)

be time bound and under which immunity had to be earned by cooperation and engagement with the ICRIR. The Bill was introduced to Parliament in May 2022. Several amendments were introduced to the Bill in the House of Lords, with concessions made by the Government, before it received Royal Assent on 18 September 2023.

In considering the specific provisions under challenge in this case, the court was conscious that the 2023 Act should be read as a whole and that its provisions are meant to be part of an overall scheme focused on information recovery. That said, it did not consider that the entire provisions "stand or fall" together. The court said it was important to analyse the specific provisions under challenge, bearing in mind the relationship with other provisions in the 2023 Act, but recognising that it may conclude that some of the provisions are unlawful. Findings to that effect do not necessarily undermine those provisions which withstand scrutiny.

THE APPLICANTS

The lead case involves four applicants: Martina Dillon, John McEvoy, Lynda McManus and Brigid Hughes.

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

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

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

Lynda McManus is the daughter of James McManus who was severely injured in a gun attack at the Sean Graham Bookmakers, Ormeau Road, Belfast on 5 February 1992. In February 2022, the Police Ombudsman found collusive behaviour by police in the attack. Ms McManus subsequently brought a civil claim for damages on 17 May 2022 which will be impacted by the 2023 Act.

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

Jordan

Teresa Jordan is the mother of Pearse Jordan who was shot and killed on 25 November 1992 on the Falls Road, Belfast, by a member of the Royal Ulster Constabulary ("RUC") known as Sergeant A. There have been a series of inquests into his death. The first inquest commenced on 4 January 1995 and was adjourned, part heard, without a verdict. The second inquest was held between 24 September and 26 October 2012. On 31 January 2014, the High Court quashed the verdict of that inquest. In the third inquest, heard in November 2015[2], the Coroner was unable to reach a concluded view as to whether the use of lethal force was justified or not, but found that the PSNI failed to provide a satisfactory and convincing explanation of the circumstances of Mr Jordan's death. He found that one or two of the officers involved in the incident (Officers M and Q) had edited a contemporaneous document in order to conceal certain facts and that both officers had been untruthful in their testimonies. These matters have been referred to the Director of Public Prosecutions ("DPP") with a view to considering the prosecution of Officers M and Q for the crimes of perjury and/or seeking to pervert the course of justice. When these proceedings were issued the DPP had made no decision as to whether the officers would be prosecuted. The failure to make such a decision was also included in the current challenge. Subsequently, the DPP has indicated that there is nothing for the PSNI to investigate. That decision is now being challenged in separate judicial review proceedings. The effect of the 2023 Act will be to prevent any potential prosecution in relation to the concealment of evidence of the documents taking place. The applicant also complains about the provision in the Act which prevents the use of certain material obtained by the ICRIR from being used in civil proceedings.

Gilvary

Gemma Gilvary is the sister of Maurice Gilvary who was "disappeared" by the Irish Republican Army ("IRA") in or around 12 January 1981. His body was later found on 19 January 1981. Evidence suggests that he was subjected to torture and was subsequently murdered because he was identified to the IRA as an informer by state agents, including a police officer. The applicant's case is currently part of Operation Kenova which was set up to investigate the alleged criminal activities of a state agent known as 'Stakeknife.' The applicant argues that the effect of the 2023 Act would be to end ongoing criminal investigations into her brother's death and the potential prosecution of those responsible for his torture and murder.

Fitzsimmons

On 8 September 1975, Patrick Fitzsimmons was convicted of an offence of attempting to escape from detention, contrary to paragraph 38(a) of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973 and common law. He received a nine-month prison sentence. The applicant's initial detention was founded on an interim custody order ("ICO") which was signed by a Parliamentary Under Secretary of State. The decision of the Supreme Court in *R v Adams*[3] held that an ICO had to be made by the Secretary of State personally. Accordingly, the applicant's

[2] [2016] NICoroner 1
[3] [2020] 1 WLR 2077

conviction was quashed on 14 March 2022 by the Northern Ireland Court of Appeal. On 10 March 2022, the applicant issued proceedings seeking damages for false imprisonment and breach of article 5 ECHR. On 27 June 2023, he sought compensation for miscarriage of justice under section 133 of the Criminal Justice Act 1988. Both proceedings are yet to be determined. The effect of the 2023 Act will be to retrospectively deem the Order-making functions in relation to ICOs to be treated as having always been exercisable by authorised ministers of the Crown (as well as by the Secretary of State).

THE LEAD CASE

The applicants contend that the 2023 Act:

- is unlawful insofar as its provisions are incompatible with articles 2, 3, 6 and/or 14 of the ECHR pursuant to section 4 of the Human Rights Act 1998 ("HRA").
- is in breach of the applicants' rights pursuant to article 2 of the Windsor Framework ("WF"). Specifically, their rights protected under Strand 3 of the B-GFA and underpinned by EU law have been diminished as a result of the UK's withdrawal from the EU, insofar as the UK would not have been permitted to introduce the immunity provisions under EU law prior to withdrawal.
- amounts to such a fundamentally unconstitutional interference in the role and function of the judiciary that they should be disapplied under common law principles, with the result that they have no force or effect.

Section 19 provides that the ICRIR must grant immunity subject to specific conditions. The court outlined the ECtHR caselaw addressing the specific issue of amnesties. It said it was clear that the ECtHR has articulated strong opposition to the granting of amnesties in the context of articles 2/3 ECHR. Indeed, there was a reticence to endorsing the concept of amnesties. The court concluded:

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

> valuable. It is arguable that the provision of such information could contribute to reconciliation. However, there is no evidence that the granting of immunity under the 2023 Act will in any way contribute to reconciliation in Northern Ireland, indeed, the evidence is to the contrary. It may well be that a system whereby victims could initiate the request for immunity in exchange for information would be compliant with articles 2 and 3 ECHR, but this is not what is contemplated here."

Section 41 provides that no criminal enforcement action may be taken against any person in respect of a Troubles-related offence unless it is a serious or connected Troubles-related offence. Based on its analysis of the issue of amnesties in the context of section 19, the court commented that the section 41 prohibition would, in effect, extend unconditional immunity to life endangering offences, where no actual harm is caused, such as attempted murder, conspiracy to murder, possessing firearms or explosives with intent to endanger life, causing explosions so long as no death or serious injury results.

In the case of *Jordan* there was evidence that one or two officers may have been guilty of perverting the course of justice by removing entries from the original RUC log book made after her son was shot. Should the prosecutorial test be met, under section 41 no prosecution could take place in relation to this allegation as it was not a Troubles-related offence within the meaning of the 2023 Act. The court concluded that the bar on the criminal investigation, prosecution and the punishment of offenders under section 41 contravenes articles 2/3 ECHR and, specifically, amounts to a breach of the applicant, *Jordan's*, rights under article 2 ECHR. The court went on to consider whether the applicant, *Jordan's*, article 8 rights are engaged in respect of her challenge to section 41? It was argued that the unconditional amnesty to the state agents who allegedly destroyed evidence relating to her son's death demeans her family life, her private life and is an afront to human dignity. The court said that to hold that her article 8 rights were engaged would, in its view, constitute an unduly expansive view of the rights protected by article 8. It concluded that the right which it is said has been interfered with by section 41 of the 2023 Act is, properly analysed, article 2.

Section 38 provides that there should be no criminal investigations in relation to Troubles-related offences except through ICRIR reviews. **Sections 9(8) and 10(3)** impose a five-year time limit in relation to requests for such reviews. The applicants contend these provisions are in breach of the state's article 2/3 investigative obligations and that this was compounded by the restrictions on all other legal proceedings including civil actions and inquests in relation to Troubles-related deaths.

The court referred to the ECtHR decision in the case of *Brecknell v United Kingdom*[4] which stated that in certain circumstances the duty to investigate under the procedural limb of article 2 ECHR may be revived 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. It considered that the lack of flexibility to deal with cases where new evidence comes to light which could trigger the need for an investigation is a matter of concern and at a minimum, there must be some mechanism capable of doing so. However, the court concluded that it is not possible, at this stage, to make a declaration to the effect that the five-year time limit on review requests is incompatible with the ECHR as the provisions may be subject

[4] [2008] 46 EHRR 42

to further amendment between now and 1 May 2029. Should the scenario arise in the future then the state will then be obliged to find some mechanism to deal with the issue. The court, therefore, did not grant any declarations or relief in relation to the five-year time limit in respect of reviews.

CAN THE ICRIR CARRY OUT AN ARTICLE 2 COMPLIANT INVESTIGATION?

The principles of what is required for compliance with the state's procedural obligations under articles 2/3 ECHR have been the subject matter of extensive jurisprudence, much of which emanates from killings in Northern Ireland. The court considered whether the ICRIR is capable of carrying out an effective investigation into deaths occurring during the Troubles in compliance with the procedural requirements of articles 2/3 including whether it has the independence, structures and powers necessary to thoroughly investigate the deaths including those involving allegations of state involvement or collusion.

1. ***Is the ICRIR sufficiently independent?***

The applicants submit that the ICRIR is a creature created by the Secretary of State for Northern Ireland and argue that it lacks institutional and hierarchical independence. To make its assessment the court said the key issue is the operational independence of the ICRIR including whether the persons responsible for carrying out the investigation are independent of those implicated in any events they are investigating. It noted that the Chief Commissioner is a person of huge judicial experience. It said the fact that the Commissioner for Investigations ("CfI") is a former RUC/PSNI officer does not mean that he lacks the necessary independence to carry out investigations into legacy issues: self-evidently he must recuse himself from any review involving an incident in which he was involved as a former RUC/PSNI officer. The court concluded that the proposed statutory arrangements, taken together with the policy documents published by the ICRIR, inject the necessary and structural independence for it to comply with the requirement for independence to meet the procedural obligations under articles 2/3 ECHR.

2. ***Has the ICRIR sufficient powers to carry out an effective investigation?***

Section 13(5) of the 2023 Act provides that the CfI must ensure that each review, whether or not a criminal investigation forms part of the review, looks into all the circumstances of the death or other harmful conduct to which it relates. Having conducted a review, the Chief Commissioner under section 15 of the 2023 Act must "produce a final report on the findings of the review". The applicants argue that such a review falls well short of what is required under articles 2/3. The court noted that it is for the state to determine the actual means by which it carries out an article 2/3 ECHR compliant investigation. In terms of investigation, the 2023 Act provides that the CfI will have all the powers and privileges of a police constable, as will any other ICRIR officer designated by the Commissioner. The CfI will have the power to compel evidence from witnesses, including oral or written testimony or physical evidence and documents. The court held it was clear that all investigations, when initiated, will be capable of leading to prosecutions should sufficient evidence of a criminal offence exist.

3. ***Powers of disclosure***

Under section 5 of the 2023 Act, a "relevant authority" which includes state bodies <u>must</u> make available to the ICRIR such information, documents or other material as the CfI may reasonably require for the purposes of, or in connection with, the exercise of the review function. A relevant authority <u>may</u> also make available to the ICRIR any information, documents or other material

which in the view of that authority may be needed for the purposes of or in connection with the exercise of the review function. The court said that having considered the disclosure powers of the ICRIR and the obligations of the state it seemed the powers of disclosure are article 2/3 compliant and an improvement on the situation in relation to inquests which have proven to have limitations in terms of disclosure issues which have been the primary reason for delays.

4. *Victim participation*

Case law[5] states that the degree of public scrutiny 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 …" While the 2023 Act allows for relatives to request a review, it makes no specific provision for providing disclosure to a victim or next of kin during a review or to any formal role of a victim or next of kin in suggesting questions during a review after the initial request. The court referred to proposed policy documents published by the ICRIR on how it will conduct reviews and produce a review report setting out the findings of the information recovery work and, where practicable, address the requester's specific questions. It said that if these policies are adopted and implemented, the ICRIR will be seen to do all that it can to ensure transparency and victim participation. It added that public consultation on the policy documents is ongoing, and it was open to applicants to engage with the ICRIR so they can have a direct input to the design of the scheme and how reviews are conducted.

5. *Legal Aid*

The absence of legal aid was deemed to be a procedural deficiency in the case of *Jordan v UK*[6]. However, the court noted that the next of kin involved in any ICRIR review will be able to avail of the Green Form Scheme for advice and assistance. It said this is an issue that is being addressed by the ICRIR, who are considering whether lawyers involved in inquests could be seconded for the purposes of specific reviews.

6. *Public Hearings*

The court commented that public hearings are not precluded under the 2023 Act and the issue remains open. Again, the proposed policy documents published by the ICRIR are relevant in considering this issue.

7. *Conclusions on effectiveness*

The court said it could understand the applicants' opposition to the proposed reviews as a substitute for the existing scheme of criminal investigations, investigations into police complaints, civil actions and inquests as a means of dealing with investigations into killings during the Troubles. The reviews stand in contrast to the current inquest system where hearings are conducted in public, in the context of full legal representation of all those involved, including the next of kin, who have access to materials, who can engage expert evidence, who can call and cross-examine witnesses and who ultimately obtain a detailed narrative verdict from a coroner. The court was sensitive to the fact that many families have been promised inquests as a means to an article 2 compliant investigation into the death of their loved ones:

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[5] *McQuillan* [2021] UKSC 55
[6] [2001] 37 EHRR 2

> "For many that promise will be broken. Their much sought after opportunity, in the form of an inquest, will be denied. Instead, the state has provided through primary legislation in Parliament an alternative means by which to carry out its article 2/3 obligations … I fully understand their opposition to the new scheme and the reasons for it."

At this stage, however, the court said it could not say that the system established under the 2023 Act cannot provide an article 2/3 compliant investigation:

> "The Commission is obliged to do so. It has wide powers and a wide range of discretion/flexibility to carry out its reviews. Should it fall short of its obligations under article 2/3 then it will no doubt be subject to the scrutiny of the court. The Commission has the benefit of clear judicial direction from the highest courts as to what is required for an article 2/3 compliant investigation. Just as the courts mandated a change of approach by interpreting "how" in the coronial rules in a broad way to ensure article 2 compliance, so must the Commission do the same when carrying out its obligations under section 13 of the 2023 Act to "look into all the circumstances of the death or harmful conduct to which it relates." The policy documents which it has published demonstrate it is clearly alive to this obligation and is seeking ways to ensure compliance with the Convention."

The court was satisfied that the provisions of the 2023 Act leave sufficient scope for the ICRIR to conduct an effective investigation as required under articles 2 and 3 of the ECHR. The court declined, therefore, to make an order 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 Schedule 6, para 4.

Section 43 provides that Troubles-related civil claims that were brought on or after 17 May 2022 may not be continued on or after 18 November 2023 and that no new Troubles related civil claims may be brought after 18 November 2023. The applicants contend that by enacting section 43, the state has put in place a strict limitation period in respect of such actions. The court said that section 43 is undoubtedly an interference with the rights provided in article 6 ECHR (which provides that in the determination of his civil rights and obligations everyone is entitled to a fair hearing by a tribunal).

The respondent submits that the general objective of the 2023 Act is to promote reconciliation through the introduction of a coherent system of providing information to victims of the Troubles. It argues that the current civil litigation is beset with difficulties, lengthy delays and the adversarial nature of the processes, including the disclosure processes, are not resulting in satisfactory outcomes. Much of the civil litigation relates to claims which are stale. The respondent points to the burden on the Northern Ireland civil court system arising from the extent of existing claims currently being considered by the court.

The court was satisfied that section 43 of the 2023 Act pursues a legitimate aim. It said the objective identified by the Government was sufficiently important to justify the limitation. Moreover, in applying a blanket measure involving a "bright line" permitting of no exceptions there will be cases like that of the applicant *McManus* who will not be able to pursue her civil litigation and will bar any future claims if new information comes to light as a result, for example, of an ICRIR review or otherwise.

However, the court noted that section 43(1) has a retrospective effect by permitting all existing claims issued prior to 17 May 2022 to continue while those proceedings issued between 17 May 2022 and 18 November 2023 will be ended. Where legislation applies retrospectively in order to defeat existing claims, the test is more stringent, and the court has to exercise a greater degree of scrutiny. The reason submitted by the respondent for the retrospectivity was to prevent a large influx of new claims in the period between first reading and commencement. The court considered that insofar as section 43 has retrospective effect, it does not meet the proportionality test. However, it was satisfied that post commencement (post 18 November 2023) the limitation imposed by section 43(2) is lawful.

Section 7 provides that certain material obtained by the ICRIR from a person may not be used against that person in criminal proceedings. The applicants argue that this imposes significant restrictions on the ability to secure the accountability of the perpetrators of Troubles-related offences. The stated purpose section 7 is to encourage people with relevant knowledge to come forward and provide information to the ICRIR which, in turn, will provide victims with information in relation to the deaths of their loved ones. Section 7(3) provides that if a person provides information in the course of an application for immunity and the application is rejected, any material provided to the immunity request panel will be inadmissible in criminal proceedings. The court noted that the privilege against compulsory self-incrimination is a well-established principle of the common law. It said the limits of section 7 are important in that it is confined to the use of material in criminal proceedings against the defendant who provided the relevant information. However, such material can still be used to identify and, if appropriate, prosecute other offenders. In the court's view, section 7 and, in particular, section 7(2) of the 2023 Act go no further than what is accepted at common law or currently within the coronial system (save for section 7(3)). It did not consider the latter to breach of the ECHR.

Section 8 provides that no protected material, or evidence relating to protected material, is admissible in any civil proceedings. "Protected material" is defined as "material provided to, or obtained by, the ICRIR for the purposes of, or in connection with, the exercise of any of its functions." The applicants challenge the lawfulness of section 8 on the grounds that it is incompatible with articles 2 and 6 ECHR read alone or in conjunction with article 14 ECHR. The reasoning behind section 8 stems from the desire to ensure the effectiveness of the information recovery objective of the legislation. The court said it could see some merit in the suggestion that the prohibition may well encourage people to come forward and give information to ICRIR, however, in seeking to justify the prohibition it seemed that the respondent has conflated section 7 and section 8. While the legal basis for the section 7 prohibition is sound, the section 8 prohibition went further in excluding all protected material or evidence relating to protected material. The court considered that section 8 is an interference with the article 2 rights of those who seek to vindicate their rights via civil litigation against the state agencies in the context of Troubles-related killings. It said that such an interference is unlawful and cannot be justified. Equally, the court accepted that the article 6 rights of such litigants is engaged. It said that section 8 impacts significantly on the prospect of success of those who have extant civil claims, the subject matter of which will also be covered by an ICRIR review. Accordingly, the court found a breach of article 6(1) ECHR in respect of its impact on the fairness of those proceedings.

Breach of Article 14 ECHR in respect of remaining provisions of the 2023 Act

Having determined that the provisions of the 2023 Act which relate to immunity from prosecution are in breach of articles 2/3 of the ECHR, the court said it was not necessary to consider whether there has been a breach of article 14 ECHR in respect of those provisions. The court, however, went on to consider the remaining provisions which it had found not to be in breach of the ECHR[7]. There has been extensive jurisprudence on what is required to establish a breach of article 14 and the questions that the court must ask itself in order to establish whether a particular situation involves treatment which amounts to a violation.

The first question is whether the applicants can establish an identifiable characteristic or "status" within the meaning of article 14. The court was satisfied they could with the status being either a victim or a relative of a victim of the Troubles as defined in the 2023 Act. The second question is whether there was a difference in the treatment of the applicants compared to those in an analogous or relatively similar situation. The court answered this in the affirmative, concluding that those who have been victims of state violence or torture and paramilitary killings and who have had the benefit of an inquest, a criminal investigation where a public prosecution has already commenced or a civil action commenced when the 2023 Act came into force and where those proceedings have satisfied the requirements of articles 2 and 3 ECHR are arguably persons in analogous, or relatively similar situation. The third question is whether the difference in treatment has an objective and reasonable justification. The challenged provisions propose to deny access to the courts to victims of the Troubles to vindicate their rights, subject to the supervisory role of the courts by way of judicial review. The court said the measures have been designed to promote reconciliation which is expressly stated as the "principal objective" of the ICRIR and in doing so, it is hoped to bring an end to an aspect of the conflict that has proved elusive over a protracted period of time namely, how to deal with the legacy of the Troubles.

The substantive issue in the context of the article 14 debate is whether treating the victims of the Troubles during the period between the starting point of the ICRIR (1966 - the point at which republican and loyalist paramilitaries became actively engaged) and 10 April 1998 (the date that the B-GFA was signed) differently from other victims can be justified in law. 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 court noted that the measures in 2023 Act 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. In the article 14 context, what the court has to consider is the decision to treat the victims of the Troubles differently via the mechanisms which have been established under the 2023 Act. The core issue is whether the legislature acted within the margin of appreciation afforded to it. The court concluded that, subject to the court's supervisory role in terms of ECHR compliance, 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. In conclusion, therefore, I am satisfied that the difference of treatment identified by the court in this case is compliant with article 14 taken together with the substantive rights relied upon by the applicants. This, of course, does not apply to the breaches which I have identified earlier in this judgment."

Article 2(1) of the Windsor Framework

[7] Sections 38, 43, 44 and 45.

The court then turned to consider whether provisions of the 2023 Act which it had found to be incompatible with articles 2, 3 and 6 ECHR (the immunity provisions) breached WF as this would result in the disapplication of the offending provisions.

Article 2(1) of the WF provides that the UK shall ensure that no diminution of rights, safeguards or equality of opportunity as set out in the B-GFA resulting from the withdrawal from the EU including in the area of protection against discrimination. In order to establish a breach of Article 2(1) the following elements must be established:

- A right included in the relevant part of the B-GFA is engaged.
- The right was given effect (in whole or in part) in Northern Ireland on or before 31 December 2020.
- That Northern Ireland law was underpinned by EU law.
- That underpinning has been removed, in whole or in part, following withdrawal from the EU.
- This has resulted in the diminution and enjoyment of this right.
- This diminution would not have occurred had the UK remained in the EU.

These elements were considered in paras [518] – [625]. The court considered that each of the elements were established. It held that in enacting the immunity provisions in the 2023 Act the Government had acted incompatibly with the EU Victims' Directive and the Charter of Fundamental Rights. It said this could not have occurred had the UK remained in the EU and therefore concluded that the immunity provisions of the 2023 Act should be disapplied.

Constitutional Argument

The applicants contend the provisions of the 2023 Act which shut down recourse to civil and criminal courts are "fundamentally antithetical" to the rule of law and should be struck down. While counsel for the applicants admitted that there is no instance of UK judges exercising this power the possibility has not been ruled out by the courts. Parliamentary sovereignty is a fundamental principle of the constitution and was recently reaffirmed by the UK Supreme Court. The court said that Parliament has provided the court with the tools to scrutinise the legality of the provisions of the 2023 Act in line with the scope prescribed by the legislature under section 4 HRA 1998 and section 7A of the EU Withdrawal Act 2018 ("EUWA 2018") which confers the power to subjugate provisions of primary legislation which are incompatible with the WF. It said this approach is entirely consistent with the core tenets of parliamentary sovereignty and the relief sought by the applicants may be obtained, if successful, on the constitutionally safe ground provided by section 4 HRA 1998 and section 7A EUWA 2018: "It is therefore, unnecessary for the court to explore this question further which so far had been confined to legal theory."

APPLICATION BY PATRICK FITZSIMMONS

Sections 46 and 47 of the 2023 Act (with the exception of 47(5)) came into force on 18 November 2023, two months after the date the Act was given Royal Assent. Section 46 provides that an ICO, and any detention under the authority of that ICO, is not to be regarded as having ever been unlawful just because a Minister of the Crown exercised any of the order-making functions in relation to the order. Section 47 provided that on or after the commencement date, a civil action may not be continued or brought in respect of a detention under such an ICO. Section 47(3)

provides a saving clause for criminal proceedings at pre-commencement stage, which includes proceedings for which leave was given before the commencement day, or which followed from a referral made by the Criminal Cases Review Commission before the commencement day.

The applicant challenges the decision to enact sections 46 and 47 on the basis that the retrospective/retroactive effect of the provisions are incompatible with articles 6 and 7 ECHR and article 1 of the First Protocol to the ECHR ("A1P1"). The applicant seeks a declaration under section 4 HRA 1998 to that effect.

A1P1 permits an individual to be deprived of "the peaceful enjoyment of his possessions" only "in the public interest and subject to the conditions provided for by law and by the general principles of international law." The concept of a 'possession' is flexible and extends to a right to pursue a legal claim which has a sufficient basis in national law. The issue for the court is whether the respondent can justify the interference, recognizing that article 6 is not an absolute right, but a qualified one which may be restricted in certain circumstances.

The court made the following comments: the applicant has several undetermined claims which were brought before the 2023 Act entered into force; the manner and timing in which the ICO amendments were introduced could hardly be said to be in pursuit of the reconciliation policy objectives of the 2023 Act but were reactive to the *Adams* litigation; the retroactive/retrospective effect of sections 46 and 47 was unforeseeable and rendered the applicant's article 6 rights unassailable in practice; the scope of sections 46 and 47 have no wider effect than the validity of ICOs and preventing benefit to those who were unlawfully detained; there was no evidential basis to sustain the claim that the interference was justified on the basis of an alleged burden on the courts as the cohort affected is small; and if it was felt necessary to restore or reinforce the *Carltona* principle or put it on a statutory footing, this can be done without retroactively interfering with the rights of a small number of individuals.

The court said the effect of sections 46 and 47 was to retroactively prohibit the extant civil claims brought by the applicant who has been found by a court of law to be acquitted on the basis of an unlawfully made ICO. Respect for the rule of law and the notion of a fair trial therefore require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection. The judge said,

> "The fact remains that as a matter of law the applicant has been acquitted of the offence which forms the basis of his claims. He should be treated as such accordingly. "

In light of these considerations the court concluded that the respondent had not demonstrated compelling grounds of a general interest to justify the interference with the applicant's article 6 rights.

The court then asked itself whether the applicant's extant claims may be considered "assets." The applicant lodged his civil claim for false imprisonment following a determination of the highest domestic court which unanimously ruled that his detention had been unlawful. The court was therefore, satisfied that the applicant could have reasonably expected this claim to be determined in accordance with the law of tort and therefore, constituted an asset within the meaning of A1P1. The applicant, however, could not have a legitimate expectation in respect of his claim for a breach of article 5 ECHR as his detention occurred in 1973, 27 years before the HRA 1998 entered into

force. The court was hesitant to conclude that the applicant had a legitimate expectation of judgment being delivered in respect of his application for miscarriage of justice.

> "Although this court delivered a judgment favourable to the applicant in *Re Adams*, the matter was not when the application was lodged, settled for the purposes of A1P1. Given the foregoing and the court's conclusion under article 6, the court is satisfied that there has been a breach of A1P1 in respect of the applicant's tort claim for false imprisonment."

The court then considered the claim under article 7 and was not persuaded that the applicant has standing to bring this challenge. 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. Insofar as the applicant has standing to bring a claim under article 6 ECHR and A1PI, the court found that the retroactive effect of sections 46 and 47 on the applicant's extant claims to be unlawful and therefore any detriment to the applicant arising out of section 46 has been addressed by the court under article 6 and A1P1. The court was of the view that it is appropriate to address any alleged incompatibility with article 7 ECHR against a concrete factual case.

FINAL CONCLUSIONS AND ORDERS

Lead case – Dillon and others

The court made the following orders in respect of the lead case:

(i) The court makes a declaration pursuant to section 4 of the HRA 1988 that the provisions in the 2023 Act relating to immunity from prosecution[8] are incompatible with articles 2 and 3 of the ECHR.

(ii) The provisions in the 2023 Act relating to immunity from prosecution are incompatible with article 2 of the Ireland/Northern Ireland Protocol/Windsor Framework. The Windsor Framework has primacy over these provisions thereby rendering them of no force and effect. The provisions should therefore be disapplied.

(iii) The court makes a declaration pursuant to section 4 of the HRA 1998 that section 43(1) of the 2023 Act which provides that a relevant Troubles-related civil action that was brought on or after 17 May 2022 may not be continued on or after 18 November 2023 and that no new Troubles related civil claims may be brought after 18 November 2023 is incompatible with article 6 of the ECHR. This declaration applies generally but specifically to the applicant *Lynda McManus*.

(iv) Section 43(1) of the 2023 Act is also incompatible with article 2 of the WF and shall therefore be disapplied both generally and specifically with respect to the applicant *Lynda McManus*.

(v) The court makes a declaration pursuant to section 4 of the HRA 1998 that section 8 of the 2023 Act relating to the exclusion of evidence in civil proceedings is incompatible with articles 2 and 3 of the ECHR.

(vi) Section 8 of the 2023 Act is incompatible with article 2 of the WF and should therefore be disapplied.

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[8] Sections 7(3), 12, 19, 20, 21, 22, 39, 41, 42(1)

The court declined to grant any of the other relief sought by the applicants.

Teresa Jordan

The court made the following order in respect of *Teresa Jordan*:

(i) A declaration pursuant to section 4 of the HRA 1998 that section 41 of the 2023 Act in relation to the prohibition of criminal enforcement action is incompatible with article 2 of the ECHR.

(ii) Section 41 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 is also incompatible with article 2 of the WF and should therefore be disapplied with respect to the applicant.

Given that the court has already granted relief to the lead applicants in respect of section 8 and that the death of the applicant's son has been the subject matter of a completed article 2 compliant inquest, it said it was difficult to foresee circumstances in which the ICRIR will be conducting a review in relation to the death. In such circumstances section 8 will not have any impact on the applicant in relation to her ongoing civil proceedings. In these circumstances the court declined to make any order in respect of this applicant in relation to section 8. Should any issue arise, she will enjoy the benefit of the order made in the lead case in any event.

Gemma Gilvary

The court declines to make any declaration in respect of the applicant, *Gilvary*, on the basis that she lacks the required standing to make a case under article 3 ECHR based on the Convention values test. Case law restricts the "Convention values" test to serious crimes under international law, such as war crimes, genocide and crimes against humanity. The court stated that this should not be understood as confirmation that torture does not fall within the range of serious crimes, contemplated in the jurisprudence, as capable of satisfying the Convention values test. Rather, in the court's view, the prevailing trend suggests that acts of torture sanctioned by the state would meet such a test. The court's conclusion was based on the lack of concrete evidence available to sustain a claim of state-sponsored torture.

Maurice Gilvary's death is being investigated under "Operation Kenova" which has now completed its investigation into whether there was evidence of the commission of any criminal offences by state agents in relation to his torture and death. The court said it is now for the DPP to decide whether there is sufficient evidence to bring criminal charges against anyone involved in those events. In practice, the 2023 Act will not now close down the investigation or any potential prosecution. Any decision by the DPP not to prosecute, having received the report, can be challenged by way of judicial review by the applicant. The applicant will have the benefit of the Kenova report when published and should she consider further investigation is necessary it will be open to her to request a review by ICRIR to look into all the circumstances of her brother's death. The possibility of prosecution remains open under section 25 of the 2023 Act. As a result of the court's ruling in the lead case any potential defendant will be unable to avail of the immunity provisions in the 2023 Act:

> "These practical considerations … also militate against the making of an order in this case. The court hopes that the applicant will take comfort in the court's finding in the

lead case and will be reassured that the effect of the Act has not closed down the Kenova investigation as was initially feared. Therefore, the application is refused."

Patrick Fitzsimmons

The court made the following order which applies specifically to *Patrick Fitzsimmons*:

(i) The court makes a declaration pursuant to section 4 of the HRA 1998 that the provisions in the 2023 Act relating to interim custody orders, namely sections 46 and 47, are incompatible with article 6 and A1P1 of the ECHR.

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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