Easter Term
[2026] UKSC 15
On appeal from: [2024] NICA 59

JUDGMENT

In the matter of an application by Martina Dillon, John McEvoy, Brigid Hughes and Lynda McManus for Judicial Review (Respondents); In the matter of an application by Martina Dillon, John McEvoy, Brigid Hughes and Lynda McManus for Judicial Review (Appellants) No 2

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON
7 May 2026

Heard on 14, 15 and 16 October 2025

Appellant/Respondent – The Secretary of State for Northern Ireland
Sir James Eadie KC
Tony McGleenan KC
Christopher Knight
Philip McAteer
Laura Curran
(Instructed by the Crown Solicitors Office)

Respondents/Appellants – Martina Dillon & others
John Larkin KC
Jude Bunting KC
Malachy McGowan
Jack Williams
Laura King
(Instructed by Phoenix Law)

Respondent – Police Ombudsman for Northern Ireland
Simon McKay
(Instructed by Legal Services Directive)

Respondent – Department of Justice and Coroners Service for Northern Ireland
Peter Coll KC
Terence McCleave
(Instructed by Departmental Solicitors Office)

Intervener – Northern Ireland Human Rights Commission
Adam Straw KC
Naomi Hart
(Instructed by Northern Ireland Human Rights Commission)

Intervener – Equality Commission for Northern Ireland
Christopher McCrudden
(Instructed by Equality Commission for Northern Ireland)

Intervener – Amnesty International (UK)
Moyne Anyadike-Danes KC
Raj Desai
Karl McGuckin
(Instructed by Phoenix Law)

Intervener – Independent Commission for Reconciliation and Information Recovery
Frank O'Donoghue KC
Andrew McGuinness
(Instructed by Lewis Silkin (NI) LLP)

Intervener – The Northern Ireland Veterans Movement
Lord Wolfson KC
James Ramsden KC
Andrew Dinsmore
(Instructed by Astraea Group Ltd)

LORD REED, LORD HODGE, LORD LLOYD-JONES, LORD HAMBLEN AND LORD STEPHENS:

1. Introduction

1. There have been longstanding conflicts in Ireland, including over the partition of the island. A key aspiration of Irish nationalists has been to bring about a united Ireland, with the whole island forming one independent state. This aspiration conflicts with that of unionists in Northern Ireland, who want that region to remain part of the United Kingdom ("the state", in what follows). These conflicting aspirations together with many other pervasive and serious communal differences resulted in violence during what have commonly come to be known as "the Troubles", leading to many tragedies with a deep and profoundly regrettable legacy of suffering. More than 3,500 people were killed during the Troubles, with approximately 40,000 injured. Around 1,200 cases relating to killings remain unsolved.

2. A resolution to the conflict was found in the Belfast Agreement dated 10 April 1998 (also known as the Good Friday Agreement). The Belfast Agreement, presented to Parliament as "The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland" (1998) (Cm 3883), is made up of two inter-related documents. The first is an "Agreement reached in the multi-party negotiations" ("the Multi-Party Agreement"). It is signed on behalf of the British and Irish Governments and eight political parties or groupings in Northern Ireland: the Ulster Unionist Party, the Social Democratic and Labour Party, Sinn Féin, the Alliance Party, the Progressive Unionist Party, the Northern Ireland Women's Coalition, the Ulster Democratic Party, and the Labour Party NI. The Democratic Unionist Party, which has later become the largest unionist party, did not support the Belfast Agreement. The second document is an "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland". It was then a draft international treaty between two sovereign Governments which subsequently was executed by an exchange of diplomatic notes. It was annexed to the Multi-Party Agreement, and the Multi-Party Agreement was annexed to it.

3. The Belfast Agreement represented "a truly historic opportunity for a new beginning" (see paragraph 1 of the Declaration of Support by the participants in the multi-party negotiations, commending the Belfast Agreement to the people of Ireland, North and South, for their approval). It provided for new political institutions based on a commitment to exclusively democratic and peaceful means of resolving differences on political and constitutional issues.

4. Since 10 April 1998, successive Governments have attempted to respond to the legacy of the Troubles, but an appropriate method of doing so has proved elusive.

Significant but unsuccessful milestones in the process of developing a policy have included: (a) the Eames/Bradley report published on 23 January 2009; (b) the proposal in November 2013 by the then Attorney General for Northern Ireland to bring an end to prosecutions, inquests, and other inquiries relating to the Troubles which, in his view, were "a logical consequence" of the Belfast Agreement; (c) the Stormont House Agreement of 23 December 2014; and (d) the "New Decade, New Approach Deal" of January 2020 published by the then Secretary of State for Northern Ireland and the Irish Tánaiste (deputy prime minister).

5. A further milestone in the responses to the legacy of the Troubles occurred some 56 years after the Troubles are said to have begun. On 17 May 2022 the Northern Ireland Troubles (Legacy and Reconciliation) Bill was introduced in Parliament by the then Secretary of State for Northern Ireland, the Rt Hon Brandon Lewis MP, a member of the Conservative Government. After Parliamentary scrutiny and significant amendment, the Bill was passed by Parliament and received Royal assent on 18 September 2023 as the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the 2023 Act"). Some sections in the 2023 Act came into force on 18 September 2023 with others coming into force on 18 November 2023, 1 December 2023, and 1 May 2024: see section 63 of the 2023 Act; the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (Commencement No 1) Regulations 2023 (SI 2023/1293); and the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (Commencement No 2 and Transitional Provisions) Regulations 2024 (SI 2024/584).

6. This appeal raises issues as to the compatibility of several provisions of the 2023 Act with the European Convention on Human Rights ("the Convention"), as given effect in our domestic law by the Human Rights Act 1998 ("the Human Rights Act"). It also raises issues as to whether several provisions of the 2023 Act should be disapplied under section 7A of the European Union (Withdrawal) Act 2018 ("the 2018 Act") by virtue of the terms of article 2(1) of the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement ("the Withdrawal Agreement") entered into between the United Kingdom and the European Union ("the EU"). The Protocol on Ireland/Northern Ireland is now known formally as the Windsor Framework (which will be the term used in this judgment) following revised arrangements being agreed between the United Kingdom and the EU for its operation. The revised arrangements took effect on 24 March 2023.

7. It will be necessary to set out the provisions of the 2023 Act in detail later in this judgment. For present purposes we set out the long title to that Act, which, in so far as relevant, states that it is:

> "An Act to address the legacy of the Northern Ireland Troubles and promote reconciliation by establishing an Independent Commission for Reconciliation and Information Recovery, limiting criminal investigations, legal proceedings, inquests

> and police complaints, extending the prisoner release scheme in the Northern Ireland (Sentences) Act 1998, and providing for experiences to be recorded and preserved and for events to be studied and memorialised …"

8. It is appropriate at this stage to briefly summarise some of the major provisions of the 2023 Act foreshadowed in the long title.

9. The 2023 Act established as a body corporate an Independent Commission for Reconciliation and Information Recovery ("the ICRIR"): see Part 2. The ICRIR consists of, amongst others, the Chief Commissioner and the Commissioner for Investigations (section 2(3)). The functions of the ICRIR include carrying out reviews of deaths that were caused by conduct forming part of the Troubles (section 2(5)(a)) and determining whether to grant persons immunity from prosecution for serious or connected Troubles-related offences other than Troubles-related sexual offences (section 2(5)(d)). "The Troubles" are defined as "the events and conduct that related to Northern Ireland affairs and occurred during the period … beginning with 1 January 1966, and … ending with 10 April 1998": section 1(1).

10. In order to carry out the reviews and in order to consider applications for immunity: (a) full disclosure of information, documents, and other material is to be made to the ICRIR by a relevant authority including, for instance, the Police Service of Northern Ireland ("the Police Service") via the Chief Constable (sections 5 and 60(1)); and (b) the Commissioner for Investigations is designated as a person having the powers and privileges of a constable and may designate any other ICRIR officer as a person having such powers and privileges (section 6).

11. If certain conditions are met, the ICRIR must grant a person immunity from prosecution: section 19. However, the reviews may lead to the ICRIR referring deaths that were caused by conduct forming part of the Troubles to prosecutors: section 2(5)(e). In relation to matters relating to the Troubles these inquisitorial reviews by the ICRIR replaced police investigations, investigations by the Police Ombudsman for Northern Ireland ("the Police Ombudsman") in relation to complaints from members of the public concerning the conduct of the Royal Ulster Constabulary (the police force in Northern Ireland until 4 November 2001) ("the RUC") and the Police Service, inquests, and civil actions.

12. On or after 1 May 2024, the date on which section 38 came into force, police investigations could not be continued or begun. On or after the same date, when section 45 came into force, formal investigations by the Police Ombudsman were not to begin and any formal investigations which had begun before that date were to cease. Also on or after the same date, a coroner must not progress an inquest into a death that resulted

directly from the Troubles, unless on that day the only part of the inquest that remained to be carried out was the coroner or any jury making or giving the final determination, verdict, or findings: section 44 of the 2023 Act, which inserted a new provision, section 16A, into the Coroners Act (Northern Ireland) 1959. Finally, Troubles-related civil actions could not be commenced on or after 18 November 2023, and a civil action that was brought on or after 17 May 2022 could not be continued on and after 18 November 2023: section 43 read with section 63(2)(a).

13. The 2023 Act represented a shift away from existing available legal processes towards an inquisitorial system by the ICRIR, pursuing the aims of reconciliation and peace, and to end what the then United Kingdom Government considered to be vexatious claims against veterans who served in Northern Ireland during the Troubles.

14. Martina Dillon, John McEvoy, Brigid Hughes, and Lynda McManus are all victims of various crimes committed during the Troubles. Each of them is directly affected by the provisions of the 2023 Act by, for instance, the provisions of the Act which permit those culpable of serious Troubles-related offences to apply for and be granted immunity, and the provisions ending police investigations into Troubles-related offences.

15. On 15 September 2023, before the 2023 Act was enacted on 18 September 2023, Martina Dillon, John McEvoy, Brigid Hughes, and Lynda McManus applied for leave to bring judicial review proceedings and sought declarations that several provisions of the 2023 Act: (a) are incompatible with, for instance, the right to life and the prohibition of torture protected by articles 2 and 3 of the Convention; and (b) are incompatible with article 2(1) of the Windsor Framework, which it was asserted has primacy over the provisions of the 2023 Act so that several provisions in the 2023 Act should be disapplied. There were 16 other applications for leave to apply for judicial review challenging various provisions of the 2023 Act, including applications brought by Teresa Jordan, Gemma Gilvary, and Patrick Fitzsimmons.

16. In this court Martina Dillon, John McEvoy, Brigid Hughes, and Lynda McManus are respondents to an appeal brought by the Secretary of State for Northern Ireland and are appellants in relation to a cross-appeal. For ease of exposition, we will refer to them as "the applicants."

17. On 9 October 2023 leave to apply for judicial review proceedings was granted to: (a) the applicants; (b) Teresa Jordan; (c) Gemma Gilvary; and (d) Patrick Fitzsimmons. The Secretary of State for Northern Ireland was the respondent to these four judicial review applications. In this court the Secretary of State is the appellant in the appeal and the respondent to the applicants' cross-appeal.

18. In the High Court, the Police Ombudsman, the Department of Justice for Northern Ireland and the Coroners Service for Northern Ireland were notice parties: see Order 53, Rule 5(3) and (7) of the Rules of the Court of Judicature (Northern Ireland) (Revision) 1980. The Northern Ireland Human Rights Commission ("the Human Rights Commission"), the Equality Commission for Northern Ireland ("the Equality Commission"), the WAVE Trauma Centre, and Amnesty International UK were permitted to intervene. The legislative provisions in Part 2 of the 2023 Act establishing the ICRIR as a public body were not in force at the date of the hearing in the High Court. Therefore, at that stage of the proceedings, the ICRIR was not a notice party to the application.

19. The four applications for judicial review were heard by Colton J ("the judge") between 21 and 30 November 2023.

20. In outline, the applicants and Ms Jordan, Ms Gilvary and Mr Fitzsimmons submitted that the 2023 Act was incompatible with the procedural obligation under articles 2 and 3 of the Convention because: (a) the immunity of those who had committed Troubles-related offences impermissibly prevented the sanctioning of those who had caused deaths or who had committed torture; (b) the absence of provision for legal aid in ICRIR reviews meant that the next of kin were not involved to the extent necessary to safeguard their legitimate interests; and (c) the provisions as to disclosure of documents and information in ICRIR reviews to the next of kin also meant that they were not involved in those reviews to the extent necessary to safeguard their legitimate interests.

21. In outline, the then Secretary of State, the Rt Hon Christopher Heaton-Harris MP, a member of the Conservative Government, submitted (relying on *Marguš v Croatia* (2014) 62 EHRR 17, para 139) that the immunities contained in the 2023 Act were acceptable as a part of a reconciliation process. The Secretary of State also opposed the applicants' challenge to the adequacy of the involvement of the next of kin on several grounds, including that the challenge to the validity of the legislative provisions was impermissible in advance of the application of those provisions to any particular facts: an *ab ante* challenge. See *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; [2023] AC 505 ("*Safe Access Zones*").

22. Whilst the ICRIR was not a notice party (given that it had not been established), various documents in relation to its preparatory work ahead of the commencement of its operations were available to and were considered by the judge: see paras 140 and 275–283 of his judgment. Those documents came into existence in anticipation of the establishment of the ICRIR and following the announcement on 11 May 2023 by the then Secretary of State that he had identified the Rt Hon Sir Declan Morgan, a former Lord Chief Justice of Northern Ireland, as the person to be appointed Chief Commissioner of the ICRIR. Commencing in June 2023, preparatory work, including work as to how the ICRIR would carry out its role, was undertaken by and under the guidance of Sir Declan.

In the course of the preparatory work, a series of documents described as "draft not agreed" policies were published addressing some of the issues identified by the Committee of Ministers of the Council of Europe and critics of the 2023 Act. Those documents included a draft Code of Conduct, a set of draft principles, and a Framework Document on governance issues. The purpose of publishing these documents was to set out publicly some of the early thinking about the approach that the ICRIR, once established, could take to various issues and to seek feedback from interested parties on the various proposals. The ideas expressed in the documents were unfinished and subject to ratification by the Commissioners once they were all appointed. It was also made clear that the ICRIR, once established, would develop the proposals in the documents in close dialogue with a range of groups including victims and survivors of the Troubles.

23. The judge delivered judgment on 28 February 2024: [2024] NIKB 11. It will be necessary to review his judgment in detail in due course. The judge determined some issues in favour of the applicants and some in favour of the Secretary of State.

24. In favour of the applicants the judge made several declarations. For instance, in respect of the prohibition in section 43(1) of the 2023 Act on continuing a Troubles-related civil action brought on or after 17 May 2022 the judge made a declaration, pursuant to section 4 of the Human Rights Act, that this provision is incompatible with article 6 of the Convention (see para 57 below). Also, in respect of the immunity from prosecution provisions in sections 7(3), 12, 19, 20, 21, 22, 39, 41 and 42(1) of the 2023 Act ("the immunity provisions") the judge made a declaration, pursuant to section 4 of the Human Rights Act, that those provisions are incompatible with articles 2 and 3 of the Convention. He also made a declaration that the immunity provisions are incompatible with article 2 of the Windsor Framework. The judge held that the Windsor Framework has primacy over the immunity provisions, rendering them of no force, so that they should be disapplied.

25. In favour of the Secretary of State the judge determined that the ICRIR is sufficiently independent. In respect of the absence of legal aid for the next of kin the judge declined to make any order, noting that: (a) the next of kin involved in any ICRIR review would be able to avail themselves of the Green Form Scheme for legal advice and assistance; and (b) this was an issue that was being addressed by the ICRIR, which was considering whether lawyers involved in inquests could be seconded for the purposes of specific reviews. The judge also declined to make any order in relation to the provisions in the 2023 Act as to the disclosure of documents and information to the next of kin. The judge held that the powers of disclosure in the 2023 Act are compliant with articles 2 and 3 of the Convention and are an improvement on the situation in relation to inquests, as the disclosure issues in inquests have been the primary reason for delays. Finally, the judge declined to make a declaration of incompatibility pursuant to section 4 of the Human Rights Act in respect of the prohibition in section 43(2) of the 2023 Act on commencing Troubles-related civil actions after 18 November 2023 (see para 56 below).

26. The Secretary of State appealed to the Court of Appeal on all issues on which the judge found against him. The applicants, Teresa Jordan, Gemma Gilvary, and Patrick Fitzsimmons cross-appealed in respect of the judge's finding that there was no breach of articles 2 or 3 of the Convention in relation to the ICRIR's ability to conduct investigations. The case was heard by the Court of Appeal on 11 to 17 June 2024. At that stage the Secretary of State remained the Rt Hon Christopher Heaton-Harris MP. The ICRIR had by then been established. It applied to the Court of Appeal to be joined as a notice party. The Court of Appeal, whilst not acceding to that application, joined the ICRIR as an intervener.

27. The Secretary of State's appeal, as originally brought, raised the issue as to whether the judge was right to issue declarations of incompatibility in relation to provisions of the 2023 Act on the basis of a failure to comply with articles 2 and 3 of the Convention. The Labour Party's election manifesto for the general election held on 4 July 2024 included a commitment to repeal and replace the 2023 Act. The Labour Party won the election, leading to the formation of a Labour government. On 5 July 2024, the Rt Hon Hilary Benn MP became the Secretary of State. The change in government and the appointment of the new Secretary of State led to a different approach to the issues before the Court of Appeal. After the hearing, but before judgment was delivered, the new Secretary of State, by a letter from the Crown Solicitor's Office dated 29 July 2024, informed the Court of Appeal that he abandoned and invited the court to dismiss the grounds of appeal against the declarations of incompatibility made by the judge.

28. On 20 September 2024, the Court of Appeal, in a judgment delivered by Keegan LCJ, with which Horner LJ and Scoffield J agreed, dismissed the Secretary of State's appeal in relation to: (a) the challenge to the judge's declarations of incompatibility and (b) the interpretation and effect of article 2(1) of the Windsor Framework: [2024] NICA 59. The Court of Appeal allowed the applicants' cross-appeal in relation to: (a) lack of effective next of kin participation in the reviews conducted by the ICRIR, caused by there being no provision for legal aid; (b) the role of the Secretary of State in relation to disclosure of documents and information by the ICRIR to the next of kin and victims; and (c) the restriction in section 43(2) on commencing Troubles-related civil actions after 18 November 2023, as breaching article 6 of the Convention.

29. On 6 January 2025, the Court of Appeal refused leave to appeal to this court.

30. On 7 April 2025, this court granted the Secretary of State's application for permission to appeal. The permission was solely in respect of the judicial review proceedings brought by the applicants. The notice parties before the lower courts (the Police Ombudsman, the Department of Justice, and the Coroners Service for Northern Ireland) fall within the category of respondents, under rule 3(2) of the Supreme Court Rules 2024 ("the rules"). In addition to the applicants and the Secretary of State they also are parties to the appeal and are entitled to take part in the appeal: rules 3(2) and 22.

Subject to limited exceptions, interveners in the lower courts must apply to this court for permission to intervene in the appeal, normally under rule 24. The Human Rights Commission, the Equality Commission, Amnesty International (UK), and the ICRIR intervened in the hearing before this court. The Northern Ireland Veterans Movement ("the Veterans Movement") was not an intervener in the courts below. Founded in 2015, it is an unincorporated association of veterans' groups who oppose the prosecution of those who served in the United Kingdom's armed forces in Northern Ireland during the Troubles. This court permitted the Veterans Movement to intervene.

31. As we have stated, the Labour Party's election manifesto included a commitment to repeal and replace the 2023 Act. On 19 September 2025 the Secretary of State and the Tánaiste, Simon Harris TD, announced a joint legacy Framework between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland. To implement that Framework, on 14 October 2025 the Northern Ireland Troubles Bill ("the Troubles Bill") was introduced in Parliament to repeal and replace the 2023 Act. If the Troubles Bill is enacted, the legislative landscape will change. For instance: (a) the ICRIR will be replaced with a reformed Legacy Commission with enhanced investigative powers; (b) the immunity scheme in the 2023 Act will be repealed; (c) inquests that were stopped part-heard by the 2023 Act will be able to resume; (d) the ability of the Legacy Commission to consider sensitive information in closed hearings will be different from that of the ICRIR; and (e) legal representation for next of kin will be introduced. Some of the issues raised in the applicants' judicial review application are addressed in the Troubles Bill. However, it remains appropriate for this court to determine all the issues on this appeal.

2. Factual background

(a) The applicants

32. The applicants are four individuals who have each suffered as a result of the Troubles.

33. Martina Dillon's husband, Seamus Dillon, was shot and killed on 27 December 1997 by a loyalist paramilitary group. In April 2023 the Coroner opened an inquest into his killing. There was evidence of collusion by state authorities relating to the death. In the inquest the Coroner decided to investigate not only "by what means" but also "in what broad circumstances" the deceased came to his death: see *R (Middleton) v West Somerset Coroner* [2004] UKHL 10; [2004] 2 AC 182. As the evidence in the inquest was not completed before 1 May 2024, it was brought to an end by the operation of section 16A of the Coroners Act (Northern Ireland) 1959 (inserted by section 44 of the 2023 Act). No one has ever been held accountable for the killing.

34. John McEvoy narrowly escaped death and sustained serious psychiatric injuries following an attack by loyalist paramilitary gunmen on 19 November 1992 in which one man was killed and several others were injured. In 2016, new material came to light revealing the possibility of state collusion in the attack. In 2022 the High Court ruled that the Police Service had acted incompatibly with article 2 of the Convention by failing to carry out an effective investigation into the attack (*In re McEvoy* [2022] NIKB 10), a conclusion endorsed by the Court of Appeal ([2023] NICA 66). No such investigation was completed before the coming into force of the 2023 Act on 1 May 2024, which ended any possibility that the Police Service could complete such an investigation: see section 38 of the 2023 Act. The 2023 Act also brought an end to the investigation being conducted by the Police Ombudsman into this attack: see section 45 of the 2023 Act and section 50A of the Police (Northern Ireland) Act 1998 ("the Police Act"), discussed at para 51 below. No request for a review has been made to the ICRIR in relation to this attack. There has been no investigation into this attack since 1 May 2024.

35. Brigid Hughes' husband, Anthony Hughes, was shot and killed by members of the security forces on 8 May 1987, as part of an ambush of an attack by the Irish Republican Army ("the IRA") on Loughgall RUC station. His death occurred more than 12 years prior to the Human Rights Act coming into force on 2 October 2000: see para 182 below. In 2001, the European Court of Human Rights ("the Strasbourg court") found that the investigations into Anthony Hughes' death breached the procedural limb of article 2 of the Convention: *Kelly v United Kingdom* (2000) 30 EHRR CD223. There has never been an investigation conducted into this shooting which discharges the investigative obligation under article 2 of the Convention. Inquests into the deaths of Anthony Hughes, and the eight others who died in the same incident, were directed by the then Advocate General on 23 September 2015. A preliminary hearing of the inquest was first convened on 24 January 2016. The evidence in the inquest was not completed before 1 May 2024, so it was brought to an end by the operation of section 16A of the Coroners Act (Northern Ireland) 1959.

36. Lynda McManus is the daughter of James McManus who was severely injured in a sectarian gun attack perpetrated by loyalist paramilitaries on 5 February 1992. Five people were killed in the attack and several individuals were injured, including her father, who was shot thirteen times, but survived. In a report published in February 2022, the Police Ombudsman found collusive behaviour by the police in the attack. Shortly after the publication of the report Ms McManus brought a civil claim on behalf of her father's estate. The 2023 Act prevented her civil action from proceeding.

(b) The applicants in the three further judicial review applications heard by the judge

37. Teresa Jordan is the mother of Pearse Jordan who was shot and killed on 25 November 1992 by a member of the RUC. There have been a series of inquests into his death. The first inquest commenced on 4 January 1995 and was adjourned, part heard,

without a verdict. The second inquest was held between 24 September 2012 and 26 October 2012. On 31 January 2014, the High Court quashed the verdict of that inquest: [2014] NIQB 11. In the third inquest, heard in November 2015 ([2016] NICoroner 1), Horner J was unable to reach a concluded view as to whether the use of lethal force was justified or not, but found that the Police Service 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 (anonymised as Officers M and Q) had edited a contemporaneous document in order to conceal certain facts (para 144) and that both officers had been untruthful in their testimonies (para 155). These matters were referred to the Director of Public Prosecutions ("the 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. Subsequently, the DPP has indicated that there is nothing for the Police Service to investigate. At the date of the hearing before the judge that decision was being challenged in separate judicial review proceedings. The effect of the 2023 Act is to prevent any potential prosecution in relation to the concealment of evidence of the documents taking place. The applicant, Mrs Jordan, 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.

38. Gemma Gilvary is the sister of Maurice Gilvary who was "disappeared" by the IRA on or around 12 January 1981. His body was found on 19 January 1981. His death occurred more than 12 years prior to the Human Rights Act coming into force on 2 October 2000: see para 182 below. 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. At the date of the hearing in the High Court, Ms Gilvary's case was part of Operation Kenova which was set up to investigate the alleged criminal activities of a state agent known as "Stakeknife." The applicant argues that the effect of the 2023 Act would be to end ongoing criminal investigations into her brother's death and the potential prosecution of those responsible for the torture and murder of her brother.

39. 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 which was signed by a Parliamentary Under Secretary of State. In *R v Adams* [2020] UKSC 19; [2020] 1 WLR 2077, this court held that such an order had to be made by the Secretary of State personally. Accordingly, the applicant's conviction was quashed on 14 March 2022 by the Court of Appeal. On 10 March 2022, the applicant issued proceedings seeking damages for false imprisonment and breach of article 5 of the Convention. On 27 June 2023, he sought compensation for miscarriage of justice under section 133 of the Criminal Justice Act 1988. At the date of the hearing in the High Court both proceedings were yet to be determined. The effect of the 2023 Act will be to retrospectively deem the Order-making functions in relation to interim custody orders as

having always been exercisable by authorised ministers of the Crown as well as by the Secretary of State.

3. The High Court judgment

40. The following paragraphs contain an outline of the judge's reasoning and conclusions together with a summary of the orders he made. At the outset we commend the judge for his prompt and comprehensive consideration of the complex and important issues involved in these proceedings. It is appropriate to summarise not only the judge's determination of the issues which arise before this court but also his determination of the other central issues in the applications for judicial review.

(a) Immunity from prosecution provisions in the 2023 Act

41. In relation to the immunity provisions, the judge considered first the immunity conferred by section 19. That provision requires the ICRIR to grant a person immunity from prosecution for "serious" or "connected" Troubles-related offences if certain conditions are met, including in particular that the person has given a true account of his conduct to the best of his knowledge and belief.

42. The judge noted at para 145 that:

> "[T]he ICRIR must grant a person immunity from prosecution for one or more serious or connected Troubles-related offences if that person meets the conditions set out in section 19. In short, the key condition is that the person concerned must give a true account of his conduct to the best of his 'knowledge and belief.' The potential implications for the applicants are obvious. Those responsible for killing Seamus Dillon, Anthony Hughes, wounding James McManus or the torture and killing of Maurice Gilvary and those responsible for the shooting of John McEvoy would be entitled to immunity if they make such a request to the ICRIR and the ICRIR is satisfied that they are telling the truth about their involvement. Immunity will be granted irrespective of the views of the applicants. There is no requirement for contrition or acknowledgment of the impact of their actions on their victims. The request for immunity can be made at any stage in the process."

43. The case made on behalf of the applicants relied on article 2 of the Convention (the right to life). The applicant, Gemma Gilvary, also relied on article 3 of the

Convention (the prohibition of torture), given the evidence which suggested that her brother was tortured prior to his murder. The judge, citing *Osman v United Kingdom* (1998) 29 EHRR 245, para 115, stated, at para 147 of his judgment, that there was no legal dispute that: (a) article 2 imposes an obligation on a state to ensure that there is an effective official investigation when individuals have been killed as a result of the use of force, and (b) in order to satisfy this obligation, a state must put in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.

44. The judge stated at para 148 that he did not consider that "there is any significant difference between the obligations under articles 2 [and] 3 [of the Convention] when analysing the provisions of the [2023] Act." The Secretary of State (then the Rt Hon Christopher Heaton-Harris MP), relying on jurisprudence of the Strasbourg court, sought to justify the immunity from prosecution provisions in the 2023 Act as being acceptable as a part of a reconciliation process. The judge, having carried out a review of the authorities, stated at para 187 that the immunity provisions under section 19 of the 2023 Act, and the related provisions under sections 7(3), 12, 20, 21, 22, 39 and 42(1), had "not been introduced in the context of 'a violent dictatorship or an interminable conflict.'" He continued:

> "[t]hey 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. … 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."

45. The judge concluded, at para 187, that the immunity provision under section 19, and the related provisions under sections 7(3), 12, 20, 21, 22, 39 and 42(1), were incompatible with articles 2 and 3 of the Convention.

46. The judge next considered section 41 of the 2023 Act, which provides that no criminal enforcement action may be taken against any person in respect of a Troubles-related offence unless it is a "serious" Troubles-related offence within the meaning of section 1(5)(b) or a "connected" Troubles-related offence within the meaning of section 1(5)(c), in which event the offender can apply to the ICRIR for immunity under section 19, as explained above.

47. The effect of section 41, read with the statutory definitions of "serious" and "connected" Troubles-related offences, is that immunity (without having to make an application to the ICRIR) is extended to offenders who have committed life endangering offences or offences perpetrated during torture which are neither "serious" nor "connected." For instance, a life-endangering offence which is committed without causing a person to suffer serious physical or mental harm, as defined in section 1(6), is not a "serious" Troubles-related offence. Therefore, provided that no person suffered serious physical or mental harm, and provided that the offence was not "connected" to a "serious" Troubles-related offence, the offences of attempted murder, conspiracy to murder, possessing firearms or explosives with intent to endanger life, and causing explosions would not amount to "serious" or "connected" Troubles-related offences.

48. The judge held, at para 201, that the state has a responsibility under the Convention to deter and punish life-endangering offences under article 2 of the Convention and torture under article 3. The judge concluded at para 208 that the bar on the criminal investigation, prosecution, and the punishment of offenders under section 41 contravenes articles 2 and 3 of the Convention.

49. The judge accordingly granted a declaration pursuant to section 4 of the Human Rights Act that the immunity provisions were incompatible with articles 2 and 3 of the Convention.

(b) Complaints in relation to police conduct

50. Section 45 of the 2023 Act amended the Police Act by inserting a new provision, section 50A. Under section 50A(3), the Police Ombudsman is not to commence any formal investigation, and must cease any existing investigation, with effect from 1 May 2024, insofar as the matter relates to police conduct forming part of the Troubles. Moreover, if a complaint has been referred by the Police Ombudsman to the Chief Constable, the Police Authority or the Secretary of State under section 52(6) of the Police Act then, under section 50A(2), the Chief Constable, the Police Authority and the Secretary of State are required to cease dealing with any complaint referred before 1 May 2024 where the complaint relates to conduct forming part of the Troubles.

51. As a result, after 1 May 2024 reviews of police conduct forming part of the Troubles could not be carried out by the Police Ombudsman, the Chief Constable, the Police Authority or the Secretary of State. Instead, such reviews could be carried out by the ICRIR if the police conduct directly or indirectly caused a death: section 2(5)(a) read with sections 9(1) and (3) and 11–13. Reviews could also be carried out by the ICRIR into other harmful conduct forming part of the Troubles, which would include harmful police conduct: section 2(5)(b) read with sections 10–13.

52. The ability to request such an ICRIR review of police conduct depends on the identity of the individual requesting a review. A close family member of the deceased may request a review of a death that was caused directly by conduct (including police conduct) forming part of the Troubles: section 9(1). A person may only request the ICRIR to carry out a review into other harmful conduct (including police conduct) if that conduct caused that person to suffer serious physical or mental harm: section 10(1) of the 2023 Act. However, the Secretary of State may request a review of a death that was caused by conduct forming part of the Troubles whether or not it was caused directly by the conduct, for instance harmful police conduct: section 9(3). Furthermore, the Secretary of State may request a review by the ICRIR of harmful police conduct forming part of the Troubles whether or not it caused any person to suffer serious physical or mental harm: section 10(2).

53. The judge, citing *Jordan v United Kingdom* (2001) 37 EHRR 2 ("*Jordan*"), held at para 365 of his judgment that:

> "in order for the [2023] Act to be read compatibly with the Convention and to satisfy the state's 'own motion' obligations under articles 2 and 3 … (see *Jordan v UK* at para 105) the Secretary of State must inform himself of all outstanding Troubles-related police complaints and submit them to the ICRIR …."

Having stated what was required of the Secretary of State the judge declined, at para 370, to make any order in relation to this ground of challenge: see paragraph 1 of the order of the High Court dated 28 February 2024.

(c) Civil actions

54. Section 43(1) of the 2023 Act provides that Troubles-related civil claims that were brought on or after 17 May 2022 (the day of the first reading in the House of Commons of the Bill which became the 2023 Act) may not be continued on or after 18 November 2023 (the date on which section 43 came into force pursuant to section 63(2)(a) of the 2023 Act). Section 43(2) of the 2023 Act also provides that no new Troubles-related civil claims may be brought on or after 18 November 2023.

55. The judge held at para 376 that "[b]y enacting section 43 the state has, in effect, put in place a strict limitation period in respect of [Troubles-related civil] actions." He held at para 379 that section 43(1) and (2) is an interference with the rights protected by article 6 of the Convention, which provides that "[i]n the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...." Proceeding on the basis that the right under article 6 is a qualified right, the judge

identified the issue at para 386 as being whether the limitation period under section 43(1) and (2) pursued a legitimate aim and was proportionate. The judge held at para 394 that section 43(1) and (2) pursued a legitimate aim, which was best summarised by reference to the comments of Lord Caine at the Committee stage of the consideration of the Bill in the House of Lords on 11 May 2023, to the effect that:

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

56. In relation to proportionality, the judge held at paras 403–406 and 414 that the bright line involved in section 43(2) barring Troubles-related civil claims on or after 18 November 2023, the date on which section 43 came into force, was within the margin of appreciation afforded to the state and was proportionate.

57. However, the judge's assessment of proportionality differed in relation to the effect of section 43(1) on Troubles-related civil claims commenced on or after 17 May 2022 but before 18 November 2023. The judge held at para 408 that "[w]here legislation applies retrospectively in order to defeat existing claims, the test is more stringent, and the court will exercise a greater degree of scrutiny." The reason submitted by the Secretary of State for the retrospective effect of section 43(1) was to prevent a large influx of new claims in the period between the first reading of the Bill and the commencement of section 43. The judge held at para 413 that:

> "Given the obligation on the court to look for compelling grounds and to treat retrospective measures with the greatest possible degree of circumspection I consider that insofar as section 43(1) has retrospective effect, it does not meet the proportionality test."

The judge granted a declaration pursuant to section 4 of the Human Rights Act that section 43(1) of the 2023 Act is incompatible with article 6 of the Convention.

(d) Admissibility of material in civil proceedings

58. Section 8(1) of the 2023 Act provides that "[n]o protected material, or evidence relating to protected material, is admissible in any— (a) civil proceedings, (b) proceedings before a coroner, or (c) inquiry under the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016 (asp 2)". "Protected material" is defined in section 8(5) as "material provided to, or obtained by, the ICRIR for the purposes of, or in connection with, the exercise of any of its functions."

59. Section 8 was challenged on a number of grounds, including that it is incompatible with article 2 of the Convention because it imposes a restriction on civil actions, which are one method by which a state complies with its procedural obligation. A challenge was also mounted on the basis that section 8 is incompatible with article 6 of the Convention because it disproportionately interferes with the right to a fair hearing by a tribunal "[i]n the determination of … civil rights and obligations".

60. The judge held at para 458 that section 8 is incompatible with article 2 of the Convention. He stated that:

> "I consider that section 8 is an interference with the article 2 rights of those who seek to vindicate those rights via civil litigation against State agencies in the context of Troubles-related killings. Given the unqualified nature of the article 2 rights, such an interference is unlawful and cannot be justified."

61. The judge held at para 459 that section 8 will have a bearing on the fairness of ongoing civil proceedings relating to conduct forming part of the Troubles which is the subject matter of an ICRIR review. This amounted to an interference with the article 6 rights of litigants. Treating article 6 as a qualified right, the judge considered, at paras 446 and 461, that the prohibition in section 8 pursued a legitimate aim of encouraging people to come forward, give information to the ICRIR and thereby advance reconciliation. However, the judge concluded at para 461 that no reasonable relationship of proportionality had been struck given the wide-ranging prohibition in section 8.

62. The judge granted a declaration pursuant to section 4 of the Human Rights Act that section 8 of the 2023 Act relating to the exclusion of evidence in civil proceedings is incompatible with articles 2, 3 and 6 of the Convention.

(e) Independence and effectiveness of the ICRIR

63. The judge, at para 256, identified the question to be decided as being:

> "whether the ICRIR is capable of carrying out an effective investigation into deaths or allegations of torture occurring during the Troubles in compliance with the procedural requirements of articles 2 and 3".

To address that question the judge posed a second question:

> "Does [the ICRIR] have the independence, structures and powers necessary to thoroughly investigate deaths occurring during the Troubles including those involving allegations of state involvement or collusion?"

64. In relation to the independence of the ICRIR, the judge observed at para 267 that the court was not dealing with an actual investigation or a concrete example. Rather, the court was analysing provisions in the 2023 Act taking into account the preparatory work undertaken in advance of the establishment of the ICRIR: see para 22 above. The judge concluded at para 284 that:

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

65. The central issues in relation to the powers of the ICRIR were whether: (a) the ICRIR is sufficiently independent of the Secretary of State; (b) the ICRIR has sufficient powers to carry out an effective investigation; and (c) whether the next of kin were involved to the extent necessary to safeguard their legitimate interests, including by reason of (i) the lack of provision of legal aid to the next of kin and to victims in ICRIR reviews; and/or (ii) the provisions in the 2023 Act as to disclosure of documents and information to the next of kin and to victims.

66. In respect of the absence of legal aid in ICRIR reviews, the judge recognised at para 358 that the absence of legal aid was deemed to be a procedural deficiency in the case of *Jordan*. However, he considered that it was wrong to read *Jordan* as saying that legal aid is mandated for all article 2/3 investigations. The judge observed that in *Jordan* the Strasbourg court was faced with a concrete factual scenario of an inquest in which the victims could not secure legal aid for representation at the inquest hearing. The judge was not faced with a concrete factual scenario. The judge noted that what was envisaged under the 2023 Act is an inquisitorial procedure under which there will be an obligation on the ICRIR to ensure adequate victim participation. The judge considered that this was an issue which was being addressed by the preparatory work for the ICRIR, including a suggestion that lawyers involved in inquests could be seconded for the purposes of specific reviews. The judge declined to make any order in respect of this complaint.

67. The judge also declined (at para 319) to make any order in relation to the provisions in the 2023 Act as to the disclosure of documents and information to the next of kin. The judge held that the powers of disclosure in the 2023 Act are compliant with articles 2 and 3 of the Convention and are an improvement on the situation in relation to inquests, as the disclosure issues in inquests have been the primary reason for delays.

(f) Article 2(1) of the Windsor Framework

68. The judge, seeking to give effect to section 7A of the European Union (Withdrawal) Act 2018, and citing *In re Allister* [2023] UKSC 5; [2024] AC 1113, held at paras 526-527 that any provisions of the 2023 Act which are in breach of the Windsor Framework should be disapplied.

69. Article 2(1) of the Windsor Framework, set out in full in para 107 below, provides that the United Kingdom "shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the [Belfast] Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union". The judge, citing *SPUC Pro-Life Ltd v Secretary of State for Northern Ireland* [2023] NICA 35; [2024] 2 CMLR 20, held at para 529 that in order to establish a breach of article 2(1) of the Windsor Framework the following elements must be established:

> "(i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged;
>
> (ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020 [the date on which the transition period ended following the UK's exit from the EU on 31 January 2020];

(iii) That Northern Ireland law was underpinned by EU law;

(iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU;

(v) This has resulted in a diminution in enjoyment of this right; and

(vi) This diminution would not have occurred had the UK remained in the EU."

70. The judge held, at paras 561, 570, 582, 583-584, 586, 588 and 612, that each of these elements were established. In particular, the judge held, at para 578, that the rights relied on by the applicants were underpinned by: (a) articles 1, 2, 4, and 47 of the Charter of Fundamental Rights of the European Union (OJ C 303, 14.12.2007, p 1) ("the Charter"), and (b) articles 11 and 16 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime ("the Victims Directive"). The judge held, at para 613, that the remedy in respect of the immunity provisions in sections 7(3), 12, 19, 20, 21, 22, 39, 41, and 42(1) of the 2023 Act is disapplication. He also held that sections 8 and 43(1) of the 2023 Act should be disapplied.

4. The Court of Appeal judgment

71. At the outset we commend the Court of Appeal for its comprehensive and prompt consideration of the complex and important issues involved in the appeal. The following paragraphs contain an outline of the Court of Appeal's reasoning and conclusions together with a summary of the orders made. It is appropriate to summarise not only the Court of Appeal's determination of the issues which arise before this court but also its determination of the other central issues in the appeal to the Court of Appeal.

(a) The declarations of incompatibility

72. As explained above, the judge made declarations of incompatibility with Convention rights in relation to: (a) the immunity provisions in the 2023 Act (see paras 41–49 above); (b) section 43(1) of the 2023 Act (preventing the continuance of Troubles-related civil claims) (see paras 54–57 above); and (c) section 8 of the 2023 Act (the exclusion of evidence in civil proceedings) (see paras 58–62 above).

73. As we have explained, the then Secretary of State appealed against those declarations, but after the appeal was heard, and before judgment was delivered, the new Secretary of State informed the Court of Appeal that he abandoned and invited the dismissal of those grounds of appeal. The Court of Appeal stated, at para 16, that the Secretary of State's concessions correlated with the view it took on the compatibility issues. In relation to the core argument as to the compatibility of the immunity provisions, the Court of Appeal, at para 164, found no reason to depart from the conclusion of the judge in relation to section 19 and related provisions. In addition, the Court of Appeal, at para 173, endorsed the judge's finding in relation to section 41 (immunity in relation to Troubles-related offences which are not "serious" or "connected"). The Court of Appeal, at para 309, dismissed the Secretary of State's appeal in relation to the declarations of incompatibility. In paragraph 6(b) of its order dated 20 September 2024 the Court of Appeal affirmed "the declarations of incompatibility made by the [judge] that … the provisions in the 2023 Act relating to immunity from prosecution, namely sections 7(3), 12, 19, 20, 21, 22, 39, 40, 41, and 42(1) are incompatible with articles 2 and 3 [of the Convention]." (The Court of Appeal sought only to affirm the declarations of incompatibility made by the judge. The judge made no declaration in relation to section 40: see para 187 of his judgment and the order of the High Court dated 28 February 2024. The reference to section 40 in the order of the Court of Appeal is a typographical error. We will correct that error in the order of this court). The Secretary of State has not appealed against the Court of Appeal's order dismissing his appeal in relation to the declarations of incompatibility in relation to sections 7(3), 12, 19, 20, 21, 22, 39, 41, and 42(1).

(b) Civil actions

74. The applicants brought a cross-appeal in the Court of Appeal, contending that the judge incorrectly limited the declaration of incompatibility in respect of Troubles-related civil claims to section 43(1) of the 2023 Act. The applicants contended that section 43 was incompatible with article 6 of the Convention irrespective of the date on which the civil claim was commenced. They submitted that a declaration ought therefore to have been granted that both section 43(1) and (2) of the 2023 Act are incompatible with article 6.

75. The Court of Appeal held at para 241 that the judge had incorrectly construed section 43 as in effect putting in place a limitation period. Section 43 was not akin to a limitation period. Rather, it introduced a blanket prohibition on access to a court in relation to an entire category of cases. The Court of Appeal at para 243 quoted para 24 of the judgment of the Grand Chamber in *McElhinney v Ireland* (2001) 34 EHRR 13 which states that:

> "… it would not be consistent with the rule of law in a democratic society or with the basic principle underlying article

> 6(1) – namely that civil actions must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons ….”

76. The Court of Appeal, at para 244 of its judgment, stated that this quotation captures the heart of the debate in respect of section 43, which removed from the jurisdiction of the courts a whole range of civil claims. The Court of Appeal held that section 43 provides a blanket prohibition on civil claims which is not proportionate or justifiable. It stated that this applies not only in relation to the retroactive element of section 43(1), as the judge found, but also to the prospective prohibition of claims under section 43(2). The Court of Appeal allowed the applicants’ cross-appeal and, in its order dated 20 September 2024, at paragraph 3(a), made:

> “… an additional declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998 to the effect that section 43(1) and (2) of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (‘the 2023 Act’), which imposes an absolute bar on civil actions which are “Troubles related”, is incompatible with article 6 [of the Convention] (and not merely in respect of those applications pre-dating the Act coming into force).”

77. The Secretary of State has not appealed against the Court of Appeal’s order making this declaration of incompatibility.

(c) Independence and effectiveness of the ICRIR

78. The applicants brought a cross-appeal in the Court of Appeal against the judge’s findings as to: (a) the overall operational independence of the ICRIR (see paras 63–64 above), and (b) the adequacy of the ICRIR’s powers in relation to the involvement of the next of kin in reviews, with particular focus on the lack of provision of legal aid and the provisions in relation to the disclosure of documents to the next of kin (see paras 65–67 above).

79. In relation to the overall operational independence of the ICRIR, the Court of Appeal decided not to depart from the judge’s findings on that issue. Accordingly, at para 213 it dismissed that ground of the cross-appeal. This court refused the applicants permission to appeal against the Court of Appeal’s decision on this issue. No question therefore arises in this court as to that aspect of the judgments in the lower courts.

80. The Court of Appeal then considered the applicants' ground of appeal concerning whether the ICRIR's powers in relation to the involvement of the next of kin in its reviews was sufficient to discharge the state's obligation to investigate a death, or an allegation of torture or inhuman and degrading treatment, under articles 2 and 3 of the Convention ("the article 2/3 investigative obligation"). In relation to the content of the article 2/3 investigative obligation the Court of Appeal quoted, at para 206 of its judgment, para 109 of the judgment of this court in *In re McQuillan* [2021] UKSC 55; [2022] AC 1063 ("*McQuillan*"). Of particular relevance to this ground of cross-appeal are the statements in *McQuillan*, at para 109 (v) and (vii), that:

> "(v) There must be a sufficient element of public scrutiny of the investigation or its results in order to secure accountability in practice. The degree of public scrutiny that is required will vary from case to case but the next of kin or victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests: *McKerr v United Kingdom* [(2001) 34 EHRR 20], para 115; *Anguelova v Bulgaria* [(2002) 38 EHRR 31], para 140; *Jordan*, para 109.
>
> …
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> (vii) Another aspect of an effective investigation … is that the persons responsible for carrying out the investigation must be independent of those implicated in the events. The Strasbourg court has emphasised … that this requires not only a lack of hierarchical or institutional connection but also practical independence. See *McKerr v United Kingdom*, para 112; *Jordan*, para 106; *Ramsahai* [*v Netherlands* (2007) 46 EHRR 43], para 325. In *Nachova* [*v Bulgaria* (2005) 42 EHRR 43], para 112, the Grand Chamber stated:
>
> > 'For an investigation into alleged unlawful killing by state agents to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice.'
>
> In support of that proposition the Grand Chamber cited *Güleç v Turkey* (1998) 28 EHRR 121, paras 81-82; *Őgur v Turkey* (1999) 31 EHRR 40, paras 91-92; and *Ergi v Turkey* (1998) 32 EHRR 18, paras 83-84."

81. The Court of Appeal observed at para 216 that the article 2/3 investigative obligation "can be satisfied by a range of investigative means" so that "article 2 compliance does not require an inquest in every case and an inquest is not the only method which may be deployed by a national authority." The Court of Appeal held that deaths and torture may be investigated by a range of different means (the investigative obligation under article 2 does not, for example, require an inquest into every death). So, whilst the article 2 investigative obligation had previously been discharged by the state holding an inquest, ICRIR reviews could in principle discharge the obligation. However, the Court of Appeal held that for ICRIR reviews to replace inquests "the necessary safeguards" had to be in place. The Court of Appeal considered, at para 218, that "a difficulty presents itself in relation to effective participation by the next of kin under the 2023 Act." Thereafter, the Court of Appeal determined that there were three such difficulties.

82. First, the Court of Appeal held at para 219 that "the absence of provision for legal aid [for the next of kin in ICRIR reviews] … is a clear contra indicator to [their] effective participation … in these cases." In arriving at that conclusion, the Court of Appeal drew on its collective experience of hearing legacy inquests in which legally aided lawyers representing the next of kin were able to cross-examine witnesses. The Court of Appeal referred at para 220 to "the novel suggestion of lawyers being seconded into the ICRIR, as Commission officers, to represent the next of kin in a particular case". The Court of Appeal considered that the proposal offends a principle that families should be able to choose their own lawyers and that they should be independent of the adjudicatory body. The Court of Appeal stated at para 221 that "[a]lthough inquisitorial by nature, in [Northern Ireland] these inquests have an adversarial aspect in practice, involving the next of kin who are represented by lawyers of their choosing and for which funding is provided". The Court of Appeal concluded at para 221 that it was "driven to the view that the [lack of provision of legal aid to the next of kin for representation in ICRIR reviews] militates against the necessary effectiveness requirements for the ICRIR *at present in conducting some investigations* and replacing inquests." (Emphasis added.)

83. Secondly, the Court of Appeal stated, in a single sentence at the end of para 221, that the applicants' "submissions also highlighted that there is no provision in the 2023 Act [for] … a formal role for questioning on behalf of the next of kin". We understand that this was a reference to the applicants' submission, recorded by the Court of Appeal at the end of para 186, that "there is no provision [in the 2023 Act] … for the victim/next of kin to engage with witnesses". It is unclear whether the Court of Appeal considered that this lack of express provision in the 2023 Act meant that there was a lack of effective participation by the next of kin in ICRIR reviews so that there was a failure to discharge the article 2/3 investigative obligation. However, given the earlier reference to the adversarial nature of inquests in Northern Ireland, we proceed on the basis that the Court of Appeal arrived at that conclusion.

84. Thirdly, the Court of Appeal analysed in detail the provisions in the 2023 Act relating to the disclosure of documents and information by the ICRIR to the next of kin,

the victims and the public. Such disclosure is to be distinguished from full disclosure *to* the ICRIR by relevant authorities such as the Chief Constable of the Police Service, the Security Services, the Secret Intelligence Service, and any of His Majesty's forces: see sections 5 and 60(1) of the 2023 Act. The ICRIR is entitled to use the information, documents and other material made available to it under section 5(1) in its investigations and in coming to its conclusions. It may do so regardless as to whether the information, documents or material contain information which should not be disclosed in order to protect national security. The Court of Appeal recognised at para 223 that this provided the ICRIR with "a greater ability for [it] to take into account information which would previously have been subject to a claim for [Public Interest Immunity ("PII")] which would be upheld." This was a reference by the Court of Appeal to the effect on the evidence at an inquest if a coroner upholds a PII certificate. If a coroner does so, then no evidence in relation to the matters which are the subject of the certificate may be admitted in the inquest. The final determination, verdict, or findings in the inquest cannot be informed by any of the material subject to the certificate. However, in a review carried out by the ICRIR, the information, documents and other material made available to it (no matter how sensitive) can inform its investigations and conclusions. The Court of Appeal described this position as an undoubted enhancement.

85. Whilst disclosure *to* the ICRIR resulted in an enhanced position, the Court of Appeal considered, at para 224, that the provisions in the 2023 Act as to disclosure *by* the ICRIR to the next of kin and victims meant that there was insufficient victim involvement in the reviews to discharge the article 2/3 investigative obligation, as the Secretary of State has "an *effective veto* over whether and how the ICRIR can share any such information". (Emphasis added.) The Court of Appeal recorded in the same paragraph that "it is said by the applicants" that the effective veto "strikes at the heart of the independence of the process in cases where significant amounts of sensitive information are involved". The applicants' submission was that even if the ICRIR possessed overall operational independence (see para 64 above), it lacked independence in relation to the disclosure by it of sensitive information to the next of kin, victims and the public. In relation to the effect of the regime in the 2023 Act for disclosure by the ICRIR the Court of Appeal stated at para 234 that:

> "Overall, we find that this regime has *the potential* to offend the proper aim of the ICRIR expressed in its written submissions that 'the organisation is made up of personnel that are able to conduct their work free of State interference' and could give rise to an unhelpful perception which could hinder progress in this area." (Emphasis added.)

86. The Court of Appeal rejected at para 236 the Secretary of State's submission that the challenge to the validity of the legislative provisions, on the basis that the ICRIR could not discharge the article 2/3 investigative obligation, was impermissible in advance of the application of those provisions to any particular facts. The Court of Appeal considered

"that the problematic elements [it] identified simply apply to all or almost all cases where inquests are to be replaced by the ICRIR under the 2023 Act and so relate to an entire category of cases". The Court of Appeal, also at para 236, questioned the applicability of the Secretary of State's submission that the challenge was an impermissible ab ante challenge, on the basis that "article 2 and 3 [of the Convention] are absolute rights where no proportionality balance need be struck". The Court of Appeal declined, in the same paragraph and at para 222, to take the approach of waiting and seeing what occurred on the facts of a particular case as to next of kin or victim involvement in the reviews actually carried out by the ICRIR. Rather, it decided, for instance, that given the lack of legal aid in ICRIR reviews it would be of assistance to all concerned to make a declaration on this issue in advance of the impact on the facts of any particular case.

87. The Court of Appeal in its order dated 20 September 2024 allowed the applicants' cross-appeal and granted at paragraph 7(a) the following relief:

> "(a) … a … declaration … that, in circumstances where the ICRIR purports to replace inquests as the means of compliance with the State's obligations under article 2 [of the Convention], it is not presently capable of discharging the article 2 investigative obligation as (i) it does not have the power to hold an investigation which allows for effective participation of the Next of Kin to the extent necessary to protect their interests and (ii) it is not sufficiently independent in relation to its powers to disclose relevant sensitive information to the Next of Kin and the public."

88. As the Court of Appeal considered that the declaration was not concerned with any particular provision in the 2023 Act it was expressed not to be a declaration of incompatibility pursuant to section 4 of the Human Rights Act. Rather, it was stated to be "a simple declaration" pursuant to section 18(1)(d) and (3) of the Judicature (Northern Ireland) Act 1978.

89. However, the Court of Appeal did make a declaration of incompatibility in relation to the disclosure provisions in the 2023 Act which the Court of Appeal held provided the Secretary of State with an effective veto over the disclosure of information by the ICRIR. The Court of Appeal, at paragraph 7(b) of its order dated 20 September 2024 made:

> "(b) … a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998 to the effect that, in the circumstances mentioned at sub-paragraph (a) above [ie in circumstances where the ICRIR purports to replace inquests as the means of compliance with the State's obligations under

> article 2 of the Convention], sections 4(1)(a) and (4), 30(2), (4)-(7), (10) and (11) of, and Part 1, paragraphs 3-5, and Part 2, paragraphs 9-13 of Schedule 6 to, the 2023 Act, insofar as they provide the Secretary of State with a power to preclude disclosure of sensitive information by the ICRIR to the Next of Kin and the public, are incompatible with article 2 [of the Convention]. (Sections 33 and 34, which relate to Secretary of State giving guidance and making regulations about handling documents, and section 60 (interpretation), are not included in this declaration, as they do not give rise to the Secretary of State's veto on disclosure.)"

90. As the Court of Appeal declared that reviews by the ICRIR did not discharge the article 2 investigative obligation and those reviews were to replace inquests, the Court of Appeal decided that a declaration should also be granted in relation to section 44 of the 2023 Act. Section 44, by inserting section 16A into the Coroners Act (Northern Ireland) 1959 (see para 12 above), brought to an end Troubles-related inquests. The Court of Appeal in its order dated 20 September 2024, in allowing the cross-appeal, also granted, at paragraph 7(c), the following relief:

> "(c) It follows that *at present*, given the declarations made at (a) above and in the absence of any other mechanism which can currently comply with article 2 obligations in cases where an inquest is required, the Court must also make a declaration of incompatibility in relation to section 44 of the 2023 Act, *simply to reflect current arrangements* (and *without expressing any view on how the present incompatibility the court have identified should be remedied*)." (Emphasis added.)

91. The Secretary of State has appealed to this court against the orders in paragraph 7(a)–(c) made by the Court of Appeal in its order dated 20 September 2024.

(d) Complaints in relation to police conduct

92. As explained above, the judge held that whilst, by virtue of section 45 of the 2023 Act, authorities such as the Police Ombudsman could no longer carry out reviews into harmful police conduct forming part of the Troubles, the ICRIR could do so upon, for instance, a request being made by the Secretary of State. The judge stated that for the 2023 Act to be read compatibly with the Convention and to satisfy the state's "own motion" obligations under articles 2 and 3 of the Convention, the Secretary of State must inform himself of all outstanding Troubles-related police complaints and submit them to the ICRIR. Having given that indication the judge declined to make any other order in

respect of section 45 such as an order of incompatibility under section 4 of the Human Rights Act: see para 53 above.

93. On appeal to the Court of Appeal it was submitted on behalf of Martina Dillon, one of the applicants, that the failure to grant a declaration of incompatibility with articles 2 and 3 of the Convention in respect of section 45 was logically inconsistent with the judge's conclusion that section 41 was incompatible with those articles. As explained at paras 46–48 above, section 41 prohibits criminal enforcement action in respect of Troubles-related offences which are not "serious" or which are not "connected" to serious Troubles-related offences. The ICRIR can carry out investigations into harmful police conduct. However, the immunity provision in section 41 means that no charges can be pursued in circumstances falling within the scope of that provision. Section 41 having been declared incompatible with articles 2 and 3 of the Convention, section 45 was treated as analogous by the Court of Appeal, which described section 45 in part as an "immunity provision which prevents misconduct charges being pursued". The Court of Appeal accepted at para 307 that a declaration of incompatibility ought also to have been made in respect of section 45. The Court of Appeal, at paragraph 7(e) of its order dated 20 September 2024, made:

> "a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998 that section 45, insofar as it precludes complaints in relation to police misconduct being progressed to misconduct charges or criminal charges, is incompatible with articles 2 and 3 [of the Convention]. (This does not preclude the ICRIR from conducting investigations which would previously have been carried out by [the Police Ombudsman] but reflects that, where misconduct charges represent part of the State's response to potential article 2/3 breaches, immunity from misconduct action which might otherwise be possible is incompatible with the Convention on a similar basis to immunity from prosecution.)"

94. The Secretary of State has not appealed against the Court of Appeal order making this declaration of incompatibility.

(e) Article 2(1) of the Windsor Framework

95. It will be necessary to consider later in our judgment the reasoning of the Court of Appeal in relation to article 2(1) of the Windsor Framework. For present purposes it is sufficient to record that the Court of Appeal dismissed the Secretary of State's appeal on the Windsor Framework grounds: see paragraph 2 of the Court of Appeal's order dated 20 September 2024. The Court of Appeal affirmed the judge's order "to the effect that

the provisions in the 2023 Act relating to immunity from prosecution, namely sections 7(3), 12, 19, 20, 21, 22, 39 … 41 and 42(1) are incompatible with article 2 of the … Windsor Framework; and that, pursuant to section 7A of the EU (Withdrawal) Act 2018, article 2 of the … Windsor Framework has primacy over these provisions thereby rendering them of no force and effect": see paragraph 6(a) of the Court of Appeal's order dated 20 September 2024.

96. However, the dismissal of the Secretary of State's appeal was subject to three qualifications. First, the Secretary of State's appeal in relation to the disapplication of section 8 (admissibility of material in civil proceedings) was allowed, so that that section was not disapplied. Secondly, the Secretary of State's appeal in relation to the disapplication of section 43 (which deals with Troubles-related civil actions) was partially successful. By its order dated 20 September 2024 the Court of Appeal, at paragraph 5, allowed the appeal in respect of the disapplication of section 43 but then, at paragraph 6(c), amended the order of the judge "to the effect that section 43(1) of the 2023 Act is incompatible with article 2 of the Ireland/Northern Ireland Protocol/Windsor Framework but only and insofar as it, in conjunction with the prohibition on criminal proceedings in which compensation may be ordered to be paid by a perpetrator/offender, precludes any route of obtaining compensation from an offender." Thirdly, the Court of Appeal held, at para 137, that contrary to the judge's reliance on the Charter it did not provide freestanding justiciable rights.

97. The Secretary of State has appealed against the orders made by the Court of Appeal under the Windsor Framework.

5. The issues in relation to which this court granted (a) the Secretary of State permission to appeal and (b) the applicants permission to cross-appeal

98. It is convenient at this stage to summarise the issues for determination in this court.

99. First, the Secretary of State appeals against the findings in the High Court and in the Court of Appeal in relation to article 2(1) of the Windsor Framework read with section 7A of the 2018 Act. We term that "the Windsor Framework ground of appeal."

100. Secondly, the applicants' cross-appeal on the basis that the Court of Appeal erred in departing from the judge's decision to disapply provisions of the 2023 Act for breach of the Charter. We term that "the Charter ground of appeal."

101. Thirdly, the Secretary of State appeals against the Court of Appeal's findings that: (a) the absence of provision of legal aid, the absence of provision for questioning of witnesses, and the limitation on the power of the ICRIR to disclose documents and

information, meant that next of kin and victims were not involved in the procedures before the ICRIR to the extent necessary to safeguard their legitimate interests; and (b) the ICRIR lacked independence in relation to the disclosure of documents and information by it to the next of kin, victims and the public. We term that "the ICRIR: Next of kin involvement and disclosure ground of appeal."

6. The Windsor Framework ground of appeal: is the court required to disapply certain provisions of the 2023 Act pursuant to article 2(1) of the Windsor Framework?

102. The central question raised by the Windsor Framework ground of appeal is whether the Court of Appeal was correct to disapply certain provisions of the 2023 Act, an Act of the Westminster Parliament, on the basis of breach of article 2(1) of the Windsor Framework read with the "Rights, Safeguards and Equality of Opportunity" ("RSEO") chapter of the Belfast Agreement and the Victims Directive.

103. The applicants maintain that there has been a diminution of rights as set out in the RSEO chapter of the Belfast Agreement resulting from the withdrawal of the United Kingdom from the EU. In particular, the applicants maintain that they have been deprived of access to inquests, police and Police Ombudsman investigations, the possibility of criminal prosecutions of offenders and civil remedies against alleged perpetrators as a result of the removal of rights and protections contained in EU law. They maintain that:

> (1) their EU law rights under articles 11 and 16 of the Victims Directive are diminished by sections 7(3), 12, 19, 20, 21, 22, 39, 41 and 42(1) of the 2023 Act; and
>
> (2) their EU law rights under the Charter are diminished by sections 8 and 43 of the 2023 Act.

104. As set out in para 70 above, in the High Court the judge held that the provisions relating to immunity from prosecution, namely sections 7(3), 12, 19, 20, 21, 22, 39, 41 and 42(1), and sections 8 and 43(1) of the 2023 Act are incompatible with article 2 of the Windsor Framework.

105. On appeal, the Court of Appeal held that the immunity provisions of the 2023 Act, namely sections 7(3), 12, 19, 20, 21, 22, 39, 41 and 42(1) are incompatible with article 2 of the Windsor Framework. However, the Court of Appeal allowed the appeal in respect of the disapplication of sections 8 and 43 of the 2023 Act, given that the basis for their disapplication was the Charter only: para 5 of its order dated 20 September 2024. Further, the Court of Appeal amended the order of the High Court to the effect that section 43(1)

of the 2023 Act is incompatible with article 2 of the Windsor Framework but only and insofar as it, in conjunction with the prohibition on criminal proceedings in which compensation may be ordered to be paid by a perpetrator/offender, precludes any route of obtaining compensation from an offender: para 6(c) of its order of 20 September 2024.

106. The applicants' case on the basis of the Victims Directive is considered in this section relating to ground 1 of the Secretary of State's appeal. Their case on the basis of the Charter is considered subsequently in the section relating to the applicants' cross-appeal.

107. Article 2 of the Windsor Framework provides:

> "1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the [Belfast Agreement] entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
>
> 2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the [Belfast Agreement], including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards."

108. Annex 1 of the Windsor Framework lists six EU Directives concerned with protection against discrimination.

109. The RSEO chapter of the Belfast Agreement provides in relevant part:

> "1. The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:
>
> - the right of free political thought;

- the right to freedom and expression of religion;

- the right to pursue democratically national and political aspirations;

- the right to seek constitutional change by peaceful and legitimate means;

- the right to freely choose one's place of residence;

- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;

- the right to freedom from sectarian harassment; and

- the right of women to full and equal political participation.

…

Reconciliation and Victims of Violence

11. The participants believe that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation. They look forward to the results of the work of the Northern Ireland Victims Commission.

12. It is recognised that victims have a right to remember as well as to contribute to a changed society. The achievement of a peaceful and just society would be the true memorial to the victims of violence. The participants particularly recognise that young people from areas affected by the troubles face particular difficulties and will support the development of special community-based initiatives based on international best practice. The provision of services that are supportive and sensitive to the needs of victims will also be a critical element

> and that support will need to be channelled through both statutory and community-based voluntary organisations facilitating locally-based self-help and support networks. This will require the allocation of sufficient resources, including statutory funding as necessary, to meet the needs of victims and to provide for community-based support programmes."

110. The Windsor Framework ground of appeal falls to be addressed in three stages:

(1) Does article 2(1) of the Windsor Framework have direct effect so that it gives rise to justiciable rights before domestic courts?

(2) If so, has there been a breach of article 2(1) of the Windsor Framework? In other words, has there been a diminution of the rights referred to in article 2(1) of the Windsor Framework because of withdrawal from the EU?

(3) If so, is the court required to disapply the relevant provisions of the 2023 Act?

(a) Stage 1: Does article 2(1) have direct effect?

111. The justiciability of article 2(1) of the Windsor Framework depends on whether it meets the conditions for direct effect under EU law. Article 4(1) of the Withdrawal Agreement provides:

> "The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.
>
> Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law."

Article 4(1) of the Withdrawal Agreement is given effect in domestic law within the United Kingdom by section 7A of the 2018 Act, headed "General implementation of remainder of withdrawal agreement." Section 7A provides in material part:

"(1) Subsection (2) applies to—

(a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and

(b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement, as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.

(2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—

(a) recognised and available in domestic law, and

(b) enforced, allowed and followed accordingly.

(3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)."

112. The test for direct effect of an international agreement between the EU and non-Member States was established by the Court of Justice of the European Union ("CJEU") in Case 12/86 *Demirel v Stadt Schwabisch Gmund* [1987] ECR 3719 ("*Demirel*") at para 14 in terms which it reiterated in Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2012] QB 606 at para 44:

"…a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure..."

113. The obligation imposed on the United Kingdom by article 2(1) of the Windsor Framework relates to rights, safeguards or equality of opportunity "as set out in" the RSEO chapter. It is therefore necessary to consider whether, having regard to the wording

and to the purpose and nature of the RSEO chapter and of article 2(1) of the Windsor Framework, those provisions read together impose a clear and precise obligation which satisfies the test for direct effect.

114. It is clear that the particular provisions of the RSEO chapter on which the applicants rely, when read in conjunction with article 2(1) of the Windsor Framework, cannot have direct effect. The applicants rely in this regard on three matters in the RSEO chapter. First, they point to the parties' affirmation of their commitment to "the civil rights … of everyone in the community" in paragraph 1. Secondly, they rely on the statement in paragraph 11 that the participants believe that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation. Thirdly, they rely on the recognition in paragraph 12 that victims have a right to remember as well as to contribute to a changed society. These provisions are expressed at a high level of generality. The reference to "civil rights" in paragraph 1 is accompanied by broad references to "mutual respect" and "religious liberties". While paragraphs 11 and 12 refer respectively to the suffering of the victims of violence and to their right to remember and to contribute to a changed society, such language is far too general to give rise to any directly enforceable rights in relation to inquests, civil proceedings or prosecutions. We note that certain other provisions of the Belfast Agreement, such as the draft clauses for incorporation in legislation on constitutional issues, are, by contrast, drafted with a high degree of specificity.

115. Indeed, Mr Larkin KC on behalf of the applicants accepts that these express provisions of the RSEO chapter do not meet the *Demirel* test for direct effect. However, he maintains that the provisions of the RSEO chapter do not need to do so. He submits that the obligation under article 2(1) of the Windsor Framework to "ensure that no diminution of rights, safeguards or equality of opportunity … results" is sufficient to meet the test for direct effect without recourse to the text of the RSEO chapter itself. He nevertheless accepts, with regard to breach of the obligation, that it is only rights which are within the ambit of the RSEO chapter and which are underpinned by EU law which are protected by article 2(1) of the Windsor Framework. Rights within the ambit of the RSEO chapter which are not underpinned by EU law (such as rights which are implemented in domestic law under the Human Rights Act or the Northern Ireland Act 1998) fall outside the scope of article 2(1). This is because only those rights underpinned by EU law can be said to have been diminished as a result of the United Kingdom's withdrawal from the EU. He describes the RSEO chapter as a container and maintains that the rights in the RSEO chapter underpinned by EU Law on 31 December 2020 fill that container. In his submission, the need to refer to the language of the RSEO chapter to identify the rights which are subject to the non-diminution obligation does not arise until the second stage, at which the court is considering breach of the obligation.

116. This approach does not accord with the language of article 2(1) of the Windsor Framework. In considering whether article 2(1) is capable of having direct effect it is necessary to focus on "rights, safeguards or equality of opportunity, as set out in [the

RSEO chapter]". It is necessary to identify a clear and precise obligation in EU law by reference to the RSEO chapter. It is only in this way that the obligation not to diminish rights, safeguards or equality of opportunity acquires any content.

117. Mr Straw KC on behalf of the Human Rights Commission submits that article 2(1) of the Windsor Framework satisfies the test for direct effect as it lays down a precise obligation of result: that the United Kingdom's withdrawal from the EU will not result in a diminution of rights, safeguards or equality of opportunity as set out in the RSEO chapter. He draws a distinction between the obligation of result (no diminution) and the subject matter of that obligation (rights, safeguards or equality of opportunity as set out in the RSEO chapter). In his submission, it is unnecessary to determine whether the subject matter of the obligation is itself clear and precise. We are unable to accept that submission. For the reasons given above, we consider it necessary to read article 2(1) of the Windsor Framework in conjunction with the RSEO chapter in order to identify a clear and precise obligation which satisfies the test for direct effect.

118. The fact that the particular provisions of paragraphs 1, 11 and 12 of the RSEO chapter on which the applicants rely do not themselves have direct effect does not mean, however, that article 2(1) of the Windsor Framework and the RSEO chapter in conjunction are incapable of direct effect in any circumstances. In this regard it should be noted that the obligation in article 2(1) not to diminish rights, safeguards or equality of opportunity as set out in the RSEO chapter includes specific reference to the provisions of EU law listed in Annex 1. The six EU Directives listed in Annex 1 all relate to the prohibition of discrimination. Before us, it was common ground between the Secretary of State and the applicants that article 2(1) might operate in conjunction with a directly effective provision of one of the Annex 1 Directives so as to give rise to a directly effective obligation not to diminish such a right. We agree. However, the Directives in Annex 1 have no application in the present case and are not relied on by the applicants. We also consider that article 2(1) may be capable of having direct effect in conjunction with other EU instruments falling within the ambit of the rights listed with bullet points in paragraph 1 of the RSEO chapter, or within the ambit of paragraphs 11 or 12, if the *Demirel* requirements are satisfied in respect of the obligation imposed. Both the Secretary of State and the applicants accepted as much before us, at least in relation to paragraph 1.

119. In this regard we note that the RSEO chapter is one section of an instrument, the Belfast Agreement, aimed at establishing peace in Northern Ireland after decades of sectarianism and civil conflict. Paragraph 1 speaks at a high level of generality of civil rights and religious liberties against the background of what, in 1998, was a recent history of communal conflict. The rights listed with bullet points are all concerned with ending sectarian conflict. These include freedom of political thought, freedom of religion, the right to pursue national and political aspirations, the right to seek constitutional change by peaceful and legitimate means, equal opportunities and freedom from sectarian harassment. The applicants have not sought to rely on any provision of EU law falling

within the scope of the rights listed in paragraph 1 of the RSEO chapter. They are all clearly inapplicable to the matters in issue in these proceedings. We consider at paras 130–137 below the position in relation to paragraphs 11 and 12 of the RSEO chapter.

120. The final words of article 2(1) of the Windsor Framework impose an obligation to "implement this paragraph through dedicated mechanisms". In our view this does not present an obstacle to article 2(1) having direct effect in circumstances where the *Demirel* conditions would otherwise be satisfied. These words are not a condition for the application of the provision. The mechanisms which were implemented include amendments made by the European Union (Withdrawal Agreement) Act 2020 to the Northern Ireland Act 1998. The new section 78C empowers the Human Rights Commission and the Equality Commission to bring judicial review proceedings in respect of an alleged breach or potential future breach of article 2(1) of the Windsor Framework or to intervene in such proceedings. The new section 78D empowers those Commissions to assist persons who have brought proceedings in respect of an alleged breach or potential future breach of article 2(1) of the Windsor Framework. The provisions in section 78C and 78D are evidence of the view of Parliament that article 2(1) is capable of giving rise to a directly enforceable right in certain circumstances.

121. Before leaving the issue of direct effect, it is necessary to say something about the reliance placed by the applicants on subsequent practice as an aid to interpretation of article 2(1) of the Windsor Framework. The applicants rely on article 31(3)(b) of the Vienna Convention on the Law of Treaties 1969 ("the Vienna Convention 1969") which provides in respect of the general rule of interpretation:

> "(3) There shall be taken into account, together with the context: …
>
> …(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; …"

122. The United Kingdom is a party to the Vienna Convention 1969 and its provisions on interpretation are in any event considered to reflect customary international law (*Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, 46, para 64). International tribunals have often referred to such subsequent practice as a means of interpretation. (See Jennings and Watts, *Oppenheim's International Law: Vol I Peace*, 9th ed (2008), para 632; James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (2019), p 368). For present purposes we are willing to assume that this rule of customary international law applies to the interpretation of the Withdrawal Agreement and the Windsor Framework, which constitute an agreement between a State and an international organization. (We note that in any event an identical provision appears in

article 31(3)(b) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, which is not yet in force.)

123. The applicants rely on the following matters which they maintain constitute subsequent practice.

(1) The amendments to the Northern Ireland Act 1998 introducing sections 78C and 78D. These amendments have been considered above where we concluded that they constituted part of the mechanisms by which Parliament implemented article 2(1) of the Windsor Framework and that they indicate a legislative intention that that provision is intended to have direct effect in at least some circumstances. It is not necessary to consider whether these amendments are subsequent practice within article 31(3)(b) of the Vienna Convention 1969.

(2) The amendment to the Northern Ireland Act introducing section 6(2)(ca). This amendment limits the legislative competence of the Northern Ireland Assembly insofar as a provision of an Act is incompatible with article 2(1) of the Windsor Framework. However, this legislative amendment is a unilateral act of one party to the Withdrawal Agreement and Windsor Framework and cannot, without more, amount to subsequent practice in the application of the treaty which establishes the agreement of the parties.

(3) A document entitled "UK Government commitment to 'no diminution of rights, safeguards and equality of opportunity' in Northern Ireland: What does it mean and how will it be implemented?" ("the Explainer"). This document was published in August 2020 by the Northern Ireland Office on behalf of the United Kingdom Government. It is a unilateral announcement of the views of one party to the Withdrawal Agreement and Windsor Framework. Notwithstanding the further written submissions of Professor McCrudden on behalf of the Equality Commission, the Explainer cannot be considered to be subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

(4) The same is true of the letter dated 26 February 2020 from the Mr Robin Walker MP, Minister of State for Northern Ireland, to Professor Christopher McCrudden, in which the Minister sets out the position of the United Kingdom Government on various issues and which includes a statement that:

> "We consider that article 2(1) of the Protocol will have direct effect and that individuals (not just the Northern Ireland Human Rights Commission and the Equality Commission for Northern

> Ireland) will therefore be able to rely directly on this article before domestic courts. This includes in proceedings against the UK Government. Ultimately, however, the direct effect of individual provisions of the Withdrawal Agreement will be a matter for the courts."

(5) This again is a unilateral statement of opinion by one party to the Withdrawal Agreement and Windsor Framework as to their effect.

(6) The applicants also rely on a written answer in Parliament by Lord Duncan of Springbank, Northern Ireland Office Minister, on 28 January 2020 that "[t]he Government also considers that article 2(1) of the Protocol is capable of direct effect and that individuals will therefore be able to rely directly on this article before the domestic courts. Individuals will be able to bring proceedings independently …" Once again, this is a unilateral statement of opinion by one party to the Withdrawal Agreement and Windsor Framework as to their effect. As indicated above, however, we would accept that article 2(1) may be capable of having direct effect in conjunction with other EU instruments falling within the ambit of the matters identified in the examples listed in paragraph 1 of the RSEO chapter, if the *Demirel* requirements are satisfied in respect of the obligation imposed.

124. In any event, subsequent practice can only be an aid to interpretation, ie to establish the meaning of the treaty provisions. The essential question here is not one of interpretation but one of the effect of the relevant provision, ie whether it has direct effect. Article 4 of the Withdrawal Agreement and section 7A of the 2018 Act make clear that the question of direct effect is governed by EU law. In particular, article 4 of the Withdrawal Agreement provides that persons shall be able to rely directly on its provisions "which meet the conditions for direct effect under Union law". It is therefore only if it satisfies the requirements for direct effect in EU law that a provision of the Windsor Framework can be relied upon before a domestic court. That cannot be changed by practice establishing the agreement of the parties as to its interpretation.

125. While the provisions of paragraphs 1, 11, and 12 of the RSEO chapter do not themselves have direct effect, article 2(1) of the Windsor Framework may be capable of having direct effect in conjunction with other EU instruments falling within the ambit of the RSEO chapter if the *Demirel* requirements are satisfied in respect of the obligation imposed. The particular EU instrument relied on by the applicants is the Victims Directive.

(b) Stage 2: Has there been a breach of article 2(1)?

126. If article 2(1) has direct effect in the circumstances with which this appeal is concerned, the question then arises whether there has been a breach of article 2(1).

127. The issues which arise when determining whether there has been a breach of article 2(1) have been formulated in different ways. The Court of Appeal in the present proceedings applied the six-stage test adopted from *SPUC Pro-life Ltd v Secretary of State for Northern Ireland* at para 54, set out at para 69 above.

128. A three-stage test, proposed by the Secretary of State, essentially covers the same ground and simplifies the analysis. It asks:

> (1) Is a right, safeguard or equality of opportunity that falls within the RSEO chapter of the Belfast Agreement engaged?
>
> (2) If so, did that right, safeguard or equality of opportunity have legal effect in Northern Ireland on 31 December 2020 and was it underpinned by EU law?
>
> (3) Was there a diminution of that right, safeguard or equality of opportunity as a result of the United Kingdom's withdrawal from the EU?

As it is not material to the outcome of the appeal which approach is followed, we will apply the three-fold test.

129. In order to satisfy that test, the applicants rely on rights under articles 11 and 16 of the Victims Directive. These provide:

> "Article 11
>
> Rights in the event of a decision not to prosecute
>
> 1. Member states shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.

> 2. Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, member states shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
>
> 3. Member states shall ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.

…

Article 16

Right to decision on compensation from the offender in the course of criminal proceedings

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

130. In relation to the first question posed by the three-fold test—whether a right, safeguard or equality of opportunity that falls within the RSEO chapter of the Belfast Agreement is engaged—the applicants maintain that the rights of victims under the Victims Directive on which they rely, namely the right to a review of a decision not to prosecute (article 11) and the right to a decision during criminal proceedings on payment of compensation by an offender (article 16), fall within the ambit of the RSEO chapter in two ways. First, they are said to fall within the ambit of the RSEO chapter because of the reference to "the civil rights … of everyone in the community" in paragraph 1 of the RSEO chapter. Secondly, they are said to fall within the ambit of the RSEO chapter

because of the reference to "the suffering of the victims of violence" and the recognition that "victims have a right to remember as well as to contribute to a changed society" in paragraphs 11 and 12 of the RSEO chapter respectively.

131. We are unable to accept this submission in relation to paragraph 1 of the RSEO chapter. In the first place, the provisions of the Victims Directive relied upon are not concerned with civil rights in the sense in which that term is employed in the first sentence of paragraph 1, where it appears to refer at a general level to civil and political rights, of which the rights which are then listed ("in particular") are specific examples. Equally, although this was not argued on behalf of the applicants, articles 11 and 16 of the Victims Directive are not within the ambit of any of the specific matters listed in paragraph 1 of the RSEO chapter, which describe at a high level of generality the civil rights which are relevant to ending the sectarian conflict in Northern Ireland.

132. Nor are they concerned with the subject matter of paragraph 12 of the RSEO chapter, which refers to victims' "right to remember", to "the development of special community-based initiatives" to address the difficulties experienced by "young people from areas affected by the Troubles", and to "the provision of services that are supportive and sensitive to the needs of victims … channelled through both statutory and community-based voluntary organisations".

133. Whether they are concerned with the subject matter of paragraph 11 of the RSEO chapter is a less straightforward question. That paragraph refers to the participants' belief "that it is essential to acknowledge and address the suffering of the victims of violence", and states that the participants "look forward to the results of the work of the Northern Ireland Victims Commission". Article 11 of the Victims Directive is concerned with the exercise of prosecutorial discretion in individual cases. Article 16 is concerned with the power to make an award of compensation when a prosecution is brought in an individual case. Paragraph 11 of the RSEO chapter is expressed in such broad language—which is part of the reason why, as we have explained, it cannot in itself be regarded as having direct effect—that it might be argued that it is capable of embracing the prosecution of offenders and the award of compensation, on the basis that these may be ways of addressing the suffering of victims of violence. However, it is unnecessary to express a concluded view on that question, in the light of the answers to the remaining questions posed in para 128 above, to which we turn next.

134. It is convenient to address the third question before the second. Under the third question the applicants must establish that the 2023 Act led to a diminution of the rights conferred by articles 11 and 16 of the Victims Directive, and that the diminution was a result of the United Kingdom's withdrawal from the EU. Their case is that the 2023 Act, in so far as it prohibits certain prosecutions, prevents a review of a decision that there will be no prosecution and prevents awards of compensation within such criminal proceedings. Furthermore, the applicants submit that, had the United Kingdom remained

in the EU, articles 11 and 16 of the Victims Directive would have had primacy over the 2023 Act. Accordingly, they submit, the fact that an individual can no longer rely on those directly effective rights to disapply primary legislation amounts to a diminution of rights resulting from withdrawal.

135. The first issue here is whether articles 11 and 16 of the Victims Directive can be read as precluding national legislation regulating when and in what circumstances prosecutions may be brought. It is clear that they cannot. Articles 11 and 16 of the Victims Directive are concerned with the conduct of actual or potential prosecutions in individual cases and with the exercise of prosecutorial discretion in relation to such proceedings. (See, generally, the observations of Rafferty LJ in *R (AC) v Director of Public Prosecutions* [2018] EWCA Civ 2092; [2019] 1 WLR 917). The Victims Directive does not address and does not seek to regulate broader questions of policy as to when prosecutions should be pursued, such as a national policy on immunity for the purpose of achieving reconciliation following conflict. As the Secretary of State points out, there are many situations in which, as a matter of policy, it may properly be considered that it is inappropriate to bring or pursue prosecutions. The Victims Directive does not attempt to regulate such matters. We draw attention to the following matters in particular:

(1) Recital 26 provides that victims should be provided with sufficiently detailed information "to enable them to make informed decisions about their participation in proceedings" and that "information allowing the victim to know about the current status of any proceedings is particularly important". This is said to be "equally relevant for information to enable a victim to decide whether to request a review of a decision not to prosecute." This is clearly focussed on actual or potential prosecutions in individual cases.

(2) Recital 43 states that "[t]he right to a review of a decision not to prosecute should be understood as referring to decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers, but not to the decisions taken by courts." A decision by Parliament to grant immunity in a class of cases, such as appears in the 2023 Act, is not a decision "taken by a prosecutor" within the Victims Directive. Similarly, a decision by the ICRIR cannot engage the Victims Directive because the ICRIR is not a prosecutorial authority.

(3) Recital 43 also provides that in general "[a]ny review of a decision not to prosecute should be carried out by a different person or authority to that which made the original decision". Once again, this is focussed on an individual decision to prosecute or not, by a prosecutor exercising discretion.

(4) Article 1(1) provides that "[t]he purpose of this Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings". Its purpose is to secure the participatory rights of victims in individual prosecutions.

136. It follows, therefore, that the applicants are unable to establish that the 2023 Act led to a diminution of rights conferred by the Victims Directive which would have been impermissible had the United Kingdom not withdrawn from the EU.

137. So far as the second question is concerned, it is not in issue that the provisions of the Victims Directive are underpinned by EU law. However, in the light of the answer to the third question, it is not necessary to address the question whether articles 11 and 16 of the Victims Directive are capable of having direct effect in the narrower context of an actual or potential individual prosecution. It is clear that the Victims Directive is not the source of a right for all victims of crime to see perpetrators prosecuted.

(c) Stage 3: Is the court required to disapply the relevant provisions of the 2023 Act?

138. In the light of the conclusions drawn above, this question does not arise.

139. For the foregoing reasons, we allow the appeal of the Secretary of State in relation to the effect of Windsor Framework.

7. The Charter ground of appeal

140. The judge held that the "civil rights" referred to in the first sentence of paragraph 1 of the RSEO chapter of the Belfast Agreement (see para 109 above) encompassed a victim's rights under the Charter and specifically the right to human dignity (article 1), the right to life (article 2), the right to prohibition of torture and inhuman or degrading treatment or punishment (article 4), and the right to an effective remedy and to a fair trial (article 47). He further held that the rights of victims are within the competence of the EU and are underpinned by EU law in the form of articles 1, 2, 4, and 47 of the Charter and that these rights had been given effect in Northern Ireland on or before 31 December 2020. He concluded at para 586 that since there has been a breach of articles 2, 3, and 6 of the Convention, there has necessarily been "a diminution in enjoyment of the rights under articles 2, 4 and 47(2) of the Charter" (but not article 1 of the Charter as there was no express protection of this right under the Convention and there was no "universally accepted legal definition of human dignity" or a "clear, exacting standard of how [article 1 of the Charter] may be applied in this context" (para 602)). Had the United Kingdom remained in the EU, it could not have acted incompatibly with the Charter and so the offending provisions should be disapplied (paras 612–613). Section 8 (dealing with

admissibility of evidence in civil proceedings) and section 43(1) (barring the continuation of civil proceedings brought on or after a certain day) of the 2023 Act were specifically disapplied on this basis (see the order of the High Court dated 28 February 2024: declarations (iv) and (vi)).

141. The Court of Appeal overturned the judge's decision that the Charter was intended to operate on a freestanding basis and reversed the disapplication of sections 8 and 43(1) of the 2023 Act: see para 96 above. It held at paras 137–139 that whilst the Victims Directive must be interpreted in accordance with the Charter, the Convention rights do not have an EU law underpinning and the judge was wrong to elide any breach of the Convention within an EU competence with a breach of the Charter. The Charter does not provide freestanding justiciable rights: it is an aid to the interpretation of relevant EU law provisions. Article 51 of the Charter, dealing with its field of application, requires member states to be "implementing Union law" and thus needs an "anchor" in a provision which is being implemented for any rights under the Charter to be applicable. This is not satisfied simply because an (over-arching) EU competence may be engaged. Outside of implementing the Victims Directive, the Court of Appeal held that another "anchoring" EU measure would be required for the Charter to apply.

142. The applicants cross-appeal against the Court of Appeal's decision. They contend that the Court of Appeal's decision is wrong for three main reasons, as follows:

> (1) The purpose of article 52(3) of the Charter is to ensure consistency between the Charter and the Convention. Each of articles 2, 4, and 47 of the Charter corresponds to article 2, 3, and 6 of the Convention. A breach of such Convention rights necessarily entails a breach of the Charter.
>
> (2) The Court of Appeal's interpretation of "implementing Union law" under article 51 of the Charter was artificially narrow. *Åklagaren v Åkerberg Fransson* (Case C-617/10) [2013] 2 CMLR 46 ("*Fransson*") endorses a wider interpretation of "implementing" in the fundamental human rights context: all that is required is that the national legislation is connected in part. The applicants submit that the CJEU went further in *CG v Department for Communities in Northern Ireland* (Case C-709/20) [2021] 1 WLR 5919 ("*CG*") and held at para 86 that the Charter is applicable in "all situations governed by EU law". As the Court of Appeal accepted at para 136, the EU has competence regarding the rights of victims (see article 82(2)(c) of the Treaty on the Functioning of the European Union—"TFEU"). Accordingly, it is submitted that the United Kingdom was acting within the scope of, and implementing, EU law through the Victim Charter (Justice Act (Northern Ireland) 2015) Order (Northern Ireland) 2015 (SI 2015/370) and the directly effective rights in the Victims Directive. In those circumstances, the Court of Appeal should have held that the Charter applies. Further, it makes little sense for the Court of Appeal to accept that the Charter applies to interpret national

legislation, but, at the same time, deny that it would also apply so as to disapply that national legislation insofar as it could not be interpreted compatibly with it.

(3) With regard to the point made by the Court of Appeal (at para 145) that "no party was able to satisfactorily explain why, if the applicants' analysis was correct, disapplication of primary Acts of the Westminster Parliament had not occurred much more frequently during the United Kingdom's membership of the EU where there had been a finding of Convention incompatibility which would or could be mirrored in breach of a [Charter] right", the applicants contend that the fact such challenges have not been made before cannot undermine the application of the Charter in Convention contexts: there are many reasons why such a claim might not have been brought.

143. The cross-appeal is supported by submissions from the Human Rights Commission and the Equality Commission.

144. We would dismiss the applicants' cross-appeal.

145. Considering first various contextual matters, the retention in domestic law of the Charter was specifically excluded by section 5(4) of the 2018 Act, subject to relevant separation agreement law. However, the effect of the applicants' argument that freestanding reliance on Charter rights is permitted would be to significantly expand the application of the Charter. As the Secretary of State pointed out, the applicants' case means that:

> "…the limited language of article 2(1) [of the Windsor Framework]'s reference to the diminution of rights has indirectly [led] via a reading into the RSEO chapter of the [Belfast Agreement] of the entirety of the [Charter] (which did not exist at the time), a general and free-standing source of civil, political, economic and social rights accompanied by the most powerful remedial consequences known to domestic law (namely the disapplication of primary legislation of the sovereign Parliament)".

This would surely require the clearest possible statutory language.

146. Another relevant contextual matter is that the terms of the Windsor Framework are not EU law. They create a route by which particular parts of EU law continue to take effect in Northern Ireland if they are "provisions of Union Law made applicable" by the Withdrawal Agreement and if they "meet the conditions for direct effect under Union

law" (article 4(1)). But the form of that law which applies in Northern Ireland is not that which applies in member states; Northern Ireland is not a member state.

147. A further relevant contextual matter is that paragraph 2 of the RSEO chapter addressed the issue of human rights by requiring that the Convention be incorporated in the law of Northern Ireland:

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

That was achieved through the enactment in 1998, and commencement in 2000, of the Human Rights Act and its application to Northern Ireland. There has been no diminution of those (non-EU law) rights.

148. Turning to the language of the Windsor Framework, as discussed above, article 2(1) applies to rights "as set out" in the RSEO chapter. For the Charter to apply on a freestanding basis it is therefore necessary to identify how the rights mentioned in the Charter are so "set out". The only provision in the RSEO chapter which could arguably "set out" Charter rights in this appeal is the reference to "civil rights" in paragraph 1. As pointed out above, this is expressed at a high level of generality and is accompanied by broad references to "mutual respect" and "religious liberties". This very generalised phrase is not apt to set out specific, enforceable legal rights, including such rights as are set out in the Charter.

149. Considering next the language of article 51(1) of the Charter, which governs its scope, it provides:

> 1. "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers...
>
> 2. The Charter does not … establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

150. The Charter accordingly only applies to member states when "they are implementing Union law". As the Court of Appeal held, this requires the Charter to be "anchored" in a provision of EU law which is being implemented. This is borne out by the CJEU case law.

151. The Court of Appeal referred at para 138 to the decision of the Grand Chamber of the CJEU in *Fransson*, in which it said at para 19 that:

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

152. In Case C-609/17 *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry* (Joined cases C-609/17 and C-610/17) [2020] ICR 336 the CJEU stated (at para 53):

> "Where the provisions of EU law in the area concerned do not *govern* an aspect of a given situation and do not *impose any specific obligation* on the member states with regard thereto, the national rule enacted by a member state as regards that aspect falls outside the scope of the Charter and the situation concerned cannot be assessed in the light of the provisions of the Charter: *Hernández*, para 35; *Miravitlles Ciurana v Contimark SA* (Case C-243/16) EU:C:2017:969, para 34 and *Consorzio Italian Management v Rete Ferroviaria Italiana SpA* (Case C- 152/17) EU:C:2018:264, paras 34 and 35". (Emphasis added.)

153. This is consistent with the decision of this court in *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73; [2019] AC 845. In that case Lord Carnwath summarised the approach established by CJEU case law as follows (at para 28):

> "The test is not whether the claimant is personally within the scope of EU law in some way. The issue must be judged by reference to the test set by article 51, which is directed to 'implementation' of EU law. Once it is determined that EU law does not require more…than practical support… that also sets

> the limits of what is involved in its implementation. Although it is open to the state to provide more generous support ('gold-plating', as it is sometimes called), that is the exercise of a choice under national law, not EU law."

154. We do not consider that the case upon which the applicants place particular reliance, *CG*, affects or alters this settled case law. That case concerned a dual Croatian and Netherlands national, CG, who had resided in Northern Ireland since 2018. In 2020, CG was granted "Pre-Settled Status" under the United Kingdom Government's EU Settlement Scheme, which gave her a temporary right of residence. CG applied for Universal Credit but this was denied by the Department for Communities in Northern Ireland on the basis that she did not meet the residence requirements of the relevant regulations. What is relevant from *CG* for present purposes, and what the applicants seek to rely on, is the generalised statement by the Grand Chamber that the Charter is applicable "in all situations governed by EU law" (para 86). However, such a statement needs to be analysed in its proper context. In the preceding paragraphs, it is clear that the Grand Chamber was emphasising the presence and importance of two "fundamental" EU law factors which were relevant to the Charter's applicability in the circumstances. First, the fact that CG was a citizen of the Union and that this status was, according to its own case law, "destined to be the fundamental status of nationals of the member states" (para 62). Second, they considered that a Union citizen who moved to another member state had exercised their "fundamental freedom" of free movement within member states, a right harmonised across the EU, with the "result that his or her situation falls within the scope of EU law" (para 84). It is in this context, one in which the Grand Chamber already considered the situation to be within the scope of EU law, that the Charter's scope of application was described.

155. Moreover, when applying its interpretation of article 51(1) of the Charter, the Grand Chamber in *CG* expressly identified the relevant "anchor" implementing EU law. After noting that the United Kingdom had provided a residence right in circumstances not required by the relevant Directive (Directive 2004/38), they considered that this action was a *recognition* of that Union citizen's free movement rights under article 21(1) TFEU and, consequently, an implementation of an EU law provision (para 88):

> "88. It follows that, *where they grant that right* in circumstances such as those in the main proceedings, *the authorities of the host Member State implement the provisions of the FEU Treaty on Union citizenship*, which, as pointed out in para 62 above, is destined to be the fundamental status of nationals of the Member States, and that *they are accordingly obliged to comply with the provisions of the Charter*." (Emphasis added.)

156. Rather than conflict with the Court of Appeal's analysis or Lord Carnwath's summary, *CG* can be explained as an application of the "settled case law" on the Charter's scope to the specific facts, involving both Union citizenship and EU free movement rights and their implementation.

157. In the present case, article 2(1) of the Windsor Framework would only give rise to a situation "governed by EU law" in so far as the RSEO chapter "set out" directly effective EU law rights. For reasons given above, paras 1, 11, and 12 of the RSEO chapter do not set out any relevant directly effective rights, nor do they set out Charter rights. There was no "implementation" of EU law so as to allow for the application of the Charter. We agree with the Court of Appeal that it is not sufficient that an EU competence may be engaged and that the Charter has no application unless it is "anchored" in a provision of EU law which is being implemented. It is not so anchored in this case.

158. Finally, the Equality Commission relied upon the background to the Explainer document as supporting the applicants' cross-appeal. They contended that this showed that the United Kingdom Government contemplated that a breach of a Charter right could breach article 2(1) of the Windsor Framework independently. For reasons set out above, this is not an admissible aid to interpretation under article 31(3)(b) of the Vienna Convention 1969. In any event, we do not consider that it supports the applicants' case. The references to reliance on Charter rights there made were in the context of other EU law rights. So, for example, in a proposal by the UK Government dated 18 September 2018 concerning the proposed remit of the "dedicated mechanism" referred to in article 2(1) of the Windsor Framework and discussed at para 120 above, it is stated that it is only where the "rights and principles underpinning the Charter exist elsewhere in directly applicable EU law, or EU law which has been implemented in domestic law, or in retained EU case law" that Charter rights may be relied upon. Further, in a letter of 13 November 2018 to the Equality Commission and the Human Rights Commission, the Northern Ireland Office of the United Kingdom Government stated that "[the Charter] will not form any part of the 'no diminution' commitment directly".

159. For all these reasons we dismiss the applicants' cross-appeal.

8. The ICRIR: Next of kin involvement and disclosure ground of appeal

(a) An ab ante challenge and the applicable test

160. The applicants argue that in ICRIR reviews: (a) the absence of provision of legal aid for the next of kin; (b) the absence of provision for questioning of witnesses by the next of kin; and (c) the provisions in the 2023 Act as to the disclosure of documents and information by the ICRIR, mean that their rights under the article 2/3 investigative obligation will be breached as they will not be involved "to the extent necessary to

safeguard [their] legitimate interests" (see para 80 above). They also argue that the provisions in the 2023 Act as to disclosure of documents breach their right under the article 2/3 investigative obligation to a procedure before an independent tribunal. These arguments are advanced in these proceedings which were commenced before: (a) the 2023 Act was passed; (b) the ICRIR had been established; (c) the Chief Commissioner or any Commissioner had been appointed; (d) the ICRIR had devised its general procedures; and (e) the ICRIR had an opportunity to adapt its general procedures to the facts and circumstances of a particular review. In short, these arguments are advanced not by reference to a review carried out by the ICRIR in an individual case where the effectiveness of the investigation can be assessed. Rather, it is a challenge to the legislative scheme's compliance with the article 2/3 investigative obligation overall and in the abstract.

161. For such an ab ante (ie prospective) challenge to succeed the applicants must overcome a high hurdle. The investigative obligation contains several elements. A failure to comply with one or more elements, taken individually or cumulatively, will not necessarily mean that there has not been an effective investigation: see para 188 below. Therefore, it is not sufficient for the applicants to establish that the legislative scheme might breach one or more elements of an effective investigation in particular cases. Nor is it sufficient for them to establish that it might not provide an effective investigation in particular cases. Rather, they must establish that the legislative scheme will give rise to a failure to comply with one or more elements so that there will be no effective investigation "in all or almost all cases": see *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68; [2015] 1 WLR 5055, per Baroness Hale DPSC, paras 2 and 60, Lord Hodge JSC, para 69, *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 SC (UKSC) 29, para 88, *Safe Access Zones*, paras 12–14 and *In re JR123* [2025] UKSC 8; [2025] AC 1256, paras 87–90.

162. The context in this appeal for the application of the test of "all or almost all cases" is the number and wide variety of potential cases given that: (a) the ICRIR may carry out reviews of Troubles-related deaths dating back to 1 January 1966; (b) there are some 1,200 Troubles-related deaths that remain unsolved; and (c) even in relation to Troubles-related deaths which have been solved issues might yet arise which justify the ICRIR in carrying out a review. To overcome the high hurdle, the applicants must establish a breach of the article 2/3 investigative obligation in "all or almost all" of those cases. Doing so necessarily involves, for instance, excluding from the cohort of such cases those where: (a) the facts surrounding a deprivation of life are clear and undisputed so that the subsequent inquisitorial examination may legitimately be reduced to a minimum formality; (b) the circumstances may be such that involvement of the next of kin may be minimal; (c) the documents and information released by bodies such as the Chief Constable of the Police Service are irrelevant or outside the scope of the review so that there is no need to disclose them to the next of kin; and (d) cases in which the ICRIR devised and put in place new arrangements as reviews were carried out.

(b) The legislative scheme in the 2023 Act

163. The functions of the ICRIR include carrying out reviews of: (a) deaths that were caused by conduct forming part of the Troubles (sections 2(5)(a), 9, and 11–13); and (b) other harmful conduct forming part of the Troubles (sections 2(5)(b) and 10–13). Torture is included in "other harmful conduct", as it is defined as "any conduct … which caused a person to suffer physical or mental harm of any kind (excluding death)": see section 1(4).

164. The functions of the ICRIR also include: (a) to produce reports ("final reports") on the findings of each of the reviews of deaths and other harmful conduct (sections 2(5)(c) and sections 15–18); (b) to determine whether to grant persons immunity from prosecution for serious or connected Troubles-related offences other than Troubles-related sexual offences (sections 2(5)(d) and 19–21); (c) to refer deaths that were caused by conduct forming part of the Troubles, and other harmful conduct forming part of the Troubles, to prosecutors (sections 2(5)(e) and 25); and (d) to produce a record (the "historical record") of deaths that were caused by conduct forming part of the Troubles (sections 2(5)(f), 28 and 29).

165. To carry out reviews, to produce reports, to determine whether to grant immunity from prosecution, to determine whether to refer deaths or other harmful conduct to prosecutors and to produce a record of deaths, the ICRIR is to be led by a person who holds or has held high judicial office (Schedule 1 para 8(4)(a)), and it is given wide powers, including investigatory powers. In relation to the review function and the immunity function, the ICRIR is also given complete access to information, documents and other material held by a comprehensive range of state bodies.

166. In the exercise of each of its functions the ICRIR is also placed under several duties. Its powers and duties can be summarised as follows.

167. The ICRIR has the power to employ persons to be officers of the ICRIR. In doing so it must ensure that (as far as it is practicable) the officers of the ICRIR include persons who have experience of conducting criminal investigations: section 3.

168. As we have stated in para 10 above the Commissioner for Investigations is (by virtue of section 6(1)) designated as a person having the powers and privileges of a constable. The Commissioner for Investigations may designate any other ICRIR officer as a person having the powers and privileges of a constable: section 6(2) and Schedule 2, para 2.

169. The Commissioner for Investigations is given wide powers to require the provision of information. For instance, by virtue of section 14(2) the Commissioner may by notice require a person to attend at a time and place stated in the notice (a) to provide information; (b) to produce any documents in the person's custody or under the person's control; (c) to produce any other thing in the person's custody or under the person's control for inspection, examination, or testing. If a person fails to do anything that the person is required to do by a notice, then a penalty may be imposed under Schedule 4. A person commits an offence if the person does anything that is intended to have the effect of (a) distorting or otherwise altering any evidence, document, or other thing that is produced or provided to the Commissioner in accordance with a notice under section 14, or (b) preventing any evidence, document, or other thing from being produced or provided to the Commissioner for Investigations in accordance with a notice under section 14: Schedule 4 paras 8 and 9. On conviction for such an offence in Northern Ireland the person may be imprisoned for up to six months: Schedule 4 para 11.

170. In relation to its review and immunity functions the ICRIR can request information, documents, and other material from a relevant authority, and the relevant authority must make the information, documents, and other material available to the ICRIR: section 5(1). Even if there is no request, a relevant authority may also make available to the ICRIR any information, documents, and 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 or the immunity function: section 5(2). The obligation to provide information, documents, and material on request and the discretion to do so even if there is no request is not the end of the matter. The relevant authority also has an obligation to provide such assistance to the ICRIR as is reasonable for the purposes of, or in connection with, the effective use of information, documents and other material: section 5(7). For instance, if documents were produced the relevant authority would be under a duty to assist the ICRIR in relation to the significance or meaning of the documents.

171. The extent of the ICRIR's power to obtain information, documents and other materials is demonstrated by the wide and comprehensive definition of a relevant authority. A relevant authority means the Chief Constable of the Police Service; the chief officer of a police force in Great Britain; the Police Ombudsman; the Director General of the Independent Office for Police Conduct; the Police Investigations and Review Commissioner; any Minister of the Crown; the Security Service; the Secret Intelligence Service; GCHQ; any other department of the United Kingdom government (including a non-ministerial department); a Northern Ireland department; the Scottish Ministers; or any of His Majesty's forces: section 60(1).

172. The ICRIR can obtain from a relevant authority information, documents, and other material and can obtain explanations from those authorities regardless as to whether there is a relevant aspect of the public interest which indicates that the information, documents, or other material should not be disclosed to the next of kin or placed in the public domain to protect national security. Furthermore, even if information, documents, or other

material may not be disclosed to the next of kin or placed in the public domain, they may be used by the ICRIR when carrying out its review and immunity functions and in carrying out a criminal investigation. The Court of Appeal correctly described this as an undoubted enhancement in comparison with the effect on the evidence at an inquest if a coroner upholds a PII certificate: see para 84 above.

173. The Commissioner for Investigations is given the power to decide whether a criminal investigation is to form part of a review: section 13(7). If the Commissioner for Investigations considers there is evidence that relevant conduct constitutes an offence under the law of Northern Ireland by an individual whose identity is known to the Commissioner, the Commissioner (a) may refer the conduct to the DPP for Northern Ireland, and (b) if the conduct is referred, must notify that prosecutor of the offence concerned: section 25(2).

174. A duty is imposed on the Commissioner for Investigations in conducting reviews to comply with the obligations imposed by the Human Rights Act: section 13(1). It is appropriate at this stage to make several observations in relation to this duty. First, the duty applies in relation to reviews of, amongst other matters, deaths and torture. Secondly, the duty in relation to reviews concerning deaths or torture includes a duty to comply with the article 2/3 investigative obligation, so that there is a duty to undertake an effective investigation. Thirdly, an element of the article 2/3 investigative obligation requires the involvement of the next of kin or victim to the extent necessary to safeguard their legitimate interests. Therefore, the Commissioner for Investigations is under a duty to determine on a case-by-case basis the extent to which it is necessary to involve the next of kin and victims in a review and then to devise procedures to satisfy that duty. Fourthly, another element of the article 2/3 investigative obligation requires the ICRIR to have a degree of independence, to be assessed in all the circumstances of the specific case. Therefore, the Commissioner for Investigations is under a duty to determine on the facts of each particular case whether there is sufficient independence in a review, and, if not, to devise procedures to satisfy that duty. Fifthly, at the stage when these proceedings were commenced there was no evidence as to how the Commissioner for Investigations would comply with the duty in section 13(1). The ICRIR had not been established. There was no Commissioner for Investigations. There had been no reviews. By the time that the proceedings were heard in the High Court, the nascent ICRIR was in the process of devising draft policies which it intended to develop in close dialogue with a range of groups, including victims and survivors of the Troubles: see para 22 above. Sixthly, there is no evidence, either in a particular case or generally, that the ICRIR was not intent on complying with the duty in section 13(1). Seventhly, if it did comply with the duty then there would be no breach of the article 2/3 investigative obligation in any case, let alone "in all or almost all cases".

175. A duty is imposed on the ICRIR in exercising its functions to "have regard to the general interests of persons affected by Troubles-related deaths and serious injuries": section 2(6). That duty is to be seen in the context that the principal objective of the ICRIR

in exercising its functions is to promote reconciliation: section 2(4). We note that an effective article 2/3 investigation would comply with the duty and the objective.

(c) The appropriate basis for determining whether there is a breach of the article 2/3 investigative obligation

176. An inquest is neither necessary nor necessarily sufficient to discharge the article 2/3 investigative obligation: see *Gribben v United Kingdom* (Application No 28864/18) (unreported) 17 February 2022 ("*Gribben*"), para 118.

177. The facts in *In re Dalton* [2023] UKSC 36; [2025] AC 235 ("*In re Dalton")* in this court, and in *Dalton v United Kingdom* (2025) 81 EHRR SE5 in the Strasbourg court, demonstrate that an inquest is not necessary to discharge the article 2/3 investigative obligation. In those cases there had been a wide ranging and thorough investigation by the independent Police Ombudsman into the deaths. During the course of that investigation documents had been gathered including intelligence from various sources, a public appeal had been made for witnesses, and witnesses had been interviewed: see *In re Dalton*, paras 63 and 78. The Police Ombudsman investigated the circumstances of the deaths in that case with considerable care and attention, and involved the families of the deceased. The Police Ombudsman reported its findings publicly and in considerable detail: see *In re Dalton*, para 194. In *Dalton v United Kingdom*, the Strasbourg court considered, at para 22, that if there were an article 2 duty to investigate, it had been satisfied by the Police Ombudsman investigation in conjunction with the ongoing civil proceedings against the police.

178. The coronial system in relation to legacy inquests in Northern Ireland has been beset by systemic delays. The systemic delays have been acknowledged by the Strasbourg court in *Gribben*, at para 119. In *Dalton v United Kingdom*, at para 27, the Strasbourg court observed that the inquest procedure in Northern Ireland has been unable to cope due to the large number of ongoing and pending legacy inquests.

179. The Court of Appeal in this case stated, and we agree, that the inquisitorial nature of legacy inquests has developed in Northern Ireland into an adversarial system with lawyers for the next of kin, funded by legal aid, who examine witnesses and to whom, subject to any PII certificate, potentially relevant documents and information are disclosed during the procedure. The adversarial nature of legacy inquests has been evident for decades. For instance, the Court of Appeal in *In re Jordan's Applications for Judicial Review* [2014] NICA 76; [2016] NI 116 commented at para 122 that legacy inquests have become "an adversarial battleground instead of a Coroner-led inquiry". The Court of Appeal in that case, giving judgment over a decade ago, stated (ibid) that:

> "The adversarial nature of the proceedings is evidenced by the fact that in the case of the death of Pearse Jordan alone there have been 24 judicial reviews, 14 appeals to the Court of Appeal, 2 hearings in the House of Lords and one hearing before the European Court of Human Rights. The issues in dispute have included questions of scope, relevance and disclosure of materials. If the existing legacy inquests are to be brought to a conclusion under the present system someone could easily be hearing some of these cases in 2040."

180. The solution in the 2023 Act is to replace the coronial system with a new inquisitorial system. In determining whether the legislative scheme in the 2023 Act breaches the article 2/3 investigative obligation in "all or almost all cases" it is essential to assess the scheme of the 2023 Act—replacing the coronial system with a new inquisitorial system—against the investigative obligation. The assessment is not against the previous scheme involving adversarial legacy inquests beset with systemic delays.

(d) Whether the ab ante test applies in the context of the article 2/3 investigative obligation and whether it is confined to a proportionality assessment

181. The Court of Appeal questioned, at para 236 (see para 86 above), whether the ab ante principles applied to the absolute rights in article 2 and 3 of the Convention "where no proportionality balance need be struck." However, the nature of the breach argued for in these proceedings is a lack of compliance with elements of the article 2/3 investigative obligation, so that the investigation would not be effective. The elements of the article 2/3 investigative obligation are not expressed in absolute terms. For instance, one element of an effective investigation is that there must be "a sufficient element of public scrutiny of the investigation or its results in order to secure accountability in practice", though "[t]he degree of public scrutiny that is required will vary from case to case" (*McQuillan*, para 109(v)). Similarly, the extent of the involvement required of the next of kin or victim in the procedure depends on the extent which is necessary to safeguard his or her legitimate interests (*McQuillan*, para 109(v)). Those aspects of the investigative obligation are highly fact dependent and must be dealt with on a case-by-case basis. We consider that the Court of Appeal incorrectly questioned the applicability of the ab ante principles based on the absolute nature of the substantive obligation not to kill and not to torture. The breach alleged by the applicants is a breach of procedural aspects of the article 2/3 investigative obligation which are not expressed in absolute terms.

(e) The temporal scope of the article 2/3 investigative obligation

182. The applicants assert that there will be a breach of the article 2/3 investigative obligation "in all or almost all" reviews into Troubles-related deaths and allegations of

torture to be carried out by the ICRIR. However, the article 2/3 investigative obligation does not apply in domestic law to deaths occurring 10 years, or in some circumstances 12 years, before 2 October 2000, the date upon which the Human Rights Act came into force, unless the Convention values test is met: see *In re Dalton*. As the ICRIR may review Troubles-related deaths occurring since 1 January 1966, there will be many reviews into deaths to which the article 2/3 investigative obligation does not apply in domestic law. If the ab ante test is applied to all reviews of deaths since 1 January 1966 the applicants are unable to establish a failure to comply in domestic law "in all or almost all cases". The test must be adjusted for the applicants to succeed, so that it is expressed as a failure to comply with the article 2/3 investigative obligation "in all or almost all cases" within the temporal scope of the Human Rights Act. For the reasons which we will give below the ab ante challenge fails to meet even that adjusted test.

(f) The essential parameters of the article 2/3 investigative obligation

183. Under the adjusted test the applicants assert that there will be a breach of the article 2/3 investigative obligation "in all or almost all" reviews into deaths and allegations of torture to be carried out by the ICRIR within the temporal scope of the Human Rights Act. Therefore, it is appropriate at this stage to set out various aspects of the investigative obligation.

184. There is implied into article 2 of the Convention an obligation on the state to conduct promptly some form of official investigation when an individual is killed by the use of force. A similar investigative obligation may arise under article 3 where there is a reasonable suspicion that a person has been subjected to torture or inhuman or degrading treatment.

185. The Grand Chamber of the Strasbourg court in *Tunç v Turkey* [2016] Inquest LR 1 ("*Tunç*") explained the reason why there should be an investigative obligation under article 2. It stated at para 169 that:

> "…the obligation to protect the right to life under article 2 of the Convention, read in conjunction with the state's general duty under article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be *some form of effective official investigation* when individuals have been killed as a result of the use of force." (Emphasis added.)

The Grand Chamber continued by stating at para 176 that "the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case." At paras 169–182 the Grand Chamber set

out specific requirements of the duty to investigate, but it also stated, at para 176, that "[i]t is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria."

186. At para 225 the Grand Chamber said that it considered:

> "… it appropriate to specify that compliance with the procedural requirement of article 2 is assessed on the basis of *several essential parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation. These elements are inter-related and each of them, taken separately, does not amount to an end in itself, as is the case in respect of the independence requirement of article 6. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues, including that of independence, must be assessed*." (Emphasis added.)

The Grand Chamber found "shortcomings" in the investigation conducted by the relevant national authorities, but held that there had been no infringement of article 2, because they were not "serious" or "decisive" (paras 189, 195), and it concluded in para 209 that there were "no such shortcomings as might call into question the overall adequacy and promptness of the investigation." In summary, the overall approach taken by the Strasbourg court was to assess the effectiveness of the investigation.

187. The Strasbourg court returned to the interrelated nature of the elements of an effective investigation in *Gribben*. It identified in summary form the essential parameters of the article 2 investigative obligation set out by the Grand Chamber in *Tunç*. It stated, at para 116, that:

> "In summary, compliance with the procedural requirement of article 2 is assessed on the basis of several essential parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation."

It added (ibid) that the elements of an effective investigation:

> "… are inter-related and each of them, taken separately, does not amount to an end in itself."

The court continued by stating that the elements:

> "… are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues must be assessed."

The court continued, at para 117, by stating that the Grand Chamber in *Tunç*:

> "… did not intend for the specific requirements of the duty to investigate to be considered in a piecemeal and incremental fashion. As the separate requirements … are not ends in themselves, compliance with the essential parameters should be considered jointly and not separately."

188. From *Tunç* and *Gribben* it may be noted that any weaknesses in relation to compliance with one or more of the essential parameters of the article 2/3 investigative obligation (taken either individually or cumulatively) are not determinative as to whether there has or has not been an effective investigation. Rather, the essential parameters should be considered jointly to determine whether all the relevant investigatory steps taken by the authorities fulfil the essential purpose of an article 2 investigation. Therefore, even if the applicants can establish that there would be a failure to comply with one or more elements of an effective investigation "in all or almost all cases", that would not be determinative of the issue as to whether they had established that there would not be an effective investigation in those cases.

189. It may also be noted from *Tunç* and *Gribben* that a determination of whether the next of kin are involved in ICRIR reviews to the extent necessary to safeguard his or her legitimate interests so as to secure an effective investigation will rarely be possible in a particular case, let alone "in all or almost all cases", until the investigation has been completed. That point was made in *McQuillan* in relation to the independence of the investigation. Lords Hodge, Lloyd-Jones, Sales and Leggatt, with whom all the other members of the Court agreed, stated at para 193 that "[t]he adequacy of the degree of independence falls to be assessed in the light of the circumstances of the specific case", and at para 196, citing paras 224 and 225 of the judgment in *Tunç*, that "the nature of the requirement of practical independence as analysed by the Strasbourg court is such that it will rarely be possible to determine whether an investigation will not be effective because of a lack of practical independence until it has been completed."

190. 190. Another well-established aspect of the article 2/3 investigative obligation is that the Convention provides minimum standards, not the best possible practice: see *Brecknell v United Kingdom* (2007) 46 EHRR 42 ("*Brecknell*"), para 70. Furthermore, it is appropriate to bear in mind "the difficulties involved in policing modern societies… and the operational choices which must be made in terms of priorities and resources", so that the positive obligations "must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities": see *Osman v United Kingdom* (1998) 29 EHRR 245, para 116, *Brecknell*, para 70, *Opuz v Turkey* (2009) 50 EHRR 28, para 129 and *Dalton v United Kingdom*, para 26.

191. A further well-established aspect of the article 2/3 investigative obligation is that the requirements of effectiveness and accessibility to the family may well be influenced by the passage of time since a death or since the events giving rise to a reasonable suspicion that a person has been subjected to torture or inhuman or degrading treatment. The Strasbourg court in *Gribben* stated, at para 126, that:

> "It is axiomatic that the greater the delay, the greater the difficulty the authorities will have in complying with the other essential parameters of an effective investigation since the lapse of time will inevitably be an obstacle to the location of witnesses and the ability of witnesses to recall events reliably (see *Brecknell v the United Kingdom*, para 71). Consequently, the Court has accepted that the extent to which the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny apply may well be influenced by the passage of such a considerable amount of time (ibid, para 72)."

We note that the passage of time, with consequent doubts as to what further elucidation of the facts will be achieved, is relevant to an assessment of the steps required of the ICRIR in undertaking an effective investigation. See also to the same effect *In re Dalton*, paras 194, 228 and 319, and *Dalton v United Kingdom,* para 27.

(g) The lack of provision of legal aid

192. The judge held that there is no provision in the 2023 Act (or in the Access to Justice (Northern Ireland) Order 2003 (SI 2003/435)) for legal aid to be made available to the next of kin or victims for the purposes of representation during a review by the ICRIR of a death or an allegation of torture. For several reasons the judge declined to make any order in relation to this complaint: see para 66 above. The Court of Appeal disagreed, and concluded that where ICRIR reviews replaced inquests, the lack of legal aid for representation meant that the next of kin were not involved to the extent necessary to

safeguard their legitimate interests: see para 82 above. The Court of Appeal qualified its conclusion by stating at para 221 that the lack of provision of legal aid for representation "militates against the necessary effectiveness requirements for the ICRIR *at present in conducting some investigations* and replacing inquests" (Emphasis added.)

193. We consider that the judge was correct not to read the judgment of the Strasbourg court in *Jordan* as implying that legal aid for representation is required for all article 2/3 investigations. Whether it is required and the extent to which it is required depend on the facts and context of the particular case. The context in *Jordan* was an article 2 investigation in the form of an adversarial inquest. In relation to the facts in that case and in the context of an adversarial inquest the Strasbourg court identified, at para 142, one of the shortcomings as including the absence of legal aid for the representation of the victim's family. In contrast to adversarial inquests, the scheme of the 2023 Act is inquisitorial. The ICRIR is not structured to carry out its processes as if there were a trial. Rather, the ICRIR employs experienced investigators with wide powers and is led by a Chief Commissioner with experience of high judicial office. Whether the provision of legal assistance is required for the next of kin in relation to such an inquisitorial process and the method and extent by which it is achieved will depend on the facts and context of the particular case.

194. The judge and the Court of Appeal disagreed as to whether legal aid was necessary for representation of the next of kin in relation to the inquisitorial procedures under the 2023 Act. The judge noted that the involvement of the next of kin and victims might be facilitated by lawyers involved in inquests being seconded to the ICRIR under section 3(2) of the 2023 Act. The Court of Appeal disagreed on the basis that this suggestion offends the principle that families should be able to choose their own lawyers and that they should be independent of the adjudicatory body: see para 220 of the Court of Appeal judgment.

195. However, in some cases it may be that: (a) sufficient assistance might be available to the next of kin under the Green Form Scheme for legal advice and assistance; (b) there would be no need for representation of the next of kin or victims in reviews; (c) if there were a need for representation, then the next of kin or victims might be content with lawyers who were seconded to the ICRIR; (d) the ICRIR could devise other policies and procedures which would satisfactorily address the involvement of the next of kin and victims either generally or in a particular case; and (e) even if there were a failure to comply with the element of next of kin involvement there was nevertheless an effective investigation, bearing in mind: (i) all the powers of the ICRIR to carry out an investigation (see paras 166–175 above), (ii) that the investigative obligations should not impose an impossible or disproportionate burden on the authorities (see para 190 above), and (iii) the impact of the passage of time on the ability to carry out an investigation (see para 191 above). In order to succeed in an ab ante challenge to the legislative scheme the applicants must exclude all those possible cases. It is plain that they cannot do so. Furthermore, whether the next of kin or victims are sufficiently involved in ICRIR reviews and whether

there has been an effective investigation will rarely be possible to determine in a particular case until the investigation has been completed: see para 189 above. This requirement is a strong indicator that a challenge in relation to the involvement of the next of kin or the effectiveness of an ICRIR review cannot be determined until the investigation has been completed.

196. The Court of Appeal arrived at its conclusion that the lack of provision of legal aid was incompatible with effective participation in ICRIR reviews by drawing on their collective experience of hearing legacy inquests in which legally aided lawyers represented the next of kin and were able to cross-examine witnesses: see para 82 above. We consider that the Court of Appeal fell into error treating the inquisitorial approach in the ICRIR as if it were equivalent to legacy inquests. The correct basis for assessment is the article 2/3 investigative obligation. There is no Strasbourg jurisprudence which requires an adversarial process with publicly funded lawyers representing the next of kin and victims who are able to cross-examine witnesses. The requirement is for an effective investigation, and the determination of whether there has been an effective investigation is rarely possible prior to the conclusion of the investigation.

197. Applying the test for an ab ante challenge, we consider that the judge was correct to decline to make any order in relation to the complaint that there was no provision of legal aid for representation of the next of kin and victims in ICRIR reviews. The applicants cannot establish that "in all or almost all cases" there will be a lack of compliance with the element of next of kin or victim involvement, and furthermore they cannot establish that if there is such a lack of compliance, this will result in there being an ineffective investigation. The Court of Appeal declined to take the approach of waiting and seeing what occurred on the facts of a particular case: see para 86 above. However, the effect of the lack of provision of legal aid for representation ought to have been decided on the facts of a particular case, and the decision ought to have been restricted to the facts of that case, unless the facts of that case demonstrated that the same result would occur "in all or almost all cases".

198. We conclude that the lack of provision of legal aid for representation of the next of kin and victims in ICRIR reviews does not justify the declaration made by the Court of Appeal in para 7(a) of its order dated 20 September 2024: see para 87 above.

(g) The lack of a provision permitting the examination of witnesses

199. For the purposes of this ab ante challenge to the legislative scheme in the 2023 Act, the applicants argue that absent an ability to question witnesses, they will not be involved in ICRIR reviews to the extent necessary to protect their legitimate interests. We observe that for this challenge to succeed they must establish that as a consequence the

review will not be effective "in all or almost all cases." The Court of Appeal dealt with this argument briefly: see para 83 above.

200. We reject the applicants' argument for several reasons. First, an inquisitorial system can satisfy the article 2/3 investigative obligation. For instance, Police Ombudsman investigations are inquisitorial, with the next of kin and victims being involved by way of interviews. Such an investigation may satisfy the article 2/3 investigative obligation even though there are no hearings and no cross-examination of witnesses: see *In re Dalton*, *Dalton v United Kingdom* and para 177 above.

201. Secondly, there is no Strasbourg jurisprudence which requires an adversarial system with lawyers representing the next of kin and victims being able to cross-examine witnesses.

202. Thirdly, the Commissioner for Investigations is under a duty to comply with the article 2/3 investigative obligation: see para 174 above. If the Commissioner considered it appropriate in a particular case, arrangements could be made for some element of questioning prompted by the next of kin or victims.

203. Fourthly, the passage of a considerable amount of time in some cases may mean that there is real doubt as to what further elucidation of the facts may be achieved by further questioning: see para 191 above.

204. Fifthly, in some cases a requirement to question a witness might place an impossible or disproportionate burden on the authorities if there were difficulties in identifying or locating the witness: see para 190 above.

205. Sixthly, even if lack of a provision enabling the next of kin or victims to examine witnesses means that there is a failure to comply with this element of the article 2/3 investigative obligation, this does not mean that there will be an ineffective investigation. See the summary of the investigative powers of the ICRIR at paras 169–172 above and the specific requirements of the duty to investigate, which are not to be considered piecemeal: see para 187 above.

206. Finally, it is rarely possible to determine the effectiveness of an investigation until it has been completed.

207. We conclude that the lack of a provision permitting the examination of witnesses does not mean that there will be a failure to comply with the element of next of kin or victim involvement "in all or almost all cases", or that, even if there were such a lack of

compliance, that this would result in there being an ineffective investigation "in all or almost all cases". Accordingly, the lack of a provision permitting the examination of witnesses does not justify the declaration made by the Court of Appeal in para 7(a) of its order dated 20 September 2024: see para 87 above.

(h) The disclosure of documents and information by the ICRIR to the next of kin and to victims, and the independence of the ICRIR in relation to disclosure

208. There must be full disclosure of information, documents, and other material by relevant authorities *to* the ICRIR: see para 84 above. Disclosure *by* the ICRIR of the information, documents and other material to the next of kin or to victims enables them to be involved in ICRIR reviews. However, there must be a system restricting disclosure in circumstances where disclosure may or would risk prejudicing the national security interests of the United Kingdom.

209. In inquests in Northern Ireland this is achieved by a PII certificate issued by Secretary of State which, if upheld by the coroner, prevents disclosure of information, documents or other material. In determining whether to uphold a PII certificate the coroner balances the public interest in the open administration of justice and in national security, as explained in *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274 ("*Wiley*"), and in *In re Secretary of State for Northern Ireland* [2025] UKSC 47; [2026] 2 WLR 109 ("the *Wiley* balancing exercise"). If a PII certificate is upheld by the coroner, then none of the matters which are the subject of the certificate may be admitted in evidence in the inquest, and the coroner or any jury cannot rely on those matters when making or giving the final determination, verdict, or findings.

210. The 2023 Act did not adopt the PII system. Rather, it moved to a system involving full disclosure to the ICRIR, which can use the material in reviews, but with a potential restriction on disclosure by the ICRIR to the next of kin, victims, and the public. If the ICRIR wishes to disclose sensitive information, then the Commissioner for Investigations is required to notify the Secretary of State of the proposed disclosure: see Schedule 6 para 4(1). The Secretary of State can permit or prohibit the disclosure, but he may prohibit disclosure:

> "… only if, in the Secretary of State's view, the disclosure of the sensitive information would risk prejudicing, or would prejudice, the national security interests of the United Kingdom." (See Schedule 6, para 4(3)).

211. There are further provisions in Schedule 6 as to the disclosure of information in the final report published by the ICRIR. The disclosure of information in that report is prohibited only if, in the Secretary of State's view, the disclosure of the sensitive

information would risk prejudicing, or would prejudice, the national security interests of the United Kingdom: see Schedule 6 para 7, read with para 4. In respect of the disclosure of information in the final report there is an appeal process available to, amongst others, the person who requested the review to which the report relates: see Schedule 6 paras 9 and 10. In determining the appeal, the relevant court, which in Northern Ireland is the High Court, must apply the principles applicable on an application for judicial review.

212. The Court of Appeal held at paras 224 and 234 that the Secretary of State's powers to prohibit disclosure provide the Secretary of State with "an effective veto" and place the final say on the disclosure of information to the next of kin and to victims during the course of a review in the hands of the Secretary of State. Consequently, the Court of Appeal held that the ICRIR is prevented from involving the next of kin and victims in reviews to the extent necessary to protect their legitimate interests. The Court of Appeal also held that the regime in Schedule 6 paragraph 4(1) meant that the ICRIR was not sufficiently independent in relation to its powers to disclose sensitive information to the next of kin and the public.

213. We acknowledge that the system in relation to a PII certificate differs from the system in relation to the disclosure of documents by the ICRIR in the 2023 Act.

214. Under the system in relation to a PII certificate a *Wiley* balancing exercise is carried out by the court, balancing the vital aspects of the public interest in the open administration of justice and in national security. It is for the court to determine whether the public interest in the administration of justice outweighs the competing public interest in national security: *Conway v Rimmer* [1968] AC 910; *Wiley*, pp 289–290 and 296; *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2*) [2010] EWCA Civ 65; [2011] QB 218, pp 265 and 291, paras 132 and 229. For constitutional reasons and reasons to do with relative institutional competence the court, in conducting that balance, will accept the Secretary of State's assessment as to the existence and extent of the risks to national security, unless that assessment is irrational, is unsupported by evidence or has failed to take relevant matters into account: see *In re Secretary of State for Northern Ireland*.

215. Under the system in the 2023 Act, the Secretary of State decides whether disclosure of the information would risk prejudicing or would prejudice the national security interest of the United Kingdom. There is no express reference in the Act to the public interest in the administration of justice. However, the Secretary of State does not have an unrestrained power to "veto" the disclosure of information, nor does the Secretary of State have "the final say." In accordance with ordinary public law principles, in making any decision as to disclosure, the Secretary of State's assessment as to the existence and extent of the risks to national security must not be irrational, must be supported by evidence and must take relevant matters into account. However, the Secretary of State's assessment as to the existence and extent of the risks to national security is not the end of

the matter. Thereafter, a relevant matter which the Secretary of State is obliged to take into account is the public interest in the administration of justice, which must be balanced against the public interest in national security. In short, the Secretary of State must carry out the *Wiley* balancing exercise. In order to carry out the balancing exercise the Secretary of State has a duty to inquire and gather sufficient information in relation to the decision, including making inquiries of and obtaining the views of the ICRIR in relation to the effect of non-disclosure on the administration of justice: see *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014. Furthermore, in making any decision as to disclosure, the Secretary of State is a public authority, so that any failure to comply with the article 2/3 investigative obligation would be unlawful under section 6(1) of the Human Rights Act. Finally, any decision made by the Secretary of State is subject to a judicial review challenge in which the Secretary of State is under a duty of candour. In this way the court would have the final say as to whether the Secretary of State's decision prohibiting disclosure should be quashed.

216. As the Court of Appeal acknowledged, the system in the 2023 Act for disclosure *to* the ICRIR is an undoubted enhancement over the system of PII certificates: see para 172 above. Whilst we disagree with the Court of Appeal as to the extent of the Secretary of State's powers in relation to disclosure *by* the ICRIR, the applicants' ab ante challenge in relation to disclosure remains to be considered.

217. In an ab ante challenge based on a failure to comply with the element of the article 2/3 investigative obligation of involving the next of kin and victims, the applicants must establish that: (a) there would not be compliance with that element "in all or almost all cases"; and (b) as a consequence there would not be an effective investigation "in all or almost all cases." The short answer is that it is impossible for the applicants to establish either of these matters.

218. In relation to the first matter: (i) there may be no sensitive information, documents or other material in some cases; (ii) even if there is sensitive information, documents or other material, in a particular case the Secretary of State may not prohibit disclosure; and (iii) the Secretary of State may correctly perform the *Wiley* balancing exercise so that the information should not be disclosed. Accordingly, there will be cases in which there will be no adverse effect on the involvement of the next of kin and victims by virtue of the Secretary of State's powers to prohibit disclosure by the ICRIR.

219. In relation to the second matter, the short answer is that this element is only one element in the article 2/3 investigative obligation. Even if there is a failure to comply with it in a particular case, that does not mean that the investigation is ineffective. We have summarised the ICRIR's extensive investigatory powers in paras 170–172 above. The Court of Appeal identified correctly that the system in the 2023 Act was an enhancement in comparison to the PII system, in that there must be full disclosure to the ICRIR which can use the information, documents, and other matters in arriving at its final report no

matter whether the information, documents, and other matters may or would risk prejudicing the national security interests of the United Kingdom. As it is rarely possible to determine the effectiveness of an investigation until it has been completed, whether this enhancement is sufficient to provide an effective investigation is one of the matters which should be assessed after a particular review has been completed.

220. In conclusion, the applicants cannot establish that the Secretary of State's powers to prohibit disclosure by the ICRIR mean that there will be a lack of compliance with the element of next of kin or victim involvement "in all or almost all cases." Furthermore, they cannot establish that even if there is such a lack of compliance, this will result in there being an ineffective investigation "in all or almost all cases." The Secretary of State's powers to prohibit disclosure by the ICRIR do not justify the declarations made by the Court of Appeal in paragraphs 7(a) and (b) of its order dated 20 September 2024: see paras 87 and 89 above.

221. Turning next to the challenge to the independence of the ICRIR in disclosing sensitive information to the next of kin, victims and the public, this is not a challenge to the practical independence of the investigations carried out by the ICRIR. Rather, the challenge is mounted as a hierarchical challenge to the independence of the ICRIR. It is argued by the applicants that the Secretary of State is hierarchically superior to the ICRIR as the Secretary of State "is the sole decision-maker on the disclosure of 'sensitive information'". It is also argued that the Secretary of State's hierarchical control is objectionable as the Secretary of State lacks independence. It is submitted that the Secretary of State may be inappropriately influenced in arriving at a disclosure decision because the Secretary of State: (a) may be a defendant in Troubles-related civil claims not brought to an end by section 43 of the 2023 Act; (b) may previously have granted PII certificates in relation to legacy inquests, seeking to protect information from being disclosed to the public (see for example *In re Secretary of State for Northern Ireland*); and (c) during the Troubles previous Secretaries of State held responsibility for security, overseeing policing, public order and criminal justice in Northern Ireland.

222. In *McQuillan* this court addressed the Convention requirements for an independent investigation under articles 2 and 3. The court stated, at para 111, that the Strasbourg court does not dictate "that there should be complete hierarchical or institutional disconnection as there are ways in which a state can inject independence into the structure of hierarchies and institutions." The court continued, at para 193, by stating that:

> "… the Strasbourg court does not require absolute independence but mandates that the persons and bodies responsible for the investigation are sufficiently independent of the persons and structures who may be responsible for the death or inhuman or degrading treatment which is the subject of the investigation. … The adequacy of the degree of independence

> falls to be assessed in the light of the circumstances of the specific case."

In relation to the requirements of article 2 (and article 3) the court quoted para 222 of the Strasbourg court's decision in *Tunç* that those requirements call for "a concrete examination of the independence of the investigation in its entirety, rather than an abstract assessment". The court stated at para 206 that the concrete examination of the investigation in its entirety requires "that the various parameters [are] to be taken jointly in assessing the effectiveness of the investigation." As the court identified at para 198, "the important guidance in *Tunç*, … ties the question of the independence and impartiality of an article 2 or 3 investigation into the overarching question of its effectiveness …"

223. In this ab ante challenge to the independence of the ICRIR in relation to the disclosure of information, the applicants must establish that: (a) there would not be independence "in all or almost all cases"; and (b) as a consequence there would not be an effective investigation "in all or almost all cases."

224. This ab ante challenge fails for several reasons.

225. First, as we have explained at para 215 above, it is misleading to categorise the Secretary of State as "the sole decision-maker." The Secretary of State is restrained in the exercise of the power to prohibit disclosure, and any decision to do so is subject to challenge by way of judicial review. The Strasbourg court does not require absolute independence. Rather, there must not be an "unacceptable" hierarchical or institutional connection: see *McQuillan* at para 195. Absent a concrete examination of the circumstances of a specific case, it cannot be said that the restrained nature of the power, together with supervision by the courts in judicial review proceedings, does not provide adequate hierarchical independence for the ICRIR in any case, let alone "in all or almost all cases".

226. Secondly, the objection mounted by the applicants is in effect an objection to involvement by any branch of the government in the decision-making process in relation to the disclosure of information to the next of kin, victims and the public. However, the democratic constitutional responsibility for, and the institutional competence in relation to, national security lies with the executive: see *In re Secretary of State for Northern Ireland*. It is constitutionally impossible to remove the executive from a decision-making process involving national security.

227. Thirdly, the ICRIR is under a duty not to do anything which would risk prejudicing, or would prejudice, the national security interests of the United Kingdom: section 4(1)(a) of the 2023 Act. In a particular review the ICRIR's views and the views of the Secretary of State as to whether disclosure would risk prejudicing, or would

prejudice, the national security interests of the United Kingdom, and as to the outcome of the *Wiley* balance, may align. In those cases, there would be no interference with the independence of the ICRIR so that the applicants would not have met the test of establishing a lack of independence "in all or almost all cases."

228. Fourthly, the overarching question concerns the effectiveness of the investigation. Even if a lack of hierarchical independence of the ICRIR were established by virtue of the Secretary of State's powers to prohibit disclosure of information, that would not necessarily mean that the investigation was ineffective in any case, let alone "in all or almost all cases". Rather, the various parameters of the article 2/3 investigative obligation are to be taken jointly in assessing the effectiveness of the investigation, and this assessment is rarely possible before the conclusion of the investigation.

229. Finally, we note the qualified terms in which the Court of Appeal expressed its conclusion as to the lack of independence of the ICRIR in relation to the disclosure of information to the next of kin, victims, and the public. The Court of Appeal stated that the regime has *the potential* to offend independence: see para 85 above. The ab ante test is not satisfied by a potential failure to satisfy the requirement of independence. Rather, the test to be met is that it must fail to satisfy the requirement of independence "in all or almost all cases".

230. We conclude that the applicants cannot establish that the Secretary of State's powers to prohibit disclosure by the ICRIR mean that the ICRIR will lack independence in disclosing sensitive information to the next of kin, victims and the public "in all or almost all cases." Furthermore, they cannot establish that even if there is such a failure to satisfy the requirement of independence, this will result in there being an ineffective investigation "in all or almost all cases." Again, the Secretary of State's powers to prohibit disclosure by the ICRIR do not justify the declarations made by the Court of Appeal in paragraphs 7(a) and (b) of its order dated 20 September 2024: see paras 87 and 89 above. The Court of Appeal's declaration of incompatibility of section 44 of the 2023 Act (the provision bringing inquests to an end) was consequent upon the finding that the ICRIR lacked independence in relation to the disclosure of documents and information: see para 90 above. As the declaration as to the lack of independence is not justified, neither is the declaration of incompatibility in paragraph 7(c) of the Court of Appeal's order dated 20 September 2024.

(i) Conclusion in relation to the Secretary of State's appeal in relation to next of kin involvement and disclosure

231. We allow the Secretary of State's appeal and set aside the declarations made by the Court of Appeal in paragraphs 7(a)–(c) of its order dated 20 September 2024.

9. The Intervention by the Veterans Movement

232. The Veterans Movement in an intervention in this appeal submits that the judge and the Court of Appeal erred by applying the wrong test in an ab ante challenge in concluding that there would be a breach of the United Kingdom's positive obligations under articles 2 and 3 of the Convention in all or almost all of the immunities granted by the ICRIR pursuant to the immunity provisions ("the Conditional Immunities"). See para 73 above, paras 162–172 of the Court of Appeal's judgment and para 6(b) of its order of 24 September 2024.

233. Lord Wolfson, who appears on behalf of the Veterans Movement, accepts that there is a general rule in the jurisprudence of the Strasbourg court that breaches of articles 2 and 3 of the Convention should not go unpunished. He submits, however, that there can be exceptions to the general rule and that the Strasbourg court affords a wide margin of appreciation to the contracting states where an amnesty or immunity is granted in pursuit of the goal of the reconciliation of communities after civil conflict ("the reconciliation exception") and gives due deference to local political complexities in that context.

234. The Veterans Movement's submission is that there is, or it is possible that there is, in the jurisprudence of the Strasbourg court a reconciliation exception to the general rule that breaches of articles 2 and 3 of the Convention should be punished and it is a sufficient answer to an ab ante challenge that the Conditional Immunities can fall within the reconciliation exception.

235. In making those submissions, Lord Wolfson makes clear that the Veterans Movement does not challenge any of the judge's findings of fact, including those referred to in para 44 above. He nonetheless points out that a reluctance of the different communities to accept a middle way in the investigation of crimes committed during the Troubles is not inconsistent with a process of reconciliation and draws the court's attention to the fact that reconciliation is the principal purpose of the ICRIR and that that accords with the United Kingdom Government's Command Paper, *Addressing the Legacy of Northern Ireland's Past*, which was published in July 2021 (CP 498). He points out that the Conditional Immunities are not a general amnesty that applies automatically and only to state actors. The Conditional Immunities have to be requested and apply to all combatants of the Troubles. A key condition for the grant of immunity is the provision of truthful information as to the circumstances in which victims of the Troubles died or were seriously injured (section 19(3)). Criminal investigations are to be only through the ICRIR (section 38). An amnesty can be revoked if an individual commits a further terrorist offence (section 26). Lord Wolfson submits that the rationale of the Conditional Immunities is (i) to uncover the truth about the past, (ii) to provide closure to families of victims and (iii) as a result, to promote reconciliation.

236. The Veterans Movement submits that the Conditional Immunities need to be understood in the wider context of the Northern Irish Peace Process in which de jure and de facto immunities and the shortening of prison sentences have played a critical role. The Veterans Movement refers to three pieces of legislation. First, the Northern Ireland Arms Decommissioning Act 1997 provided an amnesty from prosecution for firearms and terrorist offences in section 4 and Schedule 1. Secondly, the Northern Ireland (Location of Victims' Remains) Act 1999, by restricting the admissibility of any evidence or information for use in any criminal proceedings in sections 3–5, provided de facto immunity to people who provided information or evidence that led to the location of the remains of those who had been abducted and murdered during the Troubles. Thirdly, the Northern Ireland (Sentences) Act 1998 implemented the early release of prisoners which was part of the Belfast Agreement. The long title and section 2(4) of the 2023 Act make clear that the principal objective of the ICRIR is to promote reconciliation. The Veterans Movement submits that the Conditional Immunities in the 2023 Act are the latest iteration of the process of uncovering the truth and drawing a line under the Troubles and should be assessed in that context.

237. We have an insuperable difficulty in addressing those submissions in that the Secretary of State, after the hearing in the Court of Appeal and before that court's judgment was delivered, abandoned his appeal against the orders of the judge under section 4 of the Human Rights Act that the immunity provisions of the 2023 Act are incompatible with articles 2 and 3 of the Convention. See para 27 above. Since the appeal against those orders was abandoned, and the Veterans Movement cannot reactivate the appeal which the Secretary of State abandoned, it follows that those orders must stand. As the matter may proceed to the Strasbourg court, we can, nevertheless, set out briefly (i) the jurisprudence of the Strasbourg court on which the Veterans Movement relies, (ii) the task of the domestic courts of the United Kingdom in interpreting and applying that jurisprudence, and (iii) our view on the status of the reconciliation exception in that jurisprudence.

238. There is no dispute as to the existence of the general rule in the jurisprudence of the Strasbourg court that state agents and bodies should be accountable for breaches of articles 2 or 3 of the Convention and that such breaches should not go unpunished. We refer, among other cases, to *Yaman v Turkey* (2004) 40 EHRR 49, para 55, *Mojsiejew v Poland* (Application No 11818/02) (unreported) 24 June 2009, para 53, *Nikolova v Bulgaria* (2007) 48 EHRR 40, para 57, *Okkali v Turkey* (2006) 50 EHRR 43, para 65, *Mocanu v Romania* (2014) 60 EHRR 19, para 326, *Jelic v Croatia* (2014) 61 EHRR 43, paras 73–75, *Kavaklioglu v Turkey* (Application No 15397/02) (unreported) 6 October 2015, para 271, *Köse v Turkey* (Application No 15014/11) (unreported) 18 December 2018, para 35, *Vazagashvili and Shanava v Georgia* (Application No 50375/07) (unreported) 18 July 2019, paras 84–85, and *Makuchyan and Minasyan v Azerbaijan and Hungary* (Application No 17247/13) (unreported) 26 May 2020, paras 155–157. Lord Wolfson fairly points out that in none of those cases was there an issue of the grant of immunities in pursuit of reconciliation. The general rule is nevertheless not in doubt.

239. In support of the submission that there is a reconciliation exception to this general rule, Lord Wolfson refers to four cases: *Dujardin v France* (Application No 16734/90) (unreported) 2 September 1991 ("*Dujardin*"), *Tarbuk v Croatia* (Application No 31360/10) (unreported) 11 December 2012 ("*Tarbuk*"), *Ould Dah v France* (2009) 56 EHRR SE17 ("*Ould Dah*"), and *Marguš v Croatia* (2014) 62 EHRR 17 ("*Marguš*"). We analyse each of those cases below. Our conclusion, in summary, is that the cases leave open the possibility that there may be circumstances in which the Strasbourg court could recognise an exception to the general rule that breaches of articles 2 and 3 of the Convention should be prosecuted but that it has not done so to date.

240. *Dujardin* is an admissibility decision of the European Commission on Human Rights dated 2 September 1991, which addressed a complaint about the lapse of a prosecution for the massacre of four gendarmes on the island of Ouvéa in the French overseas territory of New Caledonia in 1988 as a result of an amnesty granted by France to the assailants who were involved in that massacre as part of a wider amnesty granted before a referendum on the independence of the territory. The Commission stated (pp 243–244):

> "[A]s with any criminal offence, the crime of murder may be covered by an amnesty. That in itself does not contravene the Convention unless it can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes.
>
> The Commission notes that as a result of the amnesty law adopted in this case in the light of the special circumstances, ie the political situation in New Caledonia, the prosecution of those suspected of murdering the applicants' close relatives lapsed.
>
> Accordingly, the question which arises is whether this infringed the right protected by article 2 of the Convention. The Commission considers in this connection that the amnesty law, which is entirely exceptional in character, was adopted in the context of a process designed to resolve conflicts between the various communities of the islands.
>
> It is not for the Commission to assess the advisability of the measures taken by France to that end. The State is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the

> State and the interests of individual members of the public in having the right to life protected by law. In the present case, the Commission considers that such a balance was maintained and that there has therefore been no breach of [article 2]."

The application was therefore held to be manifestly ill founded and was rejected.

241. We agree with the view of the judge at para 155 of his judgment that this was a short ruling with little detailed reasoning. It nevertheless expressed the view that a contracting state could grant amnesties in special circumstances so long as an appropriate balance was maintained between the interests of the state and the interests of individual members of the public in having the right to life protected by law. We note also that the statements of the Commission were made in the context of murders committed by persons who were not agents of the State.

242. In *Tarbuk* the Strasbourg court in a judgment dated 11 December 2012 addressed a complaint by the applicant that he had been denied his article 6 right to a fair trial of his claim for compensation under the Code of Criminal Procedure arising out of his detention on a charge of espionage in the context of the war in Croatia in the early 1990s. He was released from detention after the Croatian legislature passed a General Amnesty Act in 1996. He raised an action for compensation on the basis that the criminal proceedings had been discontinued. The state amended the Code of Criminal Procedure retroactively to exclude the payment of compensation in relation to offences committed during the war. The judgment of the court was concerned with the article 6 right. The court held that the amnesty did not suggest that there had been a miscarriage of justice or that the applicant's detention had been unlawful. In the context of that discussion the court referred briefly in para 50 to *Dujardin* stating:

> "the Convention organs have already held that, even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public…"

We consider that the subsequent cases, which we address below, have qualified the approach taken in *Dujardin* and referred to in *Tarbuk* at least in relation to the acts of members of the armed forces or the security services.

243. *Ould Dah* was an admissibility decision dated 17 March 2009. The applicant was an intelligence officer in the Mauritanian army who was accused in France of torturing

prisoners during armed conflict in Mauritania in 1990–1991. In 1993 an amnesty law was passed in favour of members of the armed forces and the security forces who had committed offences in connection with the events giving rise to the armed conflict with the result that no proceedings were brought against the applicant for offences committed against prisoners. When undergoing training in a military academy in France in 1999 the applicant was arrested and charged with offences under the United Nations Convention Against Torture. In 2005 the applicant was convicted in his absence of intentionally subjecting persons to acts of torture and barbarity and sentenced to imprisonment. The applicant complained that his prosecution in France was contrary to article 7 of the Convention on the basis among others that he could not have foreseen that French law would prevail over Mauritanian law under which he had an amnesty. The Strasbourg court referred in paras 20–21 to international texts, including article 7 of the International Covenant on Civil and Political Rights of 16 December 1966 and the UN Human Rights Committee's General Comment 20 on that article. The court held that the prohibition against torture had attained the status of a peremptory norm. It spoke (para 48) of "the absolute necessity of prohibiting torture and prosecuting anyone who violates that universal rule" and, reaffirming the general rule, stated that "an amnesty is generally incompatible with the duty incumbent on the states to investigate such acts." While the court made no reference to *Dujardin* or *Tarbuk* in its judgment and the idea in those cases of balancing the interests of the State against the interests of members of the public, it left open the possibility of a reconciliation exception when it stated (in para 49):

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

The court continued:

> "However, as the Court has already observed, the prohibition of torture occupies a prominent place in all international instruments relating to the protection of human rights and enshrines one of the basic values of democratic societies. The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law."

The court concluded that there had been no breach of article 7(1) of the Convention and rejected the application as manifestly ill-founded.

244. The most recent of the Strasbourg cases is *Marguš*, which is a judgment of the Grand Chamber concerning articles 2 and 3 of the Convention and article 4 of Protocol No 7. It addressed an amnesty given to a Croatian army commander, who had been convicted in 2007 of war crimes for the killing of several civilians and for inflicting grave bodily injury on a child in 1991, notwithstanding that he had benefitted from a domestic general amnesty which had taken effect in 1997. The court cited many international texts. It analysed the state of international law on amnesties and observed (paras 130–135) that there was a growing tendency for international, national and regional courts to overturn general amnesties but that no international treaty explicitly prohibited the granting of an amnesty for grave breaches of human rights. It recognised (para 137) the argument that the granting of amnesties as a tool in ending prolonged conflicts may lead to positive outcomes but it did not endorse the existence of a reconciliation exception. The furthest the court went was to state in para 139 that *on the hypothesis that amnesties were possible*, the applicant's amnesty was not acceptable. The court stated at para 139:

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

The italicised words in the passage cited immediately above cannot be interpreted as a recognition that there *is* a reconciliation exception. At most the court has not ruled out the possibility that such an exception might exist. The concurring opinion of Judges Šikuta, Wojtyczek and Vehabović (paras OIII-8-9), while supporting a margin of appreciation on the part of states, does not go further.

245. Lord Wolfson also referred to commentary on international law in relation to amnesties, including the positive obligations under articles 2 and 3 of the Convention, by Carole Lyons, *Neighbourly Murders, Forced Forgetting and European Justice - Marguš v Croatia*, Strasbourg Observers (30 June 2014); Michail Vagias, *Rethinking Amnesties and the Function of the Domestic Judge*, (2023) 9 Constitutional Review 142; Louise Mallinder, Luke Moffett, Kieran McEvoy and Gordon Anthony, *Investigations, Prosecutions and Amnesties under Articles 2 & 3 of the European Convention on Human Rights* Transitional Justice Institute – Ulster University – Research Paper No 15-05

(March 2015); Miles Jackson, *Amnesties in Strasbourg* (2018) 38 Oxford Journal of Legal Studies 451; and Juan-Pablo Pérez-León-Acevedo, *The European Court of Human Rights (ECtHR) vis-à-vis amnesties and pardons: factors concerning or affecting the degree of ECtHR's deference to states*, (2022) 26 International Journal of Human Rights 1107. The commentary assists either in presenting the approach of the Strasbourg court concerning amnesties in a wider context of international law or in relation to the circumstances of Northern Ireland but cannot provide a substitute for the jurisprudence of the Strasbourg court itself.

246. Absent a recognition by the Strasbourg court of the existence of a reconciliation exception, it does not advance the arguments of the Veterans Movement that the court accords a margin of appreciation to contracting states in relation to their positive obligations under articles 2 and 3 of the Convention, that particular weight should be placed on that margin of appreciation, or that due deference be shown to political complexities.

247. In such circumstances, what is the correct approach of the domestic courts in the United Kingdom? The answer is clear. In *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 the House of Lords, in the speech of Lord Bingham of Cornhill, established the approach that a court in the United Kingdom should follow any clear and constant jurisprudence of the Strasbourg court in the absence of special circumstances and should keep pace with that jurisprudence, no more and no less (para 20). This so-called "mirror principle" has been re-affirmed by the Supreme Court in *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2022] AC 487, in which Lord Reed, with whom Lords Lloyd-Jones, Sales, Hamblen and Stephens agreed, cited several judgments of the Supreme Court, which have affirmed the approach in *Ullah*, and stated (para 59):

> "It is not the function of our domestic courts to establish new principles of Convention law. But that is not to say that they are unable to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. In situations which have not yet come before the [Strasbourg] court, they can and should aim to anticipate, where possible, how the [Strasbourg] court might be expected to decide the case, *on the basis of the principles established in its case law*. … The application of the Convention by our domestic courts, in such circumstances, will be based on the principles established by the [Strasbourg] court, even if some incremental development may be involved." (Emphasis added.)

248. In our view it cannot be said that the Strasbourg court has established a principle in its case law that there is a reconciliation exception to the general ban on amnesties for grave breaches of fundamental rights or that the question has not come before that court.

Absent such a ruling, there is nothing to which the mirror principle can be applied by the United Kingdom courts through incremental development to the circumstances in Northern Ireland.

249. The Veterans Movement also made submissions in support of the Secretary of State's case that the Conditional Immunities do not breach the Victims Directive. We have addressed the Secretary of State's submissions in paras 135–136 above.

Overall conclusion

250. For all the foregoing reasons, we allow the Secretary of State's appeal and dismiss the applicants' cross-appeal. The declarations made by the Court of Appeal in paragraphs 6(a) and (c) and 7(a)–(c) of its order dated 20 September 2024 and of the High Court at declarations (ii), (iv) and (vi) of its order dated 28 February 2024 are set aside.