Neutral Citation No: [2024] NICA 41 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **McC12529** *ICOS No:* *Delivered:* **10/05/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION (JUDICIAL REVIEW)

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BETWEEN:

HAI ZHANG

Appellant:

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT, MINISTRY OF JUSTICE & DEPARTMENT OF JUSTICE (NI)

Proposed Respondents:

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Before: McCloskey LJ, and Horner LJ

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Hugh Southey KC and Mark O'Hara (instructed by Phoenix Law) for the Appellant
Tony McGleenan KC and David Reid (instructed by the Crown Solicitor's Office) for the proposed Respondents SSHSD and MoJ
Mr Philip Henry KC (instructed by the Departmental Solicitor's Office) for the proposed Respondent DoJ(NI)

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McCLOSKEY LJ (*delivering the judgment of the court*)

Lexicon

SSHD: Secretary of State for the Home Department
MOJ: Ministry of Justice
DOJ/DOJ(NI): Department of Justice NI

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Introduction

[1] Hai Zhang (the "appellant"), Chinese citizen, was convicted of murder and sentenced to life imprisonment in Northern Ireland. Having completed the minimum term and, thus, being eligible for release on licence, he sought to be deported to his country of origin, China. He failed in his quest as this possibility, in contrast with the arrangements prevailing in the jurisdiction of England and Wales, does not exist. His challenge at first instance was dismissed on two grounds:

(i) Leave to apply for judicial review on the merits was refused as the court considered that an arguable case had not been established.

(ii) Leave was refused on the further, freestanding ground of delay.

The appellant appeals to this court in consequence.

In a Nutshell

[2] The appellant was sentenced to life imprisonment in 2008. The statutory "minimum term" expired on 2 June 2021. The possibility of release on licence by statute depends on the Parole Commissioners for Northern Ireland ("PCNI") who, on three successive occasions between 2021 and 2023, have determined that his continued detention is necessary for the protection of the public from serious harm (the statutory test). The next PCNI review of his continued detention is presumably forthcoming.

Relevant Statutory Provisions

[3] Section 55 of the Justice Act (NI) 2016 (the "2016 Act") is the material statutory provision in the jurisdiction of Northern Ireland. It provides:

> "**Early removal from prison of prisoners liable to removal from United Kingdom**
>
> 55—(1) Where a prisoner to whom this section applies ("P")—
>
> (a) is liable to removal from the United Kingdom, and
>
> (b) has served at least one-half of the requisite custodial period,
>
> the Department may, with P's agreement, remove P from prison under this section at any time during the period of 135 days ending with the day on which P will have served the requisite custodial period.

(2) This section applies to a prisoner who is serving a sentence of imprisonment for a determinate term of at least 6 months, other than a prisoner **[F1**—

(a) who is serving an extended custodial sentence under Article 14 of the 2008 Order, or

(b) to whom Article 20A of that Order applies.**]**

(3) So long as P after being removed from prison under this section remains in Northern Ireland P remains liable to be detained in pursuance of P's sentence until P has served the requisite custodial period.

(4) The Department may by order amend the number of days for the time being specified in subsection (1).

(5) For the purposes of this section P is liable to removal from the United Kingdom if—

(a) P is liable to deportation under section 3(5) of the Immigration Act 1971 and has been notified of a decision to make a deportation order against him,

(b) P is liable to deportation under section 3(6) of that Act,

(c) P has been notified of a decision to refuse P leave to enter the United Kingdom,

(d) P is an illegal entrant within the meaning of section 33(1) of that Act, or

(e) P is liable to removal under section 10 of the Immigration and Asylum Act 1999.

(6) In this section and section 56—

"the 2008 Order" means the Criminal Justice (Northern Ireland) Order 2008;

"the requisite custodial period"—

(a) in a case where P is a prisoner to whom Article 17 of the 2008 Order applies, has the meaning given by paragraph (2) of that Article;

(b) in any other case, means one-half of P's sentence.

F1S. 55(2)(a)(b) substituted for words (30.4.2021) by Counter-Terrorism and Sentencing Act 2021 (c. 11), s. 50(1)(i), Sch. 13 para. 75(1) (with Sch. 13 para. 75(2))"

In short, by virtue of section 55(2), the NI statutory removal scheme applies only to certain determinate sentence prisoners and does not extend to life prisoners, thereby excluding the appellant.

[4] The latter feature of the NI statutory arrangements is what distinguishes them from the corresponding arrangements in England and Wales. In that jurisdiction the most important statutory provision is section 32A of the Crime (Sentences) Act 1997 (the "1997 Act"), which provides:

"…[**F132ARemoval of prisoners liable to removal from United Kingdom**

(1) Where P—

(a) is a life prisoner in respect of whom a minimum term order has been made, and

(b) is liable to removal from the United Kingdom,

the Secretary of State may remove P from prison under this section at any time after P has served the relevant part of the sentence (whether or not the Parole Board has directed P's release under section 28).

(2) But if P is serving two or more life sentences—

(a) this section does not apply to P unless a minimum term order has been made in respect of each of those sentences; and

(b) the Secretary of State may not remove P from prison under this section until P has served the relevant part of each of them.

(3) If P is removed from prison under this section—

(a) P is so removed only for the purpose of enabling the Secretary of State to remove P from the United Kingdom under powers conferred by—

(i) Schedule 2 or 3 to the Immigration Act 1971, or

(ii) section 10 of the Immigration and Asylum Act 1999, and

(b) so long as remaining in the United Kingdom, P remains liable to be detained in pursuance of the sentence.

(4) So long as P, having been removed from prison under this section, remains in the United Kingdom but has not been returned to prison, any duty or power of the Secretary of State under section 28 or 30 is exercisable in relation to P as if P were in prison.

(5) In this section—

"liable to removal from the United Kingdom" has the meaning given by section 259 of the Criminal Justice Act 2003;

"the relevant part" has the meaning given by section 28.**]**

F1Ss. 32A, 32B and cross-heading inserted (1.5.2012) by Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10), ss. 119, 151(2)(b) (with Sch. 15)"

By section 57(4) this provision (in common with most of the 1997 Act) is confined to England and Wales.

[5] The relevant provisions of the Human Rights Act 1998 are:

"**Section 4**

4 Declaration of incompatibility

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied-

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(5) In this section "court" means -

(a) the Supreme Court;

(b) the Judicial Committee of the Privy Council;

(c) the Court Martial Appeal Court;

(d) in Northern Ireland, the High Court or the Court of Appeal.

(6) A declaration under this section ("a declaration of incompatibility")-

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

(1) This paragraph has effect for the purposes of the Human Rights Act 1998.

(2) Any retained direct principal EU legislation is to be treated as primary legislation.

(3) Any retained direct minor EU legislation is to be treated as primary legislation so far as it amends any primary legislation but otherwise is to be treated as subordinate legislation.

(4) In this paragraph "amend", "primary legislation" and "subordinate legislation" have the same meaning as in the Human Rights Act 1998.

Section 6

6 Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if-

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes-

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(5) "An act" includes a failure to act but does not include a failure to-

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

…

Section 7

7 Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) (Scotland)

(5) Proceedings under subsection (1)(a) must be brought before the end of-

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) "legal proceedings" includes-

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the

purposes of article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

(8) Nothing in this Act creates a criminal offence.

(9) In this section "rules" means-

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,

(b) (Scotland)

(c) in relation to proceedings before a tribunal in Northern Ireland-

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force,

rules made by a Northern Ireland department for those purposes, and includes provision made by order under section 1 of the Courts and Legal Services Act 1990.

(10) In making rules, regard must be had to section 9.

(11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to-

(a) the relief or remedies which the tribunal may grant; or

(b) the grounds on which it may grant any of them.

(12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

(13) "The Minister" includes the Northern Ireland department concerned.

…

Art 5 ECHR

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

…

Art 14 ECHR

Article 14 - Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Chronology

[6] The uncontentious factual matrix is the following:

(i) The appellant is a Chinese national. He is currently a serving prisoner at HMP Maghaberry.

(ii) The appellant was convicted of murder on 11 March 2008 and was sentenced to life imprisonment with a tariff of 17 years.

(iii) His appeal against conviction was dismissed on 24 June 2011.

(iv) The appellant is liable to deportation and wants to be deported to his country of origin.

(v) Section 32A of the Crime (Sentences) Act 1997 was inserted by section 119 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on 1 May 2012.

(vi) The appellant signed a disclaimer in his deportation case on 5 June 2018 and withdrew his asylum application two days after.

(vii) The appellant's tariff expiry date was 2 June 2021.

(viii) Paragraph 20 of the 20 April 2022 decision of the Parole Commissioners for Northern Ireland ("PCNI") states that it was only realised shortly before June 2021 that he would not be deported once his tariff expired on 2 June 2021.

(ix) The appellant wrote to Phoenix Law on 20 April 2022 with instructions to pursue a legal challenge to secure his deportation and replace his previous solicitors.

(x) The appellant's solicitor wrote to the Northern Ireland Prison Service ("NIPS") on 26 May 2022 to confirm whether any agreement exists between the United Kingdom and China as to repatriation of prisoners. The NIPS confirmed on 30 June 2022 that no such agreement exists.

(xi) The appellant initiated PAP correspondence on 14 July 2022.

(xii) The Crown Solicitor's Office confirmed in PAP correspondence dated 24 October 2022 that prisoners will not normally be accepted for transfer into England and Wales solely for the purpose of subsequent removal under any early release scheme.

(xiii) These proceedings were initiated on 12 January 2023.

(xiv) The appellant was most recently refused release on licence by a PCNI panel decision dated 15 August 2023.

The Issues

[7] In England & Wales (only) there is a "Tariff Expired Removal Scheme" (TERS) which is based on section 32A of the 1997 Act. The effect of section 32A in tandem with TRRS is that, his minimum term having expired, if serving his sentence of imprisonment in that jurisdiction the appellant could apply to the Home Secretary for the exercise of a discretionary power to transfer him to his country of origin, China. Such a prisoner enjoys no legal right to, nor expectation of, the favourable exercise of this power.

[8] The first limb of the appellant's case entails the contention that section 32A and/or 57(4) of the 1997 Act (the scattergun assault on section 57 in its entirety having been abandoned in response to judicial probing) is (or are) incompatible with article 14 ECHR in conjunction with article 5 as it does (or they do) not apply to

Northern Ireland. Pursuing a declaration of incompatibility accordingly, the appellant argues further that section 32A is concerned with immigration control and enforcement and is, therefore, an excepted matter under section 4 of the Northern Ireland Act 1998 ("NIA 1998") with the result that there is no constitutional barrier to the statutory extension for which he contends.

[9] The second limb of the appellant's case, also based on article 14 ECHR in tandem with article 5, pursues the same relief vis-à-vis section 55 of the 2016 Act on the basis of the appellant's exclusion from its reach.

[10] The appellant's core propositions are:

(i) Section 6(6) of the Human Rights Act 1998 does not provide a complete defence to the appellant's challenge.

(ii) Section 32A of the Crime (Sentences) Act 1997 ("1997 Act") treats the appellant differently based on his residence, which is an 'other status', for the purposes of article 14.

(iii) The difference in treatment created by section 32A of the 1997 Act cannot be justified.

(iv) The appellant's challenge is not out of time for the purposes of a judicial review.

(v) If the appellant's challenge is out of time for the purposes of a judicial review there is 'good reason' to extend time.

[11] The respondents' core propositions are these:

(i) Section 6(6) of the Human Rights Act 1998 provides a complete defence to the appellant's challenge.

(ii) In relation to the TER Scheme under Section 32A of the Crime (Sentences) Act 1997 ("1997 Act"), the fact that the appellant is in prison in Northern Ireland rather than England and Wales does not qualify as an "other status" for the purpose of ECHR article 14.

(iii) The challenges to primary legislation on ECHR article 14 grounds must fail because there is no basis on which the Court can find that the provisions must operate in a manner incompatible with the Convention in all or almost all cases.

(iv) In any event, any difference in treatment created by section 32A of the 1997 Act is justified in light of the legitimate aim of respecting the devolved nature of law-making within the United Kingdom.

(v) The appellant's challenge is out of time for the purposes of a judicial review and there is no 'good reason' to extend time.

[12] The court invited the parties counsel to address it on what we considered to be the fundamental issue, namely the impact of section 6(6) of the Human Rights Act on the appellant's case. In *Re Sterritt's Application* [2021] NICA 4 this court analysed section 6(6) in the following terms, at para [34]:

> "By reason of section 6(1) and (6) of HRA 1998 a failure on the part of a public authority to make 'primary legislation', as defined, does not entail acting incompatibly with one of the protected Convention rights. In orthodox terms, the failure by DOJ to bring section 44 of the 1999 Act into force would not be a failure to make primary legislation as the relevant legislation has already been made …"

[13] The issue under section 6(1) in these proceedings is in our view uncomplicated. Sections 6(1), 6(6) and 7(1) of the Human Rights Act combine to form a discrete statutory unit. A successful claim by a person who is, or would be, a victim of an act or omission by a public authority incompatible with a Convention right must, fundamentally, establish that the act or omission of the public authority is "*unlawful by section 6(1)*": see section 7(1). Section 6(1) makes it unlawful for a public authority to act, or fail to act, in a way which is incompatible with a Convention right. By section 6(6) a public authority's failure to act does not include a failure to either (a) introduce in, or lay before, Parliament a proposal for legislation; or (b) make any primary legislation or remedial order."

[14] The 1997 Act is a measure of primary legislation. It was made by the Parliament of England and Wales. The responsible government department is the Ministry of Justice of England and Wales. Appropriately, therefore, the Minister of Justice is the main proposed respondent in these proceedings; "appropriately", because if the appellant cannot establish a case against the Minister for Justice of England and Wales he is doomed to fail. The other two proposed respondents, namely the Secretary of State for the Home Department and the Northern Ireland Department of Justice, are in this court's view in effect makeweights. The appellant advanced no argument to the contrary.

[15] As noted above, the court permitted the appellant to amend his grounds of challenge to seek a declaration of incompatibility in respect of section 57(4) of the 1997 Act. This being the provision of the 1997 Act which restricts the application of section 32(a) to England and Wales only, this was a very necessary amendment.

[16] The simple analysis, unassailable in our view, is that the human rights incompatibility of which the appellant complains is the non-application of section 32A to the jurisdiction of Northern Ireland. Were he to secure a declaration of incompatibility, the effective remedy he would be hoping for would take the form of (a) the introduction in, or laying before, the Westminster Parliament of a proposal for legislation rectifying this restriction or (b) primary legislation doing likewise. Thus, the Convention incompatibility "act" which he asserts is a failure to take either of these courses to date. It follows that the first of the two possible eventual solutions is captured by section 6(6)(a), while the second is embraced by section 6(6)(b). The

appellant's case is, therefore, comprehensively defeated by section 6(6) considered in conjunction with section 6(1) and section 7(1).

[17] It is appropriate for this court to make clear what we consider to be the limitations of the first instance decision in *Re Ewart's Application* [2019] NIQB 88, given the arguments advanced on behalf of the appellant. The court was informed by Mr McGleenan that *Ewart* is being deployed in the High Court with increasing frequency.

[18] It is important to recognise that section 6(6) was one of the issues to the forefront of the *Ewart* case. The High Court decided that the applicant had made good her arguments concerning the Convention incompatibility of the primary legislation provisions under scrutiny. However, neither of the respondents – the Department of Health and the Department of Justice – was a law-making body possessed of powers to amend the offending statutory provisions. The judicial review was dismissed in consequence.

[19] Mr Southey required particularly on para [53] of *Ewart*. This passage must be considered together with para [52]:

> "[52] Bearing in mind the majority view on the procedural issue expressed by Lord Mance can Ms Ewart fare any better than the NIHRC in bringing a discrete challenge to the legislation in the way she has done? Lord Mance refers on numerous occasions to a victim of an unlawful act in the context of the NIHRC claim for relief under section 4. Ms Ewart does not claim to have been subject to an unlawful act to date, although she says that the law is incompatible and may affect her in the future. That begs the question whether she can she bring a case to try to have the law corrected? Having considered the competing arguments I have decided that she can for the reasons which I explain below.
>
> [53] Firstly this is a procedural issue. The NIHRC failed in bringing a claim in the abstract. Ms Ewart is in a stronger position as she has a factual case to make. If I were convinced of the merits and that she has been an actual or potential victim of the current law, it seems anomalous to me that she would be denied relief for the same procedural reason that defeated the NIHRC. The European jurisprudence that has been brought to my attention seems clear to me that a person bringing a claim under the section 4 route must be able to show that he or she would be able to assert his or her human rights under Article 34 of the Convention. The ECtHR jurisprudence recognises that a person may be a victim for the purposes of the Convention where they are impacted by the possible future application to them of legislation which may be incompatible. The

> requirement of victimhood which is specifically found in section 7 is not present in section 4. That is most likely because there is no specific reference to an unlawful act. In other words a person directly affected can be a potential victim of an unlawful act. In *Norris v Ireland* (1989) 13 EHRR 186 this was encapsulated in the phrase that the claimant must "run the risk of being directly affected by it" That principle was subsequently affirmed in *Ramadan v Malta* (2016) ECHR 76136/12."

[20] Under questioning from the court, Mr Southey was driven to accept that this passage is obiter. This is incontestable as at para [44] of the judgment, having completed an extensive survey of the evidence, Keegan J began her consideration of the Attorney General's argument that the applicant lacked victim status and/or Order 53 standing. At paras [53] and [57] the judge rejected this argument. As the third sentence in para [53] – "If I were convinced of the merits …" – makes clear, these must be characterised obiter passages. The correctness of this assessment is confirmed by the consideration that, logically, the first question to be decided was that arising under section 6(6): see our approach above. This question was resolved in favour of the two Departments.

[21] The second question, in logical sequence, namely whether the applicant possessed the factual and legal characteristics of a "*victim*", did not therefore arise for determination. It follows inexorably, therefore, that given our obiter assessment, the issues actually raised and addressed and being a first instance decision *Ewart* should not be cited as authoritative with regard to section 7(5)/Order 53, Rule (4) issues. For the reasons given, it has no precedent value in this discrete sphere: see the analysis in *Re Steponaviciene's Application* [2018] NIQB 90. Finally, the relevant passages in Ewart, correctly understood, neither speak to nor conflict with this court's analysis of the material provisions of ss 6 and 7 of the Human Rights Act above.

[22] Returning to the immediate context, while it may be otiose to add the following, it is incontestable that none of the proposed respondents is a law-making body ("proposed" as leave to apply for judicial review has not been granted). Thus, none of them can legislate to enlarge the territorial scope of section 32A. The one further issue to address arises out of the faint suggestion of Mr Southey KC that the ultimate resolution of the Convention incompatibility advanced could include not only the removal of the territorial restriction but the outright repeal of section 57(4). This suggestion has an unavoidable flavour of unreality. Courts operate in the real world. We agree with Mr McGleenan that it must be dismissed as a mere contrivance.

[23] The appeal must fail for the reasons given.

Delay

[24] We shall nonetheless address the issue of delay. At first instance the hearing conducted by the judge was of the "rolled up" species. The proposed respondents

contended that the appellant's case was untenable on the basis of delay (Order 53, Rule 4). As noted, the judge agreed with this contention.

[25] Order 53, Rule 4 of the Rules of the Court of Judicature, so familiar to so many, must nonetheless be reproduced:

> "**4. Delay in applying for' relief**
>
> (1) An application for leave to apply for judicial review shall be made [promptly and in any event] within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> (2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.
>
> (3) Paragraph (1) is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

It is unnecessary to rehearse in extenso the multiple decisions of the Northern Irish courts, both first instance and appellate, relating to the meaning and application of this provision. This task was undertaken in the decision of this court *Re Allister and Others' Applications* [2022] NICA 15 at paras [567]–[600].

[26] The high watermark of the appellant's case on delay is the following passage in the judgment of Baroness Hale of Richmond in *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56, at para [28]:

> "**A continuing effect?**
>
> 28. The Court of Appeal held that the denial of automatic citizenship was a "one off" event that happened at birth and had no continuing effect capable of being a violation of the Convention rights. For example, in Posti and *Rahko v Finland* (2003) 37 EHRR 6, the restriction on the applicants' right to fish in state-owned waters, imposed by a decree in 1994, obviously continued to limit their fishing, but was a single event and their complaint was out of time. However, the court reiterated that "the concept of a 'continuing situation' refers to a state of affairs which operates by continuous activities by or on the part of the state to render the applicants victims" (para 39). Thus, in

> *Norris v Ireland* (1991) 13 EHRR 186, it was held that the very existence of legislation penalising homosexual acts "continuously and directly" affected the applicant's private life, despite the fact that he had neither been prosecuted nor threatened with prosecution. In this case, the denial of citizenship has a current and direct effect upon the appellant who is currently liable to action by the state, in the shape of deportation, as a result."

Strikingly, there is no mention of section 7(5) of the Human Rights Act in this passage. Nor is there any mention of the English equivalent of RCJ (NI) Order 53, Rule 4. The same observation applies to the judgment of the Court of Appeal: [2016] EWCA Civ 22. Indeed, it is not clear that this passage is addressing <u>any</u> recognisable limitation issue. Summarising, the limitations of para [28] are in our view self-evident and incontestable.

[27] A robust approach to the issue of limitation in the context of Human Rights Act proceedings raising issues of statutory incompatibility is found in *R (Delve) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199. In contrast with the short and sparsely reasoned passage in Johnson, the unanimous judgment of the English Court of Appeal contains a detailed analysis of the issue, beginning with the relevant procedural rule – CPR 54.5(1) – and extending to the consideration of several pertinent reported decisions. The court stated at paras [121-124]:

> "121. CPR 54.5(1) provides that a claim for judicial review must be made "promptly and … in any event not later than 3 months after the grounds to make the claim first arose." This time limit cannot be extended by agreement between the parties, but CPR 3.1(2)(a) empowers the court to extend or shorten the time for compliance even if that time has expired. The Senior Courts Act 1981 section 31(6) provides that, where there has been "undue delay" in making an application for judicial review, the court may refuse to grant permission or relief:
>
> > '… if it considers that the grant of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.'
>
> 122. The expression "undue delay" in that provision is to be read as meaning a failure to act promptly or within three months: *R v Dairy Produce Quota Tribunal ex p. Caswell* [1990] 2 AC 738 at 746.
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> 123. In her ruling when she granted permission to apply for judicial review, Lang J held that the appellants had

established arguable grounds that the implementation of the changes to their pension age was in breach of their legitimate expectations and that it had resulted and continued to result in age and gender discrimination. She said that "[i]f proved, these are continuing unlawful acts, and so, in my view, the claimants are not time-barred from challenging them in the courts." She nevertheless provided in her order dated 30 November 2018 that an extension of time to 30 July 2018 for filing the claim was granted, in case it was required.

124. We disagree with Lang J's analysis as regards the application of the time limit here. Unlawful legislation is not a continuing unlawful act in the sense that the time limit for challenging it by way of judicial review rolls forward for as long as the legislation continues to apply. If that were the test, there would effectively be no time limit for challenging primary or secondary legislation or for that matter administrative conduct which continues to affect a claimant unless or until the action is withdrawn or revised. The appellants rely on *O'Connor v Bar Standards Board* [2017] UKSC 78, [2017] 1 WLR 4833 to argue that this is a case of continuing illegality. In that case the Supreme Court held that the time limit for bringing a claim in respect of disciplinary proceedings brought by the Bar Standards Board started to run only from the end of the proceedings when the claimant's appeal against the decision was allowed and not from the start of the proceedings when the BSB decided to pursue the case against her. That case does not in our judgment assist the appellants. What the court was looking at there was a series of acts comprising a course of conduct occurring over an extended period of time, not the continuing effect of a single act. There is no continuing series of acts here. The adoption of each Pensions Act affecting the appellants' pension age was a single act which was completed for this purpose at the latest when the legislation was brought into effect."

The court added at paras [125]–127]:

"125. Given that this case does not involve a series of acts, when did the time limit in CPR 54.5 start to run? The principles governing the application of the time limit for bringing judicial review proceedings were recently reviewed by this Court in *R (Badmus) and others v Secretary of State for the Home Department* [2020] EWCA Civ 657. That case concerned a challenge to the rate of pay fixed by the

> respondent for work carried out by detainees in immigration detention centres. The regime introducing a standard rate of pay for paid work across all detention centres was implemented through a Detention Services Order starting in 2008 and reviewed periodically thereafter. The applicants in *Badmus* had become subject to immigration detention and challenged the legality of the flat rate they were paid for work between August 2017 and July 2018. The question was when the grounds to make the claim "first arose" for the purposes of CPR 54.5(1).
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> 126. The Court held at [77] that the correct principle was that the grounds for making a judicial review claim first arise when a person is affected by the application to him or her of the challenged policy or practice. That is the case at least where the legislation is mandatory and involves no independent consideration by anyone as to whether or not it should be applied in the particular case. The claimants were not affected by the flat rate rule until they were detained in a detention centre in which that rule applied. It was only then that they had the standing and the grounds to bring their claim, and that was when time started to run: [78]. The Court recognised that this enabled a claimant to undermine a long established rule, policy or practice that had been applied to many people in the interim. That could operate to the detriment of good public administration and create legal uncertainty. The answer to that was that the three month time limit for judicial review applications and the one year time limit for bringing proceedings under section 7 of the Human Rights Act 1998 would in practice constrain the number of former detainees who could pursue proceedings.
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> 127. Applying that principle to the present case, we find that the appellants had standing to bring judicial review proceedings challenging the Pensions Acts which affected them as soon as those Acts were passed."

The appellant's arguments did not engage meaningfully with this decision, other than to acknowledge the irresistible, namely that it is antithetical to his case on delay.

[28] The dates and events which are material in this discrete context are ascertainable above. Focusing on the language of the relevant subordinate legislation, (ie Order 53, Rule 4), the judge's assessment was that the appellant's complaint about the non-availability to him of the possibility of post-minimum term expiry removal to his country of origin crystallised at the latest on the date when his minimum term expired viz 2 June 2021. One immediately juxtaposes this date with the date when

these proceedings were initiated, 12 January 2023. The initiation of the proceedings was, therefore, heavily out of time.

[29] The judge then addressed the question of whether the court should exercise its discretion to extend time. He identified in particular the factors of inadequacies in the pre-proceedings correspondence and the delay incurred in applying for legal aid. He recorded specifically the acceptance that there was no discernible good reason for the inertia which characterised the period June 2021 – April 2022 (just over half of the entire period). The judge's assessment was that good reason for exercising the court's discretion to extend time did not exist. Thus, delay was fatal to the appellant's case.

[30] The immediately succeeding passage – at para [51] of the judgment - is in these terms:

> "I need not decide how I would have approached this issue in the event that the applicant's case on the merits was much stronger. He is plainly not unlawfully or arbitrarily detained; but the fact that, to some degree, his liberty was potentially in issue would have been a factor in favour of granting an extension of time in the case if the merits were strong."

Analysing this passage: it is pure obiter; the mention of a possible liberty issue is both tentative and (understandably) unaccompanied by any judicial analysis; the judge made no "ambit" or "other status" finding favourable to the appellant; and, subject to the preceding observations, the possible liberty issue would have ranked merely as "a" factor in finding towards extending time, without (again understandably) any identification of other facts and factors, both pro and contra, bearing on this course.

Conclusion

[31] For the reasons given the appeal is dismissed and the judgment and order of Scoffield J are affirmed in all respects.