Neutral Citation No: [2025] NIKB 29 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **SCO12766** *ICOS No:* **21/045613/01** *Delivered:* **20/05/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY NOREEN THOMPSON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE REGULATION OF INVESTIGATORY POWERS ACT 2000

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Ronan Lavery KC and Mark Bassett (instructed by Brentnall Legal Limited) for the Applicant
Tony McGleenan KC and Philip McAteer (instructed by the Crown Solicitor's Office) for the proposed Respondents

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SCOFFIELD J

Introduction

[1] The applicant, Noreen Thompson, made a complaint to the Investigatory Powers Tribunal (IPT) ("the Tribunal") in 2019. The Tribunal dismissed her complaint. When she indicated a wish to appeal this decision, the Tribunal designated the Court of Appeal in England and Wales as the relevant appellate court and granted the applicant leave to appeal to that court. Those events were the trigger for the present application. The applicant challenges the legality of the decision of the IPT, pursuant to section 67A of the Regulation of Investigatory Powers Act 2000 (RIPA), allocating a case arising in Northern Ireland to the Court of Appeal in England and Wales for appeal, instead of the Court of Appeal in Northern Ireland.

[2] Mr Lavery KC and Mr Bassett appeared for the applicant. Mr McGleenan KC and Mr McAteer appeared for the respondents, the IPT ("the first respondent") and the Secretary of State for the Home Department (SSHD) ("the second respondent"), as the government minister responsible for the legislation which is challenged. I am grateful to counsel for their helpful written and oral submissions.

Factual background

[3] The applicant resides in Northern Ireland. Her father, Francisco Notarantonio, was killed in October 1987 by members of the Ulster Defence Association (UDA). No one has been convicted of his killing. She suspects that there was involvement by state agents and/or state officials in his death. Her complaint to the IPT related (she contends) to recent and ongoing conduct by the security services aimed at frustrating the investigation of the murder by the Operation Kenova Team.

[4] The suggestion of state involvement in the murder of the applicant's father arises because it has been reported that members of the British security forces were involved in selecting him for murder, or facilitating this, in order to protect the high-level covert human intelligence source operating within the Provisional IRA known as 'Stakeknife.' Operation Kenova is a police investigation which is investigating the criminal activities of Stakeknife and potential criminality on the part of his handlers, amongst others.

[5] A further pertinent fact is that an ex-British Army soldier who had been attached to the Force Research Unit (FRU), Ian Hurst (who uses the pseudonym Martin Ingram), wrote a book called 'Stakeknife', in which he suggested security force involvement in Mr Notarantonio's murder in order to protect the real identity of Stakeknife. However, the Operation Kenova Team indicated in January 2019 that it had not found any link between the murder of the applicant's father on the one hand and its terms of reference and the activities of Stakeknife on the other. This gave rise to concerns on the applicant's part as to the apparent contradiction between the position set out in Mr Hurst's book and what Operation Kenova considered to be the case. Her allegation – which formed the basis of her complaint to the IPT – was that Mr Hurst had been pressurized by the security services to withdraw his suggestion that FRU members had been involved in the murder. She contends that such behaviour, designed to thwart the criminal investigation, is a breach of article 2 ECHR, amongst other things, and likely to amount to criminal conduct. Alternatively, she suggested that members of the security services had purposely promulgated misinformation, suggesting that her father's murder *was* connected to Stakeknife, in circumstances where this was simply intended to distract from a proper investigation or understanding of the matter.

[6] The applicant brought the matter to the IPT relying on its jurisdiction under section 65(2)(a) of RIPA, which renders the IPT the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 (HRA) in relation to any proceedings for actions incompatible with Convention rights where those are proceedings against any of the intelligence services. The applicant contends that the IPT has jurisdiction to determine these issues on the basis of section 65(2)(b), read together with section 65(4)(a) and (b) and section 65(6)(a) of RIPA.

[7] The IPT dismissed the applicant's complaint by a decision dated 13 January 2021 (IPT reference IPT/19/159/H) on the basis that it did not have jurisdiction under section 65, since the relevant events to which the complaint related had occurred prior to the effective date of RIPA and the HRA, and indeed prior to the existence of the IPT; and/or because the matters of complaint did not arise in "challengeable circumstances" as defined by section 65 of RIPA. The applicant is dissatisfied with this, in part because she contends that her complaint focused on *more recent* alleged behaviour on the part of security services, by way of cover-up, rather than the substance of what occurred at the time of the murder in 1987.

[8] In the decision letter, the IPT explained to the applicant that she may appeal on a point of law. It went on to say that the relevant appellate court was the Court of Appeal in England and Wales in accordance with section 67A(2) of RIPA in a passage in the following terms:

> "The Tribunal hereby specifies, in accordance with s.67A(2) of RIPA that, in the event of an appeal, the relevant appellate court in this case is the Court of Appeal of England and Wales. The legislation includes the power, which can be exercised with the consent of the Northern Ireland Assembly, to allow appeals to be heard in the Court of Appeal in Northern Ireland (CANI). However, the Northern Ireland Assembly has not yet given such legislative consent to enable relevant appeals to be determined by the CANI. Accordingly, in accordance with Rule 18(3), the Tribunal specifies that the relevant appellate court is the Court of Appeal of England and Wales."

[9] The applicant was unhappy with this and issued pre-action correspondence to a range of bodies: the IPT, the SSHD, the Department of Justice (DoJ), the Northern Ireland Courts and Tribunals Service (NICTS) and the Executive Office (TEO) on 3 February 2021. This indicated an intention to challenge the decision of the IPT to designate the relevant appellate court as the Court of Appeal in England and Wales; and also, to challenge the failure of the DoJ, NICTS and TEO to provide an effective appeal process for those resident in Northern Ireland. In the event, these proceedings were instituted only against the first two of those parties, the Tribunal itself and the SSHD.

[10] The applicant also submitted an application for leave to appeal on 4 February 2021. Her representatives have indicated that this was done on a protective basis but without prejudice to her objection to the designation of the relevant appellate court. The IPT (Lord Boyd, the Vice-President, and Sir Richard McLaughlin) granted leave to appeal on 25 February 2021, since the application was considered to raise an important point of law. The Tribunal again certified the Court of Appeal of England and Wales as the appropriate court to hear the appeal.

[11] Nevertheless, the applicant does not wish to exercise her right to appeal against the IPT's decision in England and Wales because she resides in Northern Ireland and the events complained of took place in Northern Ireland. The applicant has accordingly not filed a notice of appeal with the Court of Appeal in England. From the evidence this appears to have been a conscious decision on her part. An affidavit from her solicitor indicates that he was instructed that she did not wish to pursue an appeal in England with different solicitors. (Both he and the applicant's junior counsel are not qualified to practice and undertake litigation in England and Wales; although her senior counsel is so qualified.) In those circumstances, there is no extant appeal. Both parties rely upon this fact: the proposed respondents to say these proceedings are academic and of no utility; and the applicant to say that this simply demonstrates the unsatisfactory nature of the only route of appeal presently open to her.

[12] The applicant applied for legal aid in respect of these proceedings on 12 March 2021; and the Legal Services Agency for Northern Ireland (LSANI) declined to issue a certificate on 9 April 2021. The applicant appealed against that decision and an oral hearing took place on 21 May 2021, with the appeal also being refused. The reasons for the refusal were provided to the applicant on 26 May 2021. Sometime later, pursuant to a further legal aid application, the applicant was issued a legal aid certificate on 11 September 2023. These proceedings were commenced in June 2021 and were subject to initial case management at that time. After that, however, there was a substantial period of inactivity upon which the proposed respondents rely as a further basis upon which to oppose the grant of leave.

Relevant statutory provisions

[13] UK-wide first-instance tribunals and appellate tribunals were established by the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). Section 13 of the 2007 Act provides that appeals from an Upper Tribunal decision lie to "the relevant appellate court" and the Tribunal must specify the relevant appellate court. Section 13, insofar as material, provides as follows:

> "**13 Right to appeal to Court of Appeal etc.**
>
> (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.
>
> (2) Any party to a case has a right of appeal, subject to subsection (14).

(3) That right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by—

(a) the Upper Tribunal, or

(b) the relevant appellate court,

on an application by the party.

…

(11) Before the Upper Tribunal decides an application made to it under subsection (4), the Upper Tribunal must specify the court that is to be the relevant appellate court as respects the proposed appeal.

(12) The court to be specified under subsection (11) in relation to a proposed appeal is whichever of the following courts appears to the Upper Tribunal to be the most appropriate—

(a) the Court of Appeal in England and Wales;

(b) the Court of Session;

(c) the Court of Appeal in Northern Ireland.

(13) In this section except subsection (11), "the relevant appellate court", as respects an appeal, means the court specified as respects that appeal by the Upper Tribunal under subsection (11)."

[14] The right of appeal on a point of law in RIPA is provided in section 67A, which was inserted by section 242 of the Investigatory Powers Act 2016 ("the 2016 Act"), which took effect on 31 December 2018. It therefore post-dates the statutory scheme relating to appeals set out in the 2007 Act and, as can be seen below, also adopts the model (in slightly different language) of the tribunal from which appeal is sought specifying the relevant appellate court.

[15] The applicant takes issue with the provision made in section 67A because she contends that appealing a Northern Irish case to an English court is contrary to constitutional principle. Section 67A of RIPA provides as follows:

"**67A Appeals from the Tribunal**

(1) A relevant person may appeal on a point of law against any determination of the Tribunal of a kind mentioned in section 68(4) or any decision of the Tribunal of a kind mentioned in section 68(4C).

(2) Before making a determination or decision which might be the subject of an appeal under this section, the Tribunal must specify the court which is to have jurisdiction to hear the appeal (the "relevant appellate court").

(3) This court is whichever of the following courts appears to the Tribunal to be the most appropriate—

(a) the Court of Appeal in England and Wales,

(b) the Court of Session.

(4) The Secretary of State may by regulations, with the consent of the Northern Ireland Assembly, amend subsection (3) so as to add the Court of Appeal in Northern Ireland to the list of courts mentioned there.

(5) The Secretary of State may by regulations specify criteria to be applied by the Tribunal in making decisions under subsection (2) as to the identity of the relevant appellate court.

(6) An appeal under this section—

(a) is to be heard by the relevant appellate court, but

(b) may not be made without the leave of the Tribunal or, if that is refused, of the relevant appellate court.

(7) The Tribunal or relevant appellate court must not grant leave to appeal unless it considers that—

(a) the appeal would raise an important point of principle or practice, or

(b) there is another compelling reason for granting leave.

(8) In this section—

"relevant appellate court" has the meaning given by subsection (2),

"relevant person", in relation to any proceedings, complaint or reference, means the complainant or—

(a) in the case of proceedings, the respondent,
(b) in the case of a complaint, the person complained against, and
(c) in the case of a reference, any public authority to whom the reference relates."

[16] As indicated above, pursuant to section 67A(1), the applicant has identified a point of law to be appealed in respect of the IPT's decision; but the Tribunal has specified the Court of Appeal in England and Wales under section 67A(2); and has since granted leave for the appeal to be made to that court under section 67A(6)(b). It was not open to the IPT to specify the Court of Appeal in Northern Ireland since it is not in the list of potential appellate courts contained in section 67A(3). The consent of the Northern Ireland Assembly has not been provided under section 67A(4) and the SSHD has therefore not added the Court of Appeal in this jurisdiction to the list of courts set out in section 67A(3).

[17] There are, however, rules which have been made by the SSHD pursuant (inter alia) to section 69 of RIPA regulating and relating to the exercise of the Tribunal's jurisdiction: the Investigatory Powers Tribunals Rules 2018 (SI 2018 No 1334) ("the 2018 Rules"). Rule 18 of those rules specifies criteria to be applied by the IPT in making decisions as to the identity of the relevant appellate court. It is in the following terms:

"**Relevant appellate court**

18.—(1) In making decisions under section 67A(2) of the Act as to the identity of the relevant appellate court, the Tribunal must apply the criteria set out in paragraphs (2) and (3).

> (2) Subject to paragraph (3), the relevant appellate court is the appellate court in the jurisdiction with the closest and most substantial connection to the section 7 proceedings or complaint.
>
> (3) The Tribunal may specify a different appellate court if the Tribunal considers it appropriate due to—
>
> (a) the public interest, and in particular any risk that the identity of a particular appellate court could be prejudicial to the interests of national security;
>
> (b) any other compelling factors the Tribunal considers relevant."

[18] The applicant relies upon the court structure on the island of Ireland and refers to Article 8 of the Act of Union (Ireland) Act 1800 (with Article 8 of the Union with Ireland Act 1800 enacted by the Westminster Parliament, collectively "the Acts of Union", being in the same terms) which provides as follows:

> "That it be the eighth article of union, that all laws in force at the time of the union, and all the courts of civil and ecclesiastical jurisdiction within the respective kingdoms, shall remain as now by law established within the same, subject only to such alterations and regulations from time to time as circumstances may appear to the parliament of the united kingdom to require; …"

Summary of each party's position

[19] Both parties have addressed their submissions to three principal issues, namely (a) delay, (b) constitutional rules and principles, and (c) article 14 ECHR. The proposed respondents rely upon the first of these to defeat the application for leave. The applicant did not pursue an originally pleaded, separate ground under article 6 ECHR.

[20] On the merits, the applicant contends that the decision of the IPT (and the related statutory framework) are "contrary to fundamental constitutional principles of the common law which recognizes Northern Ireland and England and Wales as separate legal jurisdictions within the UK" and also in breach of the anti-discrimination provision in article 14 ECHR. She seeks the quashing of the IPT's decision designating the Court of Appeal in England and Wales as the relevant appellate court. In her written submissions she also "seeks to challenge the constitutionality" of RIPA as being fundamentally contrary to common law principle, such that the principle of Parliamentary sovereignty should be abrogated

in this context, along the lines mooted in some of the speeches in the House of Lords in *R (Jackson) v Attorney General* [2006] 1 AC 262. Her case is encapsulated in the pithy submission that "an *Irish* case cannot, as a matter of constitutional law, be determined by an *English* court" [emphasis in original]. In oral submissions, Mr Lavery presented this as an issue of statutory construction, urging a strained construction of section 67 of RIPA (such as, he submitted, has been used by courts when construing statutory ouster clauses) which would treat the Court of Appeal in Northern Ireland as having been added to the list of potential appellate courts in order to correct the constitutional anomaly which the applicant submits has arisen in this case.

[21] The applicant relies in particular upon *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, where the majority of the Supreme Court decided that the judicial review jurisdiction of the High Court was not excluded by an ouster clause contained in RIPA in relation to the decisions of the IPT. Although the present case does not relate to an express ouster clause, the applicant proceeds on the basis that (at present) the jurisdiction of the Court of Appeal in Northern Ireland has been ousted by the way in which the legislation operates. Relying on para [131] of *Privacy International* (and the earlier case of *Cart*), she contends that it is for the courts and not the legislature to determine whether this is permissible, applying constitutional principles. As to these, the applicant relies generally upon the rule of law and the fact that – leaving aside the UK-wide jurisdiction of the Supreme Court – each of the legal jurisdictions in the UK has its own independent court system. (The applicant did not refer to section 41(1) and (2) of the Constitutional Reform Act 2005; but it can be seen that those provisions recognize and retain "the separate legal systems of the parts of the United Kingdom" in the context of the Supreme Court's appellate jurisdiction. The position is somewhat different in relation to its jurisdiction to decide devolution matters.)

[22] The applicant further argues that the Eighth Article of the Acts of Union (see para [18] above) was intended to retain a separate 'Irish' legal system within the UK and that this constitutional requirement cannot simply be impliedly repealed. Further relying on *R (Jackson) v Attorney General* (supra), and specifically Lord Hope's obiter observations at para [106], Mr Lavery argued that there were some constitutional imperatives arising from the Acts of Union which it was not within Parliament's power to simply alter. Permitting English courts to deal with Northern Irish cases is one such imperative, he submitted. On the applicant's case, this is not a mere issue of inconvenience but affects her ability to instruct (Northern Ireland) lawyers of her choice and also her entitlement to legal aid to pursue the appeal.

[23] As to article 14, the applicant contends that her complaint arises within the ambit of article 6, since the proceedings before the IPT pursuant to section 65 of RIPA relate to a "civil right." In this regard, she relies upon *British-Irish Rights Watch v Security Services, GCHQ and Others* [2004] UKIPT 01-77 (9 December 2004). She says that she is treated less favourably than those who can pursue an appeal from the IPT in their own jurisdiction; and that this less favourable treatment is on the

ground of her residence in Northern Ireland and/or belonging to, or being associated with, a national minority. She contends that there is no justification for this differential treatment. Additionally, she puts the case as one of discrimination of the type recognized in *Thlimmenos v Greece* (2001) 31 EHRR 15, at para [44], namely where the state without an objective and reasonable justification fails to treat differently persons whose situations are significantly different. In this regard, she contends that she should not be treated the same as someone whose case arose in, or relates to, one of the jurisdictions in Great Britain.

[24] The proposed respondents rely upon the fact that the Court of Appeal in Northern Ireland is not (presently) available as a relevant appellate court; and that this arises by virtue of the operation of a primary Act of the Westminster Parliament. The most fundamental principle of the UK constitution in this context, the respondents submit, is that of Parliamentary sovereignty. In the present case, it is clear why Parliament has not (yet) taken the step of permitting appeals from the IPT to be allocated for determination to the Northern Ireland Court of Appeal. That is because it was judged inappropriate to do so unless and until a legislative consent motion (LCM) was obtained from the Northern Ireland Assembly agreeing to this course, in light of the devolution of policing and justice matters. This was giving effect to the UK's devolved constitutional arrangements, rather than overriding them, Mr McGleenan submitted. The proposed respondents took issue with the applicant's article 14 ECHR analysis in a number of respects but, in any event, contend that respect for the UK's devolved constitutional arrangements, awaiting an LCM before legislating as the applicant would wish, provides adequate justification for any differential treatment.

Delay

[25] There is a somewhat complicated procedural history in this case. A significant period of delay in advancing the case arose whilst the applicant was seeking legal aid to pursue the proceedings, which was granted only in September 2023. The proceedings were initially commenced without the benefit of legal aid but then not progressed whilst legal aid was sought.

[26] The proposed respondents submit that the grounds for the application "first arose" for the purpose of RCJ Order 53, rule 4 on 25 February 2021 at the latest, when the applicant was granted leave to appeal by the IPT and it specified the Court of Appeal in England and Wales as the relevant appellate court. The three-month time limit, taken from that date, expired on 25 May 2021. However, the application was only lodged a number of weeks after that, on 7 June 2021. In a case management directions order issued in July 2021, it was noted that a leave hearing should be convened, and the parties were requested to liaise with each other and the Judicial Review Office with a view to fixing a mutually convenient date and agreeing a litigation timetable for the leave hearing. It does not appear that this occurred.

[27] The proposed respondents contend that there is no good reason for extending time to commence the proceedings. The application was lodged without the benefit of legal aid on the applicant's part, and then effectively 'parked' for a period of time. There was no progress from June 2021 until there was contact between legal representatives in February 2023. In addition to the initial delay in making the application, therefore, the proposed respondents also rely upon delay in progressing the case *after* the proceedings had been commenced.

[28] The respondents further contend that the absence of legal aid is not a good reason for the delay in commencing the case because the applicant was prepared to initiate the proceedings without the benefit of a legal aid certificate, having had her application for legal aid refused on 9 April 2021 and her appeal against that refused on 26 May 2021. (The respondents are additionally critical of the applicant's failure to apply for legal aid until March 2021, having sent pre-action correspondence on 3 February 2021, and contend that periods of delay in the seeking of legal aid have not been adequately explained.) The applicant was subsequently granted legal aid on 11 September 2023; but the respondents contend that she has also inadequately explained how and when she re-applied for legal aid.

[29] Relying on the decision of Humphreys J in *Re Tracey's Application* [2021] NIQB 104, at para [17], which itself referred back to *Re Watterson's Application* [2021] NIQB 16, the proposed respondents note that practitioners should have no expectation that applying for public funding alone would give rise to a 'good reason' for extending time to bring an application for judicial review. They also contend that there have been previous cases where delay after the issue of the proceedings, in the nature of want of prosecution without reasonable cause, has been a basis for refusing the grant of leave.

[30] I would not be unduly critical of the applicant's delay in initially applying for legal aid since, as she has indicated, the LSANI will frequently wish to see and consider a response to pre-action correspondence from the proposed respondent before an application for legal aid for judicial review proceedings will be considered or processed. In addition, it appears to me that the applicant was not guilty of undue delay in seeking to appeal the refusal of legal aid. Her representatives were informed on 21 May 2021 that the appeal had been refused, although reasons were only provided five days later. Although she could have issued these proceedings immediately after the appeal hearing and so within time, I do not consider she should be significantly criticized for taking time to await the written decision of the appeal panel and then consider matters.

[31] I accept the thrust of the applicant's point that issuing the proceedings without the benefit of legal aid should not be 'held against' her. She was entitled to seek public funding and, after it became clear that this was not going to be available, to take a decision on whether to proceed at her own costs risk. Before making that decision, she was also, in my view, entitled to a brief period of time for consideration and consultation with her legal representatives as to the risks involved. To her

credit, she issued proceedings at her own risk in order to preserve her position. Little if any prejudice arose on the part of the proposed respondents by virtue of the short delay in issuing proceedings after the expiry of the three-month time limit. I am therefore inclined to grant an extension of time for the commencement of the proceedings.

[32] How the court ought to deal with what happened thereafter is more difficult to resolve. As indicated above, it was to the applicant's credit that she stopped time running against her by issuing proceedings without the benefit of legal aid. From that point on, the proposed respondents were aware that proceedings were live. However, the proceedings issued did not make sufficiently clear (if indeed this is what was intended) that the applicant wished the application to be stayed whilst further steps were taken in relation to public funding. This is an approach with which the court and practitioners are familiar. On the contrary, the Order 53 statement in this case made clear that the applicant did not have the benefit of legal aid but proposed a litigation timetable involving a leave hearing being listed as soon as convenient to the court and the parties and further proposed directions for the onward expeditious management of the case.

[33] Notwithstanding the court's case management directions of July 2021, it appears that no active steps were taken for some time to seek to progress the case. No real or satisfactory explanation for this has been provided, although it seems clear that, at some point in time, the applicant or her representatives decided to make further attempts to secure public funding. Mr Lavery indicated that some measure of the delay may have arisen from, or in the aftermath of, the Covid pandemic's disruption of court business. He also indicated that, at one point, for some reason, the case was erroneously put into a list of cases being case-managed as 'legacy' cases, notwithstanding that this case is not classically of that nature (albeit the deeper context of the case is the murder of the applicant's father in 1987). Mr Lavery conceded that the case could have been moved on more quickly but argued that no prejudice had accrued to the proposed respondents as a result.

[34] The impetus for what further progress was then made is also unclear. It seems that there was contact between the applicant's junior counsel and the Crown Solicitor's Office (CSO) in May and June 2022 trying to move the matter forward, although there was some doubt as to whether the CSO was instructed and, if so, which solicitor within that office was instructed. The applicant's counsel was unaware of the identity of the proposed respondents' instructed counsel to allow for direct communications. The applicant's junior counsel also emailed the Judicial Review Office in June 2022 indicating that his solicitor had not been contacted by any representative of either proposed respondent. This email also indicated that the applicant was to seek legal aid for the application, having previously been refused a certificate; and asked that the matter be listed for mention in September 2022. It does not seem that anything became of that request.

[35] In February 2023 the applicant's junior counsel again contacted CSO and was finally provided with confirmation of the solicitor dealing with the case in that office. At that point, the parties finally undertook to liaise with each other to identify suitable dates for a listing and the date of 11 May 2023 was then suggested. A further application for legal aid was then made in May 2023. However, around a week before the proposed leave hearing on that date, a request for an adjournment was made on behalf of the SSHD, to which the applicant consented. This arose as a result of the service of a lengthy skeleton argument on the part of the applicant which the proposed respondents needed further time to consider. The parties agreed a further date for a leave hearing on 15 September 2023; and it seems a further legal aid application (which was ultimately successful) was made at that point. In the event, on the day before that leave hearing, a joint request was made by senior counsel to adjourn the hearing as "both sets of counsel are in difficulty." The leave hearing was then put back further and listed in early 2024.

[36] It probably goes without saying that no one emerges particularly well from the above summary. The case was not treated with any degree of urgency by anyone. The responsibility for such delay as there was can appropriately be apportioned between a number of parties, not excluding the court itself, and was contributed to by a mixture of miscommunication and mishap, as well as inaction and complacency. In fairness to Mr Bassett, the applicant's junior counsel, he was the person who made the most effort to move the case along.

[37] The reason these matters require to be considered is because of the proposed respondents' insistence that the delay subsequent to the issue of the proceedings is a further appropriate basis for the refusal of leave. I do not doubt that, in an appropriate case, the court has power to refuse leave to apply for judicial review (or, indeed, to set aside such leave or dismiss a case substantively) on the basis of the applicant's conduct, including for wilful or inexcusable failure to progress the proceedings sufficiently expeditiously, particularly (although not necessarily) where court orders or directions have been breached. It is the applicant, as moving party, who is chiefly responsible for progressing their own case. Once proceedings have been issued, however, respondents also have the ability to inject momentum into the case by seeking court directions or listings. Indeed, in public law proceedings, where all parties have a duty of cooperation with the court in the service of the public interest, I do not consider that respondents can simply sit back and do nothing with a view to any delay accruing only to the prejudice of the moving party, as might be the case in private law proceedings. In the present case, I have not been persuaded that the applicant's conduct was sufficiently culpable to warrant the refusal of leave to apply for judicial review on this basis alone. I therefore proceed to address the merits of the application below.

The 'constitutional issue'

[38] The applicant's case on her 'constitutional' complaint is summarised at paras [19]-[21] above. This represents only a brief synopsis of wide-ranging written

submissions on the issue, including a historical analysis of the history of court structures on the island of Ireland. The nub of the complaint is that the UK constitution recognises a number of separate, constituent legal jurisdictions; and it is constitutionally repugnant to allow the courts of one such jurisdiction to determine legal disputes which are properly a matter for another of those jurisdictions.

[39] On the other hand, the SSHD highlights the importance of the introduction of section 67A of RIPA because, prior to that, there was no right of appeal at all from an IPT decision. The new provision was therefore aimed at correcting or enhancing the Convention compliance of the IPT regime and bestowing additional rights on complainants to the IPT.

[40] The second respondent also notes that in the Investigatory Powers Bill, as introduced in Parliament, the Court of Appeal in Northern Ireland *was* listed alongside the Court of Appeal in England and Wales and the Court of Session in Scotland as one of those courts available to be designated for appeal. However, an LCM from the Northern Ireland Assembly had not been obtained and, in the absence of this, the Bill was amended so as to permit the Court of Appeal in this jurisdiction to be added by secondary legislation once the relevant LCM had been provided. The respondent says that this situation was the result of the failure of the devolved institutions in Northern Ireland to provide legislative consent and was therefore "a direct consequence of the functioning [of] constitutional arrangements in Northern Ireland rather than a breach thereof." The SSHD still intended to make regulations pursuant to section 67A(4) to add the Court of Appeal in Northern Ireland to the relevant list when Parliamentary time allowed and when an LCM had been secured. I assume that this remains the intention, although it still does not yet appear to have occurred.

[41] The proposed respondents assert that, in the meantime, an effective system of appeal has been provided for litigants before the IPT in Northern Ireland cases. As noted below, there may well be some inconvenience for a litigant before the IPT who is based in Northern Ireland having to pursue an appeal in a court which sits in England and Wales. However, there can be no plausible suggestion that the Court of Appeal in England would be incompetent to determine an appeal on a point of law from the IPT. In most cases – as in this case – the relevant law is likely to be the provisions of RIPA itself and/or the HRA, or perhaps other statutory provisions of UK-wide application concerning the operation of the security and intelligence services. The interpretation and application of such provisions is the bread and butter of the Court of Appeal in England and Wales, whose decisions are highly persuasive in this jurisdiction, just as it is of the Court of Appeal in Northern Ireland. In circumstances where, unusually, some particular provision of Northern Ireland law was relevant (for instance, a provision of criminal law not common between the jurisdictions) the Court of Appeal in England and Wales may be required to apply the law of Northern Ireland; but it is far from unheard of for courts, in a variety of contexts, to have to apply the law of another jurisdiction.

[42] I accept the second respondent's submission that reliance on Article 8 of the Acts of Union does not assist the applicant. Plainly, this provision significantly pre-dates the establishment of the IPT. It has nothing in particular to say about the operation of this UK-wide tribunal, created some 200 years later. Obviously, neither the 2000 Act nor the 2016 Act purports to abolish the separate legal system operating in Northern Ireland. Rather, in creating an entirely new right of appeal from a newly established UK-wide tribunal, it has allowed flexibility in allocating the appeal to several of His Majesty's senior courts. Significantly, Article 8 itself expressly recognizes that the provision it made was to be subject to alterations "from time to time as circumstances may appear to the parliament of the united kingdom to require." In other words, it recognized that Parliament itself could amend the position that Irish and English courts would continue in existence with the same jurisdictions as theretofore, where Parliament considered this to be required in the circumstances. Examples of major subsequent alteration include (but are not limited to) the respective Judicature Acts in England and Ireland in the late 19th Century; the Government of Ireland Act 1920; and the Judicature Act (Northern Ireland) 1978.

[43] I do not consider it arguable that the Acts of Union precluded, as a matter of law, the provision made in section 67A of RIPA in the particular circumstances. Even if it had done so on its face (which I do not accept, for the reasons summarized above), it would still remain open to Parliament to modify the relevant provision in the Acts of Union since the most fundamental rule of UK constitutional law remains that Parliament is sovereign and that legislation enacted by Parliament is supreme: see the recent restatement of this principle in the Supreme Court, in the context of abrogation of rights contained in the Acts of Union, in *Re Allister and Others' Application* [2023] UKSC 5, at para [66].

[44] Nor do I consider it arguable that section 67A of RIPA is repulsive to the common law in a way which would warrant the radical step of the IPT or the court failing to give effect to the plain words and meaning of an Act of the Westminster Parliament. The potential, extreme scenarios mooted in some of the cases where the courts might refuse to do so – such as abolition of judicial review or of the Court of Session in Scotland – are very far removed from the present case where Parliament has provided a right of appeal to an independent court.

[45] The cases relied upon by the applicant in relation to ouster clauses also do not appear to me to really assist. There is no jurisdiction on the part of a court in Northern Ireland in this case which has been ousted. The case does not concern the original jurisdiction of the High Court in Northern Ireland. No jurisdiction has been conferred on the Court of Appeal in Northern Ireland. (Indeed, that is the applicant's complaint.)

[46] Moreover, the IPT's statutory jurisdiction is not one which would necessarily fall to be subject to appeal in only one appellate court in a particular case. As the House of Lords held in *Tehrani v Secretary of State for the Home Department* [2007] 1 AC 521 at para [100] in relation to the Immigration Appeal Tribunal (IAT), the IPT is

also a creature of a statute extending to the whole of the United Kingdom that is "in essence, a United Kingdom body, capable of sitting throughout the United Kingdom and applying exactly the same law throughout the United Kingdom based on a statute extending to the whole of the United Kingdom." This means that various superior courts throughout the UK are fully equipped to ensure that the Tribunal acts within and in accordance with its legal powers. It also means that it is wrong to consider the appeal to the English Court of Appeal being an appeal from an 'Irish' or 'Northern Irish' court. Rather, it is an appeal from a UK tribunal.

[47] As the pre-action response on behalf of the Secretary of State for Northern Ireland set out, the IPT has a UK-wide jurisdiction. This is not, therefore, a case where "an "English" court has been inserted into the Northern Ireland legal system." It is also not a case where a decision of the Northern Ireland judiciary has been made amenable to appeal to the courts of England and Wales or Scotland. For these reasons, I do not consider the applicant's analysis to be correct when she says in her affidavit that her case is "being *transferred out* of Northern Ireland" [my emphasis]. It is conceivable that a more extreme case might arise where the applicant's objections have more purchase; but I do not consider them well-founded where a new right of appeal is created from a UK-wide (and itself relatively newly created) tribunal.

[48] The *Tehrani* case was cited by the Court of Appeal in England and Wales in *Secretary of State for the Home Department v Smith* [2022] EWCA Civ 1445 – a case not identified or relied upon by either party but which broadly supports the proposed respondents' position – which dealt with the availability of an appeal from the Special Immigration Appeals Commission (SIAC) to the Court of Appeal in England and Wales rather than the Court of Appeal in Northern Ireland. In that case the Court of Appeal dismissed an article 14 claim, based on the respondent's inability to instruct a special advocate qualified only in Northern Ireland. Bean LJ also noted that, in the circumstances of the case, there may be "a great deal to be said" for an appeal being to the Court of Appeal in Northern Ireland (para [36]). However, he held at para [30], "But where an appeal is brought under a statute, the terms of the statute may dictate the court or tribunal to which an appeal must be brought".

[49] For these brief reasons, I do not consider that the applicant has established an arguable case that the IPT acted unlawfully in failing to specify the Court of Appeal in Northern Ireland as the relevant appellate court. That option was simply not open to it as a matter of law. (No challenge was made to the specification of the Court of Appeal in England as opposed to the Court of Session in Scotland). Nor do I consider that a challenge to the legislation – or a proposed reading down of it to the degree suggested by the applicant – has a realistic prospect of success.

Article 14

[50] In terms of article 14 ECHR, the applicant argues that having to pursue her appeal in the Court of Appeal in England is more than a mere inconvenience.

Mr Lavery characterized this as a significant obstacle to the applicant pursuing her appeal and as placing her at a distinct disadvantage. In particular, he raised the issue of the applicant having to seek the grant of legal aid in England rather than from LSANI, since the latter will not grant legal aid for proceedings being pursued in England. The applicant also complains that having to pursue her appeal in England deprives her of her choice of advocate without good cause and undermines effective access to justice.

[51] The applicant says that she has been treated less favourably than someone in England and Wales or Scotland who has the right of appeal within their own jurisdiction. She relies upon her status as a resident of Northern Ireland, which she contends falls within the reference in article 14 to "other status" or "association with a national minority". (She has not identified the national minority in question but there are a number of ways in which this might be characterized to incorporate a person living in Northern Ireland.) The case is presented as one of indirect discrimination, since the applicant is subject to the same procedural regime as others but this is argued to have a disproportionate adverse effect on Northern Ireland litigants who have made complaints to the IPT.

[52] The second respondent does not take serious issue with the applicant's suggestion of differential treatment or that she is in an analogous situation to her comparators. Objections are taken in relation to the issues of status and justification.

[53] I consider that the applicant is able to rely upon a status which is potentially protected under the "other status" limb of article 14. It is not simply about residence in Northern Ireland, however. The issue is that she resides in Northern Ireland and is a complainant before the Tribunal in a case in which Northern Ireland (using the words of the 2018 Rules) has the closest and most substantial connection to the proceedings. (I assume that for present purposes, although I would add that it is not clear on the evidence. It is conceivable that the challenged actions of the security forces and/or any interaction Mr Hurst may have had with them or with the Operation Kenova Team may have occurred in Great Britain.) I also take as read for present purposes that she is treated differently, and less advantageously, than a litigant before the IPT in one of the other two jurisdictions within the UK. The key issue in the case is likely, therefore, to be justification of the differential treatment.

[54] The first point to note is that, whilst the applicant may be disadvantaged to some degree, there is not a major impediment to her exercising her right of appeal in the Court of Appeal in England and Wales. The IPT itself sits in Field House in London. Complainants before it, from all parts of the UK, will deal with the IPT in that location. As noted above (see para [41]) the designated appellate court is well able to resolve any issues of law which arise on appeal. Legal aid is available for public law proceedings in England and Wales. There are many experienced counsel and solicitors who would be quite able to present the applicant's appeal on her behalf; including several practising in Northern Ireland who are entitled to practice in England or practising primarily in England but who also appear regularly in court

in Northern Ireland. The facility of temporary call is also available, as is the possibility of a special dispensation being given to counsel in Northern Ireland to appear in the English Court of Appeal (see, by way of example, the *Smith* case (supra), at para [3]). Any logistical difficulties could no doubt be overcome. Public law litigants in Northern Ireland regularly have recourse to the Supreme Court sitting in London; and, in any event, all courts now have facilities for remote participation and engagement where this is warranted by the circumstances.

[55] As to the aim being pursued by the (temporary) exclusion of the Court of Appeal in Northern Ireland from the list of potential appellate courts, it is clear on the face of the statutory provisions that this was out of respect for the devolution settlement. It is clear from cases such as *R (A & B) v Secretary of State for Health* [2017] UKSC 41 – where a challenge was made to the differential treatment in healthcare provision for UK citizens usually resident in different parts of the United Kingdom – that it is a legitimate aim for the state to seek to protect and 'stay loyal' to the devolution scheme, respecting the position adopted by devolved legislatures (see, in particular, the judgment of Lord Wilson at paras [32] and [35] and, on a related issue, at para [20]). It is right that the Westminster Parliament can legislate for Northern Ireland in relation to devolved matters and can do so without the consent of the Assembly, but it will not normally do so. In this case, the second proposed respondent says that the grant of a right of appeal to the Court of Appeal in Northern Ireland was, or was at least potentially, politically contentious and "a matter of some sensitivity" (no doubt in light of the contention generally relating to legacy matters in Northern Ireland and the role of intelligence services and state agents throughout the Troubles).

[56] Although the applicant says that the seeking of an LCM is a mere convention and, therefore, suggests that Parliament should have legislated for an appeal to the Court of Appeal in Northern Ireland without the consent of the local legislative body, whether or not to exceptionally do so was a matter for Parliament, in respect of which its judgement is a matter deserving significant respect. This court might well consider that it would, or should, have been uncontentious for the Court of Appeal in Northern Ireland to be a potential appellate court in this sphere and/or that this is an area where Parliament might well have chosen to act without Assembly approval; but that was a judgement for Parliament itself to make and is a matter of high politics where it is to be afforded a wide discretion.

[57] Taking account of the fact that the status relied upon is not a suspect ground requiring very weighty reasons to justify differential treatment, and that this issue arises in a field where (in my judgment) Parliament's view is entitled to a significant degree of respect, I do not consider there to be a realistic prospect of success of the applicant succeeding in obtaining a declaration of incompatibility.

[58] I would add, however, that the applicant's complaint relates to how matters stood when she was granted leave to appeal in February 2021. The right of appeal had only, at that stage, been in force for a period of just over two years. The

Northern Ireland Assembly had not been operating effectively since the collapse of devolution in January 2017 to January 2020 and, although devolution had been restored at that point, virtually all other business was overshadowed by the Covid-19 pandemic throughout 2020 and into 2021. In February 2022, the First Minister resigned, with devolution only being restored again in January 2024. There has, accordingly, been only very limited windows within the last 9 years when an LCM might have been sought and secured. There may well come a point where it is no longer proportionate for the situation to simply remain as it is, given the obvious Parliamentary intention on the face of the 2016 Act that the Court of Appeal in Northern Ireland should be added to the list of potential appellate courts, with the consent of the Assembly. If such consent is given, the making of regulations by the SSHD should be straightforward. If such consent is refused, the matter may require to be reconsidered by Parliament so that it can take a more fully informed decision upon whether, exceptionally, it wishes to legislate further in this area without the consent of the devolved administration.

[59] A further issue of concern in relation to the applicant's article 14 challenge, which was not addressed in any particular detail in the course of argument, but which appears to me to represent a further impediment to this element of her case, is as follows. Section 7(1) of the HRA generally permits a person to bring proceedings in reliance on their Convention rights only where they are or would be a victim of an unlawful act under section 6 of that Act. However, pursuant to section 6(6), whilst an unlawful act for this purpose can include a *failure* to act, it expressly "does not include a failure to… make any primary legislation." In this case, it appears to me that the applicant's complaint is really about a failure to make additional provision in an Act of Parliament (whether RIPA itself or the 2016 Act) specifying the Court of Appeal in Northern Ireland as an additional option for an appeal from the IPT. It cannot be a complaint directly against the SSHD for failure to make regulations adding the Court of Appeal in Northern Ireland to the relevant list, since the SSHD is only permitted by section 67A(4) of RIPA to do so with the consent of the Northern Ireland Assembly which has not been given. To purport to do so without that consent would be to act unlawfully and ultra vires the empowering provision. The applicant's complaint can only realistically be that Parliament should have legislated by making additional provision in her favour. Applying the reasoning set out in *Hai Zhang v Secretary of State for the Home Department and Others* [2024] NICA 41, at paras [13]-[16] and [22], that does not appear to be an unlawful act of which the applicant can complain pursuant to sections 6 and 7 of the HRA. As in *Zhang*, this is not a case where such an article 14 claim can be saved by a suggestion that the differential treatment should be remedied by 'levelling down' (ie removing the right of appeal from the IPT from everyone) rather than 'levelling up' (ie providing a right of appeal to the Court of Appeal in Northern Ireland also). It is clear that the objective of the claim is to secure the second of these results.

Utility

[60] Finally, the respondent argues that there is no utility in the proceedings since, even though the applicant was granted leave to appeal, she has not served a notice of appeal. Even if she were to be successful in these proceedings, she could not, or could not now, pursue her appeal as she wishes in the Court of Appeal in Northern Ireland.

[61] As appears from the analysis above, I do not consider that the applicant could realistically achieve any relief which would confer upon her the right to pursue her appeal in the Court of Appeal in Northern Ireland, absent further statutory provision or the making of relevant regulations by the SSHD with the consent of the Northern Ireland Assembly. The most that could be achieved is a declaration of incompatibility under section 4 of the HRA (if I am wrong in my analysis on the article 14 issues). This is unlikely to give rise to a situation where the applicant could pursue her appeal from the IPT, unless that tribunal took an exceptionally generous approach to the extension of time for appeal and, in due course, after the remedial action, re-granted leave to appeal specifying the Court of Appeal in Northern Ireland is the relevant appellate court.

[62] In the circumstances, I consider that there is force in the proposed respondents' objection that the applicant's case is academic as between the parties. She had the opportunity to pursue an appeal in the Court of Appeal in England and Wales and made her choice not to do so. That being so, these proceedings are highly unlikely, even if she were successful, to result in any practical benefit to her. In the absence of any evidence suggesting that this is an issue of concern to a significant number of Northern Ireland litigants before the IPT, and in view of the SSHD's plain indication that it remains the intention of government to seek an LCM from the Northern Ireland Assembly and add the Court of Appeal in Northern Ireland to the section 67A(3) list in due course, I would not be inclined to exercise my discretion to hear this challenge notwithstanding its academic nature.

Conclusion

[63] For the reasons given above, I refuse leave to apply for judicial review in this case. I do not consider the applicant's two central grounds to be arguable in the sense of having a realistic prospect of success at full hearing. I also consider that the applicant does not have the relevant victim status under section 7 of the HRA for the purpose of her article 14 claim. In any event, in light of her abandonment of the right of appeal available to her, I also consider that the case will be academic for her in practical terms and there is insufficient good reason in the public interest to proceed to hear the case, even had I been persuaded that either of the central grounds was arguable.