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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 MEDIAHUIS UK LIMITED, MEDIAHUIS IRELAND LIMITED AND THE IRISH NEWS LIMITED FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN APPLICATION BY TIMES MEDIA LIMITED, BRITISH BROADCASTING CORPORATION, GUARDIAN NEWS AND MEDIA LIMITED, NEWS GROUP NEWSPAPERS LIMITED AND ASSOCIATED NEWSPAPERS LIMITED FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE JUSTICE (SEXUAL OFFENCES AND TRAFFICKING VICTIMS) ACT (NORTHERN IRELAND) 2022

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David Dunlop KC & Laura Curran (instructed by Carson McDowell) for the first Applicants
Jude Bunting KC & Lara Smyth (instructed by A & L Goodbody) for the second Applicants
Tony McGleenan KC & Philip McAteer (instructed by the Departmental Solicitor's Office) for the Respondent

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HUMPHREYS J

Introduction

[1] By these conjoined applications for judicial review, a series of media companies challenge the compatibility of sections 12 to 16 of the Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022 ('the Act') with article 10 of the European Convention on Human Rights ('ECHR'). These provisions came into effect on 28 September 2023.

[2] The impugned part of the Act relates to the provision of anonymity to those who are suspected of committing sexual offences. The applicants say, in this respect,

that the Act represents a serious interference with the right of freedom of expression enshrined in article 10, and that this interference is not in accordance with law and is disproportionate.

[3] For this reason, the applicants contend that the provisions fall outside the legislative competence of the Northern Ireland Assembly and the Department of Justice, which is the respondent to these applications. The relief sought is a declaration to this effect or, in the alternative, an order quashing the relevant provisions.

[4] The second applicants also seek to challenge the statutory provisions on the grounds that they were enacted in breach of the common law principle of procedural fairness.

The Statutory Provisions

[5] Section 12 of the Act provides:

> "(1) Subsection (2) applies where—
>
> (a) an allegation that a particular person has committed a sexual offence has been made to the police, or
>
> (b) the police have taken any step to investigate whether a particular person has committed a sexual offence (but an allegation within paragraph (a) has not been made in respect of the offence),
>
> and references in this section and sections 14 and 16 to "the suspect" are to the person mentioned in paragraph (a) or (b).
>
> (2) No matter relating to the suspect is to be included in any publication if it is likely to lead members of the public to identify the suspect as a person who is alleged to have, or is suspected of having, committed the offence.
>
> (3) Subsection (2) does not apply after the earliest time (if any) when any of the following events occurs—
>
> (a) a summons or warrant is issued under Article 20 of the Magistrates' Courts (Northern Ireland) Order 1981 against the suspect in respect of the offence;
>
> (b) the suspect is charged with the offence after being taken into custody without a warrant;

(c) an indictment charging the suspect with the offence is presented under section 2(2)(c) or (e) of the Grand Jury (Abolition) Act (Northern Ireland) 1969;

(d) a magistrates' court commits the suspect to the Crown Court for trial on a new charge alleging the offence.

(4) If none of those events occurs, then subsection (2) does not apply after the end of 25 years beginning with the date of the suspect's death.

(5) The matters relating to a suspect in relation to which the restriction imposed by subsection (2) applies (if their inclusion in any publication is likely to have the result mentioned in that subsection) include in particular—

(a) the suspect's name;

(b) the suspect's address;

(c) the identity of any school or other educational establishment attended by the suspect;

(d) the identity of any place of work;

(e) any still or moving picture of the suspect.

(6) For the avoidance of doubt, for the purposes of subsection (1) it does not matter whether the allegation is made, or the step is taken, before or after this section comes into operation.

[6] Section 13 provides a wide definition of what constitutes a "sexual offence" for these purposes.

[7] Section 14 concerns the power to disapply reporting restrictions:

"(1) Subsection (2) applies where matters relating to a suspect are prohibited from publication by virtue of section 12(2).

(2) A relevant person may apply to a magistrates' court for an order—

(a) disapplying, or

(b) modifying the application of,

section 12(2) in relation to the suspect.

(3) The modifications that may be made under subsection (2)(b) include increasing or decreasing the period mentioned in section 12(4), but do not include the disapplication or modification of section 12(3).

(4) In this section, "relevant person" means—

(a) during the suspect's lifetime—

(i) the suspect;

(ii) the Chief Constable;

(b) after the suspect's death—

(i) a person who was a family member of the suspect at the time of the suspect's death;

(ii) a personal representative of the suspect;

(iii) a person interested in publishing matters relating to the suspect which are prohibited from publication by virtue of section 12(2).

(5) On an application under subsection (2) the court must make an order under that subsection if it is satisfied that it would be—

(a) in the interests of justice, or

(b) otherwise in the public interest,

to make such an order.

(6) An order made under subsection (2) may be varied or revoked by order of a magistrates' court on the application of a relevant person where the court is satisfied that it would be—

(a) in the interests of justice, or

(b) otherwise in the public interest,

to make such a variation or revocation.

(7) An order made under this section does not affect the operation of section 12(2) at any time before the order is made.

(8) In this section, "a family member of the suspect" means—

(a) a person who at the time of the suspect's death was—

(i) married to the suspect;

(ii) in a civil partnership with the suspect;

(iii) living with the suspect as if a spouse;

(b) a relative of the suspect.

(9) For the purposes of this section—

(a) "relative" means parent, child, grandparent, great-grandparent, grandchild, great-grandchild, brother, sister, uncle, great-uncle, aunt, great-aunt, nephew, great-nephew, niece or great-niece;

(b) a relationship of the half-blood or by affinity is to be treated as a relationship of the whole blood;

(c) the stepchild of a person is to be treated as that person's child.

(10) In this section, "a person interested in publishing matters" means a person who—

(a) wishes the matters to be included in a publication, and

(b) in relation to the publication, is a person mentioned in section 16(1) (persons by whom an offence relating to publishing may be committed).

(11) In subsections (1) and (4)(b)(iii), a reference to matters being prohibited from publication includes matters being partially prohibited from publication following the making of an order under this section modifying the application of section 12(2) in relation to the suspect."

[8] Section 15 empowers the making of magistrates' courts rules in relation to the making of orders under section 14.

[9] Section 16 creates a criminal offence:

"(1) If any matter is included in a publication in contravention of section 12(2), the following persons are guilty of an offence—

(a) where the publication is a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical;

(b) where the publication is a relevant programme—

(i) any body corporate or Scottish partnership engaged in providing the programme service in which the programme is included, and

(ii) any person having functions in relation to the programme corresponding to those of an editor of a newspaper;

(c) in the case of any other publication, any person publishing it.

(2) Where a person is charged with an offence under this section in respect of the inclusion of any matter in a publication, it is a defence, subject to subsection (3), to prove any of the following—

(a) that the suspect included matter of that description in a publication;

(b) that the publication in which the matter appeared was one in respect of which the suspect had given written consent to the appearance of matter of that description;

(c) that at the time of the alleged offence under this section the person was not aware, and neither suspected nor had reason to suspect, that the publication included the matter in question;

(d) that at the time of the alleged offence under this section the person was not aware, and neither suspected nor had reason to suspect—

(i) that the allegation mentioned in section 12(1)(a) had been made to the police, or

(ii) that any step mentioned in section 12(1)(b) had been taken by the police.

(3) Written consent is not a defence under subsection (2)(b) if it is proved that—

(a) any person interfered unreasonably with the peace or comfort of the suspect, with intent to obtain it, or

(b) the suspect was under the age of 16 at the time when it was given.

(4) If a person charged with an offence under this section relies on a defence in subsection (2)(c) or (d), and evidence is adduced that is sufficient to raise an issue with respect to that defence, the court must assume that the defence is satisfied unless the contrary is proved beyond reasonable doubt.

(5) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding level 5 on the standard scale, or to both."

[10] 'Publication' is defined by section 6(1) of the Sexual Offences (Amendment) Act 1992 ('the 1992 Act'), as applied by section 17(1) of the Act as including:

> "any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public …"

[11] In summary therefore, the Act creates a statutory prohibition on the publication of any matter likely to lead to members of the public identifying a suspect in a sexual

offence when either an allegation has been made to the police or the police have taken any step to investigate whether this suspect has committed such an offence. The prohibition only applies pre-charge but continues for the suspect's lifetime and for 25 years thereafter. It applies to allegations made or steps taken both before and after 28 September 2023.

[12] The prohibition may be revoked or modified on application to the magistrates' court. During the suspect's lifetime such an application can only be made by the suspect himself or the Chief Constable of the PSNI. Following death, this category is expanded to include family members of the suspect and persons interested in publishing matters relating to the suspect. The district judge considering such an application may make an order if satisfied it would be in the interests of justice or the public interest.

[13] The prohibition is fortified by the creation of a criminal offence of publication of any matter in contravention of section 12(2) of the Act. Such a crime is punishable by a term of imprisonment of up to six months and/or a fine of up to £5,000.

[14] The Act also provides, at sections 8 to 11, for an extension to duration of the anonymity enjoyed by victims of sexual offences. Section 1 of the 1992 Act is amended from a lifetime period to lifetime plus 25 years after death. There is also included a provision whereby, after the death of a victim, the prohibition created by section 1 may be modified or disapplied on application to the magistrates' court by, inter alia, a person interested in publishing matters relating to the victim.

[15] However, the 1992 Act also includes, at section 3(2) a provision whereby section 1 must be disapplied if the court at a trial is satisfied that:

(a) the effect of section 1 is to impose a substantial and unreasonable restriction upon the reporting of proceedings at the trial, and

(b) it is in the public interest to remove or relax the restriction.

The legislative history

[16] The question of whether, and to what extent, those suspected of involvement in sexual offences should be entitled to anonymity has been the subject of debate historically. In 1975, the Report of the Advisory Group on the Law of Rape ("the Heilbron Report") recommended complainant anonymity but advised against anonymity for suspects.

[17] However, the Sexual Offences (Northern Ireland) Order 1978 subsequently introduced statutory anonymity for both complainants and those accused of having committed a rape offence. By Article 8(1)(b) of that Order, anonymity for the accused ceased on conviction. Furthermore, it was open to the accused or a co-accused to apply to have publication authorised; or the court could disapply the prohibition

where it imposed a substantial and unreasonable restriction on reporting, and it was in the public interest to remove it.

[18] These provisions were repealed by Article 18(4) of the Criminal Justice (Northern Ireland) Order 1994 and thenceforth there was no statutory anonymity for suspects in rape cases. In 2010, a Ministry of Justice report entitled 'Providing Anonymity to those Accused of Rape' concluded there was "insufficient reliable empirical evidence on which to base an informed decision on the value of strengthening anonymity for rape defendants" and recommended no change in the law.

[19] In 2018, a high-profile rape trial took place in Belfast during which issues arose concerning, inter alia, the naming of the complainant on social media and the access enjoyed by members of the public to the trial. This led to a review of Northern Ireland law and procedure in prosecutions of serious sexual offences being commissioned under the leadership of Sir John Gillen.

[20] The "Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland" ('the Gillen Review') was published on 9 May 2019. In chapter 12, "The voice of the accused", the issue of the publication of a suspect's identity either pre- or post-charge is considered. The report discusses the implications of the decision in *Richard v BBC & Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch.) and notes that the claimant in that action had established a legitimate expectation of privacy under article 8 ECHR which had been infringed by the BBC. It is important to note that the court found that there was no public interest at play in that case.

[21] The degree of statutory anonymity afforded to school teachers alleged to have committed sexual offences in England & Wales under the Education Act 2002 is also referenced. The report found that the case made for pre-charge anonymity was much more effective than the one in favour of pre-conviction anonymity generally.

[22] The report recites the dangers of public shaming, the impact on the presumption of innocence and the extraordinary stigma which attaches to being accused of sexual offences.

[23] The review concluded that an extremely strong case had been made for the introduction of legislation "to extend a degree of statutory anonymity to persons being investigated until the time that a charge is brought." (para 12.58) It states, at para 12.64, that there is a need for a new law:

> "to make it a criminal offence to breach anonymity until charges are brought unless in exceptional circumstances in the public interest."

[24] At para 12.66 the report refers to a draft Private Members Bill laid before the House of Lords which would make it illegal to identify suspects before charge "without the authority of a Crown Court Judge."

[25] The relevant section concludes with the words:

> "there may be rare circumstances where anonymity pre-charge should be removed in the interests of justice" (para [12.79]).

[26] The Gillen Review made 253 recommendations of which 16 were described as 'key recommendations.' On this issue, the relevant recommendations were as follows:

(i) No change in the current law concerning publication of the identity of the accused post charge. The identity of the accused should be anonymised pre-charge and the accused should have the right to apply for a judge-alone trial in the rare circumstances where the judge considers it to be in the interests of justice (key recommendation [10]);

(ii) Anonymity of complainants shall be made permanent so that it applies even after death (recommendation [21]);

(iii) There should be statutory regulation to prohibit the publication of the identity of those being investigated for serious sexual offences until they are charged (recommendation [159].

[27] The Justice (Sexual Offences and Trafficking Victims) Bill ("the Bill"), together with its Explanatory and Financial Memorandum ('EFM') were introduced to the Assembly on 5 July 2021 and contained clauses 8 to 14 which later became sections 12 to 16 of the Act. These documents were published on the Assembly website.

[28] The Bill was considered by the Committee for Justice ('the Committee') on 9 September 2021. The Committee heard evidence from four officials of the Department of Justice. The deputy director of criminal justice policy in the Department, Brian Grzymek, described Chapter 2 of Part 1 as implementing four recommendations in the Gillen Review. The Committee asked a number of questions about why anonymity was being granted for complainants/victims until 25 years after their death. It was explained that this was as the result of legal advice that an indefinite period would not have been proportionate.

[29] The issue of the analogue provision relating to the anonymity of suspects was not the subject of discussion or debate.

[30] The Committee then issued a Call for Evidence to invite witnesses to provide written submissions on the Bill's provisions. Some 42 submissions were received in response.

[31] In moving the Bill before the Assembly on 13 September 2021, the Minister reiterated that Chapter 2 of Part 1 was intended to implement recommendations from the Gillen Review, including providing for anonymity of suspects up to the point of charge. In relation to victim anonymity, she explained:

> "… legal advice indicated that an indefinite reporting restriction may contravene article 10 … and that permanency would not be considered proportionate. The provisions have therefore been drafted to prohibit the publication of anything that would identify a victim of a sexual offence for a period of 25 years after their death to minimise the potential for a breach of the ECHR. I consider that to be an appropriate and proportionate period to address the legitimate aim of protecting the reputation or rights of others for a reasonable period after death."

[32] As far as suspects were concerned, the Minister stated:

> "Anonymity for suspects who are investigated but not subsequently charged is being placed on a par with that of victims."

[33] The Minister explained the rationale for suspect anonymity, in line with the Gillen Review, and the circumstances in which the prohibition could be set aside. The Bill passed its second stage and was referred to the Committee for consideration. It heard evidence from a range of interest groups although not from any media organisation. These Committee sessions did not involve any engagement on the question of suspect anonymity.

[34] The Committee published its report on the Bill on 27 January 2022. In relation to suspect anonymity, it recorded that support for this proposal had been forthcoming from a number of organisations including the Northern Ireland Human Rights Commission and the Law Society. The Public Prosecution Service stated that its practice was for individuals not to be named until the point of charge. The Committee noted that the police could apply to the court to have anonymity disapplied.

[35] Having considered the comments made in evidence, the Committee declared itself was content with the clauses as drafted.

[36] A further Assembly debate took place on 15 February 2022, but the subject clauses were not discussed since there were no proposed amendments. Further evidence session with officials from the Department were held on 17 and 24 February 2022 but again suspect anonymity was not specifically considered.

[37] On 7 March 2022, the Minister moved the further consideration stage of the Bill in the Assembly and it resolved to pass the Bill on 15 March 2022. Royal Assent was received on 27 April 2022. As the provisions relating to suspect anonymity were essentially unamended, they were not mentioned in the debate.

[38] It is the applicants' case that the provisions as enacted went significantly beyond the Gillen Review recommendations:

(i) There is no defence of public interest to any prosecution for breach of the prohibition;

(ii) Post death anonymity for suspects was not recommended by the report;

(iii) There is no provision for media organisations or others to apply to the court, during the suspect's lifetime, for modification or revocation of the prohibition;

(iv) The report did not recommend that anonymity would apply retrospectively; and

(v) The report did not recommend that the prohibition would have extra-territorial effect.

ECHR compliance

[39] The EFM addressed the implications of ECHR only as regards the extension of anonymity for victims. It explained that permanent anonymity may have caused breach of the ECHR and therefore the period of life plus 25 years after death was chosen. It added, at para [33]:

> "A similar limit has been applied to the provisions providing for the anonymity of a suspect in a sexual offence case who has not been subsequently charged."

[40] The EFM also contains the statement from the Minister of Justice that:

> "In my opinion the Justice (Sex Offences and Trafficking Victims) Bill would be within the legislative competence of the Northern Ireland Assembly."

The applicants' evidence

[41] The court had the benefit of an affidavit from Sam McBride, the Northern Ireland editor of the Belfast Telegraph and Sunday Independent, which are published by the Mediahuis entities. He deposes to a number of significant concerns which he and other editors and journalists have concerning the implications of the Act.

[42] He gives the example of his investigation into allegations of serious sexual assault by a clergyman who continues to hold a senior role in the church which includes interaction with children. A woman whom he interviewed expressed her fear that there may be up to 20 other victims. On 18 November 2023 Mr McBride published an article explaining the consequences of the Act namely that nothing could be published in respect of the clergyman's identity regardless of the public interest arguments for so doing.

[43] Following this publication, Mr McBride was contacted by Thirtyone:eight, a charity which provides safeguarding advice to churches and trains those involved in the identification of child abuse. It expressed its concerns about the consequences of the legislation suppressing the voice of survivors of abuse as it is often through media coverage that such individuals become aware of others experiencing harm at the hands of the same person.

[44] Mr McBride also gives examples of known sex offenders and abusers in respect of whom complaints were made to the police in Northern Ireland, but who were never charged, and who have died within the last 25 years. Since the Act is retrospective, the publication of anything likely to lead to their identification would be a criminal offence in Northern Ireland, but not anywhere else in the United Kingdom.

[45] In one high profile case, there have been multiple reports in the media identifying a particular cleric, who died in 2002, as a result of civil litigation ongoing between abuse victims and the diocese of which he was a member. Mr McBride raises the question as to whether section 12 of the Act now prohibits the reporting of those court cases or, indeed, reference to the individual in the course of such legal proceedings.

[46] In January 1980 investigative journalists working for the Irish Independent broke the story of systemic child abuse being carried out at Kincora Boys' Home in Belfast. This led to the arrest and conviction of three members of staff. Claims persisted that the police had not properly investigated complaints made to them for improper reasons. Mr McBride points out that this type of investigative journalism, exposing serious criminal wrongdoing, is criminalised by the Act.

[47] Mr McBride also deposes to examples of alleged sexual offending by elected representatives or police officers, where there may be compelling public interest reasons to identify the individual concerned. Since 28 September 2023, editors in England, Scotland and Wales could choose to publish suspects' names whilst their Northern Irish colleagues could face criminal prosecution for making the same decision.

[48] The evidence also reveals that following the publication of an article concerning civil proceedings brought by an abuse victim which named a clergyman allegedly

involved, the Belfast Telegraph received a letter from solicitors representing the relevant diocese specifically referring to the prohibition in section 12 of the Act.

[49] Fiona Hamilton, Chief Reporter at The Times, swore the principal affidavit on behalf of the second applicants. She explains the long and significant history of public interest journalism at her newspaper, citing what she describes as "authoritative, credible and responsible reporting." It enjoys a circulation of some 2.5 million, as well as a strong online presence.

[50] She deposes to her extensive experience in the investigation of allegations of sexual misconduct and the unique difficulties faced by the survivors of such abuse. She states:

> "Public interest journalists play a critical role in supporting alleged victims' rights to freedom of expression and allowing them the opportunity to share their version of events."

[51] Many examples of the work carried out by The Times in this field are referenced. Ms Hamilton also refers to issues surrounding inadequate police investigations, unreported crimes and failings in the criminal justice system generally as matters which are relevant to the public interest in reporting.

[52] There are several high profile cases in which her newspaper has made the decision to name a sexual offence suspect prior to any charge because of the perceived strong public interest in so doing. These include Rolf Harris, Andrew Rosindell MP and Russell Brand. It is asserted that such reporting can actually facilitate the investigation of crime and encourage other complainants to come forward.

[53] One particular concern expressed by Ms Hamilton relates to police failings and wrongdoing. The provisions of the Act prevent, during the suspect's lifetime, anyone other than the suspect himself and the Chief Constable of the PSNI from making an application to court to have the prohibition disapplied. She cites an example of a former senior PSNI officer who is himself now under investigation for sexual offending. Part of that investigation will address the alleged shortcomings in the original PSNI investigation. This case was extensively reported by The Times in July 2023. Publishing the same report today, despite the fact that all these matters are in the public domain, could lead to criminal liability.

[54] The 'chilling effect' of the Act, as Ms Hamilton describes it, has restricted publication not only in Northern Ireland but also throughout the United Kingdom since online articles will be available in this jurisdiction.

[55] Ms Hamilton's evidence is endorsed and adopted by senior figures in each of other media organisations within the second applicants.

[56] The applicants raise in evidence and argument a number of potential factual scenarios which illustrate some possibly unintended consequences of the Act:

(i) It may serve to criminalise victims who make any disclosure or publication in relation to their alleged abuser;

(ii) It prevents suspects from issuing a public denial of wrongdoing unless a successful application has been made to the court;

(iii) An allegation of an alleged sexual motive in a murder case, if it was investigated by the police, cannot be published unless the police see fit to make an application to court; and

(iv) It would not be possible to report publicly on the work of public inquiries such as the Historical Institutional Abuse Inquiry.

The respondent's rationale

[57] In evidence, Lorraine Ferguson-Coote, the respondent's Head of Criminal Policy Unit, has offered the rationale behind the impugned provisions of the Act.

[58] It is said that they seek to protect a suspect from reputational damage and other potential impacts, including violence or a threat to life, which may arise as a consequence of identification. The rights protected include those arising under articles 2, 3, 6 and 8 ECHR and those of family members.

[59] It is stressed that anonymity only applies pre-charge where an allegation has been made to police or the police have taken a step to investigate.

[60] In relation to the availability of the application to court to modify or revoke the prohibition, the witness states:

> "It was considered necessary to draw a distinction between who can apply before the death of the suspect and who can apply thereafter to reflect the very different circumstances that apply in those varying circumstances." (para [77])

[61] Ms Ferguson-Coote points out that the ECHR rights are only potentially engaged during the suspect's lifetime and not after death. She states:

> "While the suspect is still alive, to provide for applications from anyone other than the suspect or the police would run contrary to the aims of key recommendation 10."(para [78])

[62] Following death, it is considered that a broader approach is appropriate. In general, the position is:

> "Anonymity of those suspects not charged was aligned with that provided for the victim of a sexual offence."

[63] It is noteworthy that this rationale, as presented in evidence, does not feature in any of the materials presented to the Committee or the Assembly.

Article 10 ECHR and journalism

[64] By section 21(1) of the Human Rights Act 1998 ('HRA'), an Act of the Northern Ireland Assembly is subordinate legislation and therefore can be struck down in the event of incompatibility with the ECHR. Section 6 of the Northern Ireland Act 1998 ('NIA') states:

> "(1) A provision of an Act is not law if it is outside the legislative competence of the Assembly.
>
> (2) A provision is outside that competence if any of the following paragraphs apply …
>
> (c) it is incompatible with any of the Convention rights;"

[65] Article 10 ECHR states:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[66] Article 10 therefore confers a qualified right, interference with which may be justified when it is:

(i) Prescribed by law;

(ii) In pursuit of a legitimate aim; and

(iii) Proportionate.

[67] The Strasbourg courts have frequently emphasised the important role played by media outlets in a democratic society. In *Satakunnan Markkinapörssi Oy v Finland* [2018] 66 EHRR 8, the Grand Chamber referenced:

> "The vital role of the media in facilitating and fostering the public's right to receive and impart information and ideas has been repeatedly recognised by the Court. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role as "public watchdog"…." (para [126])

[68] In *Sürek and Özdemir v Turkey* [1999] 7 WLUK 160, the ECtHR found:

> "Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society." As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly." (para [57])

[69] The ECtHR has also held that the risk or fear of prosecution can give rise to a violation of the article 10 right. In *Altug Taner Akçam v Turkey* [2016] 62 EHRR 12, the court said:

> "Furthermore, it is also open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct because of it or risk being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation. The court further notes the chilling effect that the fear of sanction has on the exercise of freedom of expression, even in the event of an

> eventual acquittal, considering the likelihood of such fear discouraging one from making similar statements in the future." (para [68])

[70] *Ólafsson v Iceland* [2018] 67 EHRR 19 concerned the publication of an article which contained allegations that a political figure had sexually abused two women when they were children. The subject of the article brought defamation proceedings against the editor of the media site which made the publication. He was found liable and ordered to pay damages by the Icelandic Supreme Court.

[71] The ECtHR found that the national court had struck the wrong balance between the rights of the individual and the public interest and that there had been a violation of article 10 ECHR:

> "In assessing the circumstances submitted for their appreciation, the Supreme Court did not give due consideration to the principles and criteria as laid down by the Court's case law for balancing the right to respect for private life and the right to freedom of expression. It thus exceeded the margin of appreciation afforded to it and failed to strike a reasonable balance of proportionality between the measures imposed, restricting the applicant's right to freedom of expression, and the legitimate aim pursued." (para [62])

[72] It is significant that the court arrived at this conclusion in the context not of a fine or period of imprisonment imposed as a criminal sanction but in respect of a purely civil remedy. The court stated:

> "Although the compensation was not a criminal sanction, and the amount may not appear harsh, the court reiterates that in the context of assessing proportionality, irrespective of whether or not the sanction imposed was a minor one, what matters is the very fact of judgment being made against the person concerned, even where such a ruling is solely civil in nature. Any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions." (para [61])

The approach to incompatibility

[73] The applicants accept that the provisions of the Act have a legitimate aim, namely to protect a person alleged to have committed a sexual offence from the reputational damage which may arise from their identification. The challenge is advanced on the basis that the legislation is not prescribed by law, and it brings about

a disproportionate interference with the applicants' article 10 rights. This is an ab ante challenge, ie one brought in the abstract without any particular factual matrix having been established.

[74] In a series of recent cases, appellate courts have addressed the approach to such ab ante challenges. In *Christian Institute v Lord Advocate* [2016} UKSC 51, the court considered whether the Children and Young People (Scotland) Act 2014, a piece of legislation not yet in force, was within the legislative competence of the Scottish Parliament. The challenge was grounded on article 8 ECHR, it being argued that the legislative provisions breached the right to privacy of parents and children.

[75] The court held, at para [88]:

> "an ab ante challenge to the validity of legislation on the basis of a lack of proportionality faces a high hurdle: if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with article 8 rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights … The proportionality challenge in this case does not surmount that hurdle …"

[76] There have been a number of decisions at the highest level concerning the proper application of the compatibility test in proportionality cases. In *Re NIHRC's Application* [2018] UKSC 27, a challenge to the criminal law of Northern Ireland in abortion, the focus was on the specific cases of rape and foetal abnormality. A literal application of the *Christian Institute* test would mean that such a challenge could never succeed since such cases make up a small minority of the instances where a pregnant woman seeks but is denied an abortion. Lord Mance said:

> "The relevant question is whether the legislation itself is capable of being operated in a manner which is compatible with that right or, putting the same point the other way around, whether it is bound in a legally significant number of cases to lead to an unjustified interference of the right … It cannot be necessary to establish incompatibility to show that a law or rule will operate incompatibly in all or most cases. It must be sufficient that it will inevitably operate incompatibly in a legally significant number of cases." (para [82])

[77] *In Re McLaughlin's Application* [2018] UKSC 48, which was not an ab ante challenge, concerned the entitlement of an unmarried partner to widowed parent's allowance. Lady Hale stated, at para 43:

> "… the test is not that the legislation *must* operate incompatibly in all or even nearly all cases. It is enough that it will inevitably operate incompatibly in a legally significant number of cases: see *Christian Institute v Lord Advocate* [2016] UKSC 52 at para [88]."

[78] Confusingly, Lady Hale referred to Lord Reed's judgment in *Christian Institute* rather than Lord Mance's test in *NIHRC* when adopting the words "legally significant number of cases."

[79] The question was revisited in *Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, a reference by the Attorney General for Northern Ireland in relation to the legislative competence of the Assembly to make a law prohibiting protest in the vicinity of clinics offering pregnancy termination services. It was argued that the lack of any "reasonable excuse" defence gave rise to a disproportionate interference with the article 9, 10 and 11 ECHR rights of protesters and demonstrators.

[80] Lord Reed determined that Lady Hale had misstated the test in *McLaughlin* and it remained as expressed at para [88] of *Christian Institute*, ie the "all or almost all cases" test.

[81] These decisions were recently considered by the Northern Ireland Court of Appeal in *Department for Justice v JR123* [2023] NICA 30, which concerned a challenge to the Convention compatibility of article 6(1) of the Rehabilitation of Offenders (Northern Ireland) Order 1978. The court followed the *Christian Institute* test and concluded that it applied to challenges to extant legislation as well as draft legislation or uncommenced provisions.

[82] The question arising in this case is whether the *Christian Institute* test requires the court to arrive at an assessment of all cases across the entire spectrum of factual scenarios or whether it can examine categories of case in carrying out the proportionality exercise. The answer to this can be found in the Supreme Court decision in *Re Gallagher's Application* [2019] UKSC 3, which concerned the compatibility of statutory schemes regulating the disclosure of criminal records to potential employers.

[83] Lord Sumption delivered the majority judgment. He held that where legislation operates by pre-defined categories, the task of the court is to assess the proportionality of the categorisation and not its impact on individual cases. In that case, he found that the bright line categorisation was proportionate, save in two cases, namely the 'multiple conviction rule' and warnings administered to young offenders. In those cases, the court determined that there was a "category error."

[84] The applicants contend that the inclusion of public interest journalism within the prohibition and the potential criminal law sanction represents a category error.

Proportionality

[85] The approach to the assessment of proportionality in the context of qualified ECHR rights is guided by Lord Sumption's four stage test from *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39:

> "(i) whether its objective is sufficiently important to justify the limitation of a fundamental right;
>
> (ii) whether it is rationally connected to the objective;
>
> (iii) whether a less intrusive measure could have been used; and
>
> (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community."

[86] In carrying out this analysis, the court should accord an appropriate degree of deference to the legislature as the primary decision maker. As Lord Neuberger explained in *R(L) v Commissioner of Police of the Metropolis* [2009] UKSC 3*:*

> "In order to protect the members of a particular group of people, Parliament has enacted legislation, the effect of which is to encroach on the Convention rights of members of another group. When, as in this case, a member of the latter group, who is adversely affected by the legislation, complains that her Convention rights have been infringed, the task of the court is to decide whether the legislation concerned has struck an appropriate balance between the interests of the two groups. When deciding whether the balance is appropriate, it is for the court to form its own judgment, but in doing so, it should accord proper deference to the fact that the legislation represents the view of by the democratically elected legislature as to where the balance should be struck. In addition, the court is, of course, bound to try, if possible, to construe the legislation in such a way as to achieve compatibility with the Convention: a declaration of incompatibility is very much of a last resort." (para [74])

[87] The jurisprudence reveals that the approach may be different depending on which of the Convention rights is in play. The degree of deference will vary between cases of socio-economic measures, where the legislature and the executive may be well

placed to assess the fair balance required, and high constitutional rights where the courts may have particular competence. However, in any proportionality case, the role of the court is not limited to rationality based review, but it must assess, on a substantive basis, whether a fair balance has been struck.

[88] The court's assessment will be influenced by the extent to which the legislature has considered the fair balance task for itself.

The Attorney General's submissions

[89] The Attorney General for Northern Ireland ('AGNI'), having been served with a notice of devolution issues, provided a summary of her legal arguments to the court pursuant to Order 120 rule 4 of the Rules of the Court of Judicature. She states that, in her opinion, the restrictions on pre-charge publication serve a legitimate aim, are proportionate, do not apply retrospectively and should be considered compatible with article 10 ECHR.

[90] The AGNI relies on the 'high hurdle' faced by applicants challenging the validity of legislation on an ab ante basis, relying on *Christian Institute* and *Abortion Services*. She also asserts that the court ought to accord appropriate respect to the assessment of proportionality made by the Assembly.

[91] In her opinion, therefore, the Act falls within the legislative competence of the Assembly.

The proportionality challenge

[92] The applicants say both that a less intrusive measure could have been used and that a fair balance has not been struck between competing rights. As is often the case, these arguments substantially overlap since the use of less intrusive measures tends to reflect a different balance of rights.

[93] In England & Wales, it is now clear since the Supreme Court decision in *ZXC v Bloomberg* [2022] UKSC 5 that a person under criminal investigation has, as a general rule, a reasonable expectation of privacy in respect of information relating to that investigation. Publication of such material can lead to civil liability in respect of the tort of misuse of private information, and can be pre-emptively restrained by injunction. Whether or not a civil action will be successful will depend on a balancing of rights. It is open to media organisations to argue that the article 10 right of freedom of expression should, in a public interest case, outweigh the article 8 rights of a suspect.

[94] In *Khuja v Times Newspapers* [2017] UKSC 49, the Supreme Court found, in the context of reporting proceedings in open court, that the article 10 rights of the newspaper outweighed the article 8 rights of an individual who was arrested but never charged in respect of serious sexual offences.

[95] In Scotland, neither complainants nor suspects in sex cases enjoy any statutory right to anonymity, albeit legislative proposals have been brought forward in respect of complainants.

[96] It is only in Northern Ireland therefore that the publication of material which identifies a suspect in a sexual offence investigation may lead to criminal liability.

[97] The position is quite different in Ireland where an accused person in a rape or incest case has statutory anonymity post-charge under section 8 of the Criminal Law (Rape) Act 1981. Breach of this prohibition is a criminal offence. However, there is a public interest exception under section 8(5) of that Act and the right ceases upon conviction.

(i) The lack of a public interest defence

[98] It is, in particular, the absence of a 'public interest' defence to a prosecution under section 16 of the Act which gives rise to concern on the part of the applicants. The importance of article 10 in the context of criminal law has been the subject of recent judicial analysis in *R v Casserly* [2024] EWCA Crim 25 and *Abortion Services*.

[99] In the latter case, Lord Reed recognised, that even in article 10 cases, 'bright line' rules can be justifiable even where these result in individual hard cases. The Supreme Court referred to the evidence of debate on the floor of the Assembly and at committee level as to whether the statute in question ought to admit of a 'reasonable excuse' defence. By contrast, there is no such evidence in this case that the existence or otherwise of a public interest defence was the subject of any consideration.

[100] In carrying out the fair balance assessment, Lord Reed noted the following:

(i) The Bill did not prevent the exercise any ECHR right, but merely restricted the location at which the right could be exercised (para [127]);

(ii) The women seeking to avail of reproductive care, and those staff providing it, are a captive audience, compelled to listen to unwelcome and intrusive speech (para [128]);

(iii) The legislation was introduced to comply with the UK's international obligations (para [129]);

(iv) The maximum penalty for an offence under the legislation is a fine (para [130]);

(v) A wide margin of appreciation is appropriate in cases raising sensitive issues of ethical and social policy (para [131]); and

(vi) The legislation is consistent with similar provisions in other countries (para [141]).

[101] By contrast, in the case of the suspect anonymity provisions in the Act:

(i) The exercise of the article 10 right is criminalised per se, regardless of location or circumstance;

(ii) There is no captive audience issue;

(iii) There are no international obligations which prompted the enactment;

(iv) The criminal offence carries a sentence of imprisonment;

(v) The subject matter is not a sensitive one of ethical or social policy; and

(vi) No other jurisdiction has enacted similar legislation.

[102] For these reasons, the fair balance assessment in this case is quite different to that in *Abortion Services*, particularly in the context of the status afforded to article 10 rights and the media by the Strasbourg courts. The imposition of a criminal sanction on public interest journalism, and the chilling effect occasioned thereby, represents an interference with an article 10 right which requires the most anxious scrutiny.

[103] In very many cases, the publication of the name of an individual suspected of involvement in a sexual offence will not be a matter of public interest. However, in cases where it is, editors and broadcasters ought not to be exposed to the threat of prosecution and conviction without an opportunity to make this case. Interference with the article 10 rights of journalists in this fashion can only serve to restrict the carrying out of important public interest investigations of the nature outlined by the applicants in their evidence. In the language of *Sürek*, restrictions on the exercise of freedom of expression in this context must be strictly construed and the rationale for same convincingly established. The rationale put forward by the respondent in this case falls far short of this threshold. The failure to recognise the category of case where public interest journalism is concerned means that a fair balance between competing rights has not been struck.

(ii) The exclusion of the media as a 'relevant person'

[104] The second aspect of the challenge relates to the inability of any media organisation or interested person to apply during the suspect's lifetime to have the anonymity prohibition modified or removed. The consideration of the legislative provisions in the Assembly does contain references to the need for equivalence between victims and suspects but at no time are the areas of difference between them articulated or explained.

[105] In evidence, the respondent asserts that it was:

> "considered necessary to draw a distinction between who can apply … before the death of the suspect and who can apply thereafter to reflect the very different circumstances that apply in those varying circumstances."

[106] It is, however, unclear as to why those different circumstances ought to prohibit a media organisation from making an application to the court, particularly when this is permitted in other contexts. The claim, put forward in evidence, but not made at any stage during the Assembly or Committee hearings, that allowing application from anyone other than the suspect or police during the suspect's lifetime "would run contrary to the aims of key recommendation 10" is quite wrong when one reads the Gillen Review in full.

[107] There is nothing in the Gillen Review which supports the contention that only the suspect or the police ought to be able to make such applications. Indeed, in the statutory regime cited in the report relating to restrictions on the reporting of alleged offences by teachers, section 141F(5) of the Education Act 2002 provides for a public interest exception on application to the court. Section 141F(4) permits such an application to be made by "any person", including a representative of a media outlet.

[108] It was speculatively argued that media organisations or others could attempt to persuade the police to make an application under section 14(2) of the Act or that, in certain cases, the interests of the police and the media may coincide. Whilst this may on occasion be true, this argument fails to recognise:

(i) The right of freedom of expression enshrined in article 10 is conferred on everyone. Its exercise is not to be determined by agents of the state such as the police except in clearly defined circumstances;

(ii) As was found in *Ólafsson*, any interference with the right entails a risk of obstructing or paralysing future media coverage;

(iii) In media reporting, time may be of the essence. The ability to make one's application, rather than hoping and waiting for the actions of others, may be of real significance; and

(iv) There may be many cases where the interests of the media and the police do not coincide. For instance, the allegations may relate to sexual offences allegedly committed by police officers or may be suggestive of a want of proper police investigation. In such cases it would be entirely inappropriate for media outlets to be obliged to approach the police in an effort to have the prohibition removed.

[109] The only contemporaneous explanations for the statutory provisions relate to the presumption of innocence, the harm caused to reputations by identification and the jigsaw identification of victims. All of these are important considerations, but none serve to explain why the media ought not, in appropriate public interest circumstances, be entitled to apply to the court to have the prohibition modified or revoked.

[110] The respondent contends that any criticism of the steps taken by the Assembly in considering the legislative provisions falls foul of section 5(5) of the NIA:

> "The validity of any proceedings leading to the enactment of an Act shall not be called into question in any legal proceedings."

[111] However, in exploring the extent to which issues were debated and considered, the validity of the proceedings is not being called into question. Rather, the court is engaging in the exercise referred to by McCloskey LJ in *JR123* at para [56], which includes "evaluating the quality of the parliamentary consideration." In *R (SC) v SSWP* [2021] UKSC 26, Lord Reed had confirmed that a relevant factor in the proportionality assessment is whether the legislature made its own judgement on the compatibility issue (see paras [180] to [183]).

[112] It is evident that the consideration of this particular issue during the Bill's passage into law was manifestly lacking. This must impact upon the court's view of the proper margin of appreciation. If the absence of any ability on the part of the media or others to apply to the court, on public interest grounds, had been brought to the attention of legislators, and subjected to analysis and consideration, then the approach of the court may differ. However, on the evidence in this case, no such analysis was undertaken.

[113] Furthermore, this must be seen in the context of the importance of the article 10 right to freedom of expression, particularly in the context of public interest journalism, as has been recognised by the courts both domestically and in Strasbourg. Legislative interference with this right does not give rise to difficult issues of social or economic policy where the courts may fear to tread. Rather, this is the type of constitutional right of high priority where the courts are on familiar territory.

[114] If a right existed for any person to apply to the court pre-emptively to have the prohibition modified or revoked during the suspect's lifetime, on public interest grounds, then this may impact on whether, in the exercise of fair balance, a public interest defence to any criminal charge should exist.

[115] In this legislative scheme, however, neither of these means of protecting public interest journalism exists.

[116] There has been disproportionate interference with the article 10 rights of the applicants by:

(i) Criminalising publication without recognising any public interest defence; and

(ii) Failing to provide for a process by which media organisations may apply to the court to have the prohibition on publication modified or revoked on public interest grounds

[117] For ab ante challenges such as these to succeed it is necessary, in light of *Abortion Services*, for the court to be satisfied that the disproportionate interference will occur in "all or almost all cases." The relevant category of cases under consideration is those where there is a public interest in publishing the name of a living suspect. The fact that, in the preponderance of cases, the media will not seek to name a suspect in a sexual offence investigation is not relevant to the analysis. The blanket nature of the prohibition means that the prohibition will occur in all or almost all public interest cases. The applicants' case on proportionality therefore succeeds.

(iii) Retrospectivity

[118] The third ground of challenge relates to the retrospectivity of the Act. The legislation is not retroactive in that it does not change what the law was in the past. It is, however, retrospective in the narrow sense that it creates different outcomes in respect of an event in the past. Thus, prior to 28 September 2023, it was not a crime to identify a suspect in a sexual offences investigation which occurred in 2022. Post that date, however, it becomes a crime.

[119] Such limited retrospectivity does not offend any legal principle or upset the fair balance in a proportionality exercise. The effect of the law is clear and those impacted by it will modify their behaviour accordingly. No one will be subject to criminal sanction by reason of a publication which occurred prior to the Act coming into force. This aspect of the applicants' challenge is not made out.

In accordance with the law

[120] Unlike a challenge to a legislative provision on the basis of proportionality, the issue of whether a measure is "in accordance with the law" is a binary one. There is no question of degree or margin of appreciation. If legislation fails the legality test, then it is incompatible with ECHR.

[121] In *Christian Institute*, the Supreme Court explained that to be "in accordance with law", legislation must be accessible, and its effects must be foreseeable. It must be sufficiently precise to provide safeguards against arbitrariness. This, in turn, requires that there are adequate safeguards to ensure that the proportionality of the interference with the ECHR right can be adequately examined (see paras [79] to [81]).

[122] In *Mackay & BBC Scotland v UK* (2011) 53 EHRR 19, the ECtHR held that the inability of the BBC to challenge a reporting restriction order constituted a violation of the right to an effective remedy for the enforcement of ECHR rights. In *A v BBC* [2014] UKSC 25, the Supreme Court applied *Mackay a*nd emphasised the requirement that media organisations have an effective remedy in respect of article 10 rights (see para [67]).

[123] Similarly, in *Bulgakov v Russia* (Case 20159/15, 16.11.20), a case involving state blocking of access to a website, the ECtHR held that the absence of any access to a court to enable the proportionality of the measure to be assessed constituted a breach of the article 13 ECHR right to an effective remedy in the context of a claimed violation of article 10.

[124] Under the provisions of the Act, media organisations have no access to the court to test whether the interference with the article 10 right in any given situation is disproportionate and therefore unlawful. There is no public interest defence, nor is any media organisation able to apply to the court, during the suspect's lifetime, for modification or revocation of the prohibition. There is no role for the court, or any other effective remedy, to enable the article 10 rights of the media to be protected.

[125] The blanket ban on publication means that no court can carry out the balancing act between the ECHR rights of the suspect and the article 10 rights of the publisher in the public interest. There are no safeguards provided which enable proportionality to be examined. The legislative provisions therefore also fall at this hurdle – they are not "in accordance with law."

The common law challenge

[126] The second applicants also pursue a claim based on an alleged lack of procedural fairness arising out of the consultation process which led to the Act. Specifically, the complaint is that the respondent failed to put in place any targeted or specialist consultation. It is said that the media in general ought to have been consulted, rather than merely the criminal justice partners in the Public Prosecution Service and Northern Ireland Court and Tribunal Service, and therefore the legislative proposals failed to have due regard to the media's interests.

[127] This ground suffers from the particular infirmity of not being pleaded as a freestanding basis for judicial review. In any event, it can be dealt with briefly. Applying the taxonomy of *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC 1662 (Admin):

(i) No statutory duty to consult arose;

(ii) No promise to consult was made;

(iii) There was no established practice to consult.

[128] Therefore, any duty could only arise if the applicants established that a failure to consult would be "conspicuously unfair."

[129] The Gillen Review itself reveals that there was extensive engagement with the media and many of its proposals were subject to comment by editors and journalists. In light of this, the respondent made a decision not to consult widely on the draft legislation. However, the legislative process is an entirely public one. Committee reports and Assembly debates are publicly available and, if any media representative wished to do so, it could have made representations publicly or privately. There was a Call for Evidence seeking written submissions. If any media organisation wished to engage on the content of the draft legislation, it had every opportunity to do so.

[130] In such circumstances, I have concluded that it cannot be said that any lack of consultation gave rise to conspicuous unfairness.

Summary and conclusions

[131] I have therefore found that in two significant respects the legislation under challenge fails to strike a fair balance between the rights of suspects and those of the applicants. By enacting law which failed to provide a mechanism whereby the article 10 rights of media organisations, in the pursuit of public interest journalism, could be protected, the legislation is not in accordance with law and the Northern Ireland Assembly acted outwith the margin of appreciation afforded to it in this field.

[132] In summary therefore:

(i) Public interest journalism serves a vital role in any democratic society. The role of the press as watchdog, and the role of journalists in facilitating and prompting police investigations is fully evidenced in these cases;

(ii) The courts, both domestically and in Europe, have recognised the particular protection which must be accorded to the right of freedom of expression of journalists and the media. Any interference must be carefully scrutinised and be capable of justification by the state in the limited circumstances recognised by article 10(2);

(iii) There were clear shortcomings in the consideration of the article 10 rights of organisations such as the applicants throughout the legislative process. There was no debate around the issue of the public interest, relevant to the anonymity of suspects, nor any consideration of the need for a fair balance of rights;

(iv) The consideration of the role of ECHR rights was limited to the question of the duration of the anonymity of victims/complainants. The advice received in this regard was transplanted into the area of suspect anonymity without proper recognition of the different interests in play;

(v) The ex post facto rationale offered by the respondent in evidence did not feature in any contemporaneous debate or discussion and was, in any event, unconvincing since it failed to recognise that the Gillen Review itself referenced situations in which suspect anonymity may have to give way to the public interest;

(vi) The degree of deference which ought to be shown to the legislature on this issue must therefore be limited, both because of the lack of proper debate and scrutiny but also because of the importance attached to the article 10 right in this context;

(vii) The statutory provisions represent a disproportionate interference by reason of the criminalisation of publication in the absence of a public interest defence and by reason of the lack of an ability on the part of the media to apply to the court to have the prohibition on publication modified or revoked on public interest grounds. A fair balance has not been struck and less intrusive measures could have been used to achieve the legitimate aim of the legislation;

(viii) The absence of proper safeguards in the form of scrutiny by the court of the public interest renders the provisions of the Act not in accordance with law.

Relief

[133] For these reasons, I make a declaration that sections 12 to 16 of the Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022 are not law since they are outside the legislative competence of the Northern Ireland Assembly as they are incompatible with the article 10 ECHR rights of the applicants. I will hear the parties as to the precise form of the declaratory relief.

[134] In accordance with the agreement entered into between the parties, I make no order as to the costs these applications.