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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 JR295
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE ILLEGAL MIGRATION ACT 2023

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Jude Bunting KC and Robert McTernaghan (instructed by Phoenix Law) for the Applicant
Tony McGleenan KC, Philip McAteer and Terence McCleave (instructed by the Crown Solicitor's Office) for the Proposed Respondent

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HUMPHREYS J

Introduction

[1] The applicant in this application for leave to apply for judicial review is a 16 year old asylum seeker from Iran who arrived into the United Kingdom as an unaccompanied child. He had travelled from France by small boat and claimed asylum on 26 July 2023.

[2] The applicant makes the case that he would be killed or sent to prison if returned to Iran. He is currently residing in a children's home in Northern Ireland.

[3] In an amended Order 53 Statement, the applicant seeks to challenge certain provisions of the Illegal Migration Act 2023 ('IMA') on two discrete bases:

(i) That the statutory provisions are incompatible with article 2 of the Northern Ireland Protocol or Windsor Framework ('WF'), as implemented by section 7A of the European Union (Withdrawal) Act 2018; and

(ii) That the same provisions are incompatible with articles 3, 6 and/or 8 of the European Convention on Human Rights ('ECHR') and section 4 of the Human Rights Act 1998 ('HRA').

The NIHRC Challenge

[4] On 10 October 2023 Colton J granted leave to the Northern Ireland Human Rights Commission ('NIHRC') to apply for judicial review in respect of the following provisions of the IMA:

(i) Examination of asylum claims - section 2(2-6) and section 5(2)

(ii) Effective remedy – section 5(2) and section 54

(iii) Removal – section 2(1), section 5(1) and section 6

(iv) Non refoulement – section 2(1), section 5(1) and section 6

(v) Detention – section 13(4)

(vi) Trafficking – section 22(2-3) and section 25(2)

(vii) Children – section 2(1), section 5 (1-2) and section 6

[5] The relief sought by the NIHRC in that challenge includes a declaration that the relevant provisions breach article 2(1) of the WF, a declaration of incompatibility pursuant to section 4 of the HRA and an order disapplying the specified provisions.

[6] The court heard the full substantive judicial review challenge between 29 and 31 January and has reserved judgment.

The JR 295 Challenge

[7] At the same time, the court considered the leave application in the instant case. The refined pleaded claim seeks to impugn sections 2 and 5 of the IMA on similar grounds to the NIHRC challenge. However, the following additional statutory provisions are also the subject of these proceedings:

(i) Section 4 which deals with unaccompanied children;

(ii) Sections 16-20 which concern accommodation and support for unaccompanied children; and

(iii) Section 57 in relation to age assessments.

[8] None of the provisions under attack in either application are, as yet, in force, save for section 4 which is only in force for the purpose of making Regulations. The IMA received Royal Assent on 20 July 2023. Section 68(4)(b) provides that the Act comes into force on such day or days as the Secretary of State may appoint, save for a limited set of sections.

[9] In the replying affidavit sworn on behalf of the Home Office in the NIHRC case, Daniel Hobbs, Director General of the Migration and Borders Group, states as follows:

> "The England and Wales High Court judgment in *R (On the Application of ECPAT UK) v Kent County Council & Anor* [2023] EWHC 1953 (Admin) was handed down after the Illegal Migration Act ('the Act') received Royal Assent on 20 July 2023. Following this judgment the Government is carefully reflecting on commencement of the powers in the Act, including those relating to the accommodation and transfer of unaccompanied children in sections 16-21 of the 2023 Act. These sections have not yet been commenced and a decision will be made in due course."

[10] In light of this indication, counsel for the applicant JR 295 invites the court to stay this aspect of the claim pending a decision by the Government as contemplated.

[11] In respect of the other grounds, the applicant contends that the threshold for the grant of leave has been met, namely that an arguable case with realistic prospects of success has been established.

[12] In summary, it is argued:

(i) The NIHRC was granted leave and no application to set this aside has been made;

(ii) The NIHRC challenge does not engage the statutory provisions relating to unaccompanied children;

(iii) The IMA will directly impact upon unaccompanied children once the relevant provisions are in force.

[13] For the purposes of the leave application, the submissions of NIHRC on the overlapping provisions were adopted.

The Statutory Provisions

[14] Section 2 of the IMA imposes a duty on the SoS to remove a person from the UK if the following conditions are satisfied:

"(2) The first condition is that—

(a) the person requires leave to enter the United Kingdom, but has entered the United Kingdom—

(i) without leave to enter, or

(ii) with leave to enter that was obtained by means which included deception by any person,

(b) the person has entered the United Kingdom in breach of a deportation order,

(c) the person has entered or arrived in the United Kingdom at a time when they were an excluded person within the meaning of section 8B of the Immigration Act 1971 (persons excluded from the United Kingdom under certain instruments) and—

(i) subsection (5A) of that section (exceptions to section 8B) does not apply to the person, and

(ii) an exception created under, or direction given by virtue of, section 15(4) of the Sanctions and Anti-Money Laundering Act 2018 (power to create exceptions to section 8B) does not apply to the person,

(d) the person requires entry clearance under the immigration rules, but has arrived in the United Kingdom without a valid entry clearance, or

(e) the person is required under immigration rules not to travel to the United Kingdom without an electronic travel authorisation that is valid for that person's journey to the United Kingdom, but has arrived in the United Kingdom without such an electronic travel authorisation.

(3) The second condition is that the person entered or arrived in the United Kingdom as mentioned in subsection (2) on or after the day on which this Act is passed.

(4) The third condition is that, in entering or arriving as mentioned in subsection (2), the person did not come

directly to the United Kingdom from a country in which the person's life and liberty were threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion.

(5) For the purposes of subsection (4) a person is not to be taken to have come directly to the United Kingdom from a country in which their life and liberty were threatened as mentioned in that subsection if, in coming from such a country, they passed through or stopped in another country outside the United Kingdom where their life and liberty were not so threatened.

(6) The fourth condition is that the person requires leave to enter or remain in the United Kingdom but does not have it."

[15] By section 2(11), the duty does not apply when section 4(1) applies to the person, that it to say when he or she is an unaccompanied child. In such a case the duty to remove is replaced by a power under section 4(2):

"(3) The power in subsection (2) may be exercised only—

(a) where the person is to be removed for the purposes of reunion with the person's parent;

(b) where the person is to be removed to a country listed in section 80AA(1) of the Nationality, Immigration and Asylum Act 2002 (safe States for the purposes of section 80A of that Act) which is—

(i) a country of which the person is a national, or

(ii) a country in which the person has obtained a passport or other document of identity;

(c) where the person has not made a protection claim or a human rights claim and the person is to be removed to—

(i) a country of which the person is a national,

(ii) a country or territory in which the person has obtained a passport or other document of identity, or

(iii) a country or territory in which the person embarked for the United Kingdom;

(d) in such other circumstances as may be specified in regulations made by the Secretary of State."

[16] Thus, in the case of an unaccompanied child, he or she may be removed from the UK in certain circumstances and, in any event, will be subject to the section 2 duty to remove once majority is attained.

[17] Section 5 provides:

"(1) The duty in section 2(1) or the power in section 4(2) applies in relation to a person who meets the four conditions in section 2 regardless of whether—

(a) the person makes a protection claim,

(b) the person makes a human rights claim,

(c) the person claims to be a victim of slavery or a victim of human trafficking as defined by regulations made by the Secretary of State under section 69 of the Nationality and Borders Act 2022, or

(d) the person makes an application for judicial review in relation to their removal from the United Kingdom under this Act.

(2) If a person who meets the four conditions in section 2 makes a protection claim, or a human rights claim within subsection (6), the Secretary of State must declare the claim inadmissible (and see section 41(4) in relation to human rights claims not within subsection (6)).

(3) A protection claim or a human rights claim declared inadmissible under subsection (2) cannot be considered under the immigration rules.

(4) A declaration under subsection (2) that a protection claim or a human rights claim is inadmissible is not a

decision to refuse the claim and, accordingly, no right of appeal under section 82(1)(a) or (b) of the Nationality, Immigration and Asylum Act 2002 (appeal against refusal of protection claim or human rights claim) arises.

(5) A human rights claim is within this subsection if it is a claim that removal of a person from the United Kingdom to—

(a) a country of which the person is a national, or

(b) a country or territory in which the person has obtained a passport or other document of identity,

would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Convention).

(6) In this Act "application for judicial review" means—

(a) in England and Wales and Northern Ireland, an application to the High Court for judicial review,

(b) in Scotland, an application to the supervisory jurisdiction of the Court of Session, and

(c) any other application to a court or tribunal which is required by an enactment to be determined by applying the principles that would be applied by a court on an application within paragraph (a) or (b).

(7) In this section, references to a claim include a claim—

(a) that was made on or after the day on which this Act is passed, and

(b) that has not been decided by the Secretary of State on the date on which this section comes into force."

[18] Thus, in the case of an asylum claim advanced after 20 July 2023, and not decided by the SoS prior to section 5 coming into force, and where the section 2 conditions apply, the SoS is obliged to by section 5(2) to declare such an application inadmissible.

[19] Section 57, concerning age assessments, states:

> "(1) This section applies if a relevant authority decides the age of a person ("P") who meets the four conditions in section 2 (duty to make arrangements for removal), whether that decision is for the purposes of this Act or otherwise.
>
> (2) If the decision is made on an age assessment under section 50 or 51 of the Nationality and Borders Act 2022, P may not bring an appeal against the decision under section 54(2) of that Act.
>
> (3) Subsections (4) and (5) apply if P makes an application for judicial review of—
>
> (a) the decision mentioned in subsection (1), or
>
> (b) any decision to make arrangements for the person's removal from the United Kingdom under this Act which is taken on the basis of that decision.
>
> (4) The application does not prevent the exercise of any duty or power under this Act to make arrangements for the person's removal from the United Kingdom.
>
> (5) The court or tribunal must determine the application on the basis that the person's age is a matter of fact to be determined by the relevant authority; and accordingly the court or tribunal—
>
> (a) may grant relief only on the basis that the decision was wrong in law, and
>
> (b) may not grant relief on the basis that the court or tribunal considers the decision mentioned in subsection (1) was wrong as a matter of fact.
>
> (6) In this section "relevant authority" means—
>
> (a) the Secretary of State,
>
> (b) an immigration officer,

(c) a designated person within the meaning of Part 4 (age assessments) of the Nationality and Borders Act 2022,

(d) a local authority within the meaning of that Part, subject to subsection (7), or

(e) a public authority within the meaning of that Part which is specified in regulations under section 50(1)(b) of that Act (referral of age-disputed person for age assessment).

(7) This section applies in relation to a decision of a local authority which is a decision within subsection (1) only if it is for the purposes, or also for the purposes, of the local authority deciding whether or how to exercise any of its functions under relevant children's legislation within the meaning of Part 4 of the Nationality and Borders Act 2022.

(8) For the purposes of this section, the cases in which a relevant authority decides the age of a person on an age assessment under section 50 or 51 of the Nationality and Borders Act 2022 include where a relevant authority is treated by virtue of regulations under section 58 of this Act as having decided that a person is over the age of 18.

(9) This section applies only in relation to a decision which is made after this section comes into force."

[20] Age assessment is an important part of the asylum process since the determination that a person is a minor will engage, inter alia, welfare protection under the Children (Northern Ireland) Order 1995.

[21] In *R (A) v Croydon LBC* [2009] UKSC 8, the Supreme Court held that whether a person was a child was a matter of fact to be determined by the court on the balance of probabilities. Once commenced, section 57 will remove the right to appeal against an age assessment to a court or tribunal, when the four conditions in section 2 are satisfied, and will limit judicial review to cases where there has been an error of law. There will therefore be no factual assessment carried out by a court or tribunal.

The Applicant's Evidence

[22] The minor applicant's own affidavit explains in brief compass how he arrived in the UK by small boat, having travelled through Turkey, Greece and France.

Initially, his age was not accepted by the Home Office although this was resolved on 13 November 2023 by confirmation that he had been assessed as being a child.

[23] The applicant states:

> "I am an unaccompanied child asylum seeker who came to the UK via a dangerous route (small boat), and I am terrified of being sent back to Iran or a third country because I am a vulnerable child"

[24] The applicant's solicitor, Sinead Marmion, has also sworn an affidavit in which she outlines the present position in relation to unaccompanied children in the asylum system. She relies on evidence to the effect that the IMA has the potential to incentivise children to run away, seeking to avoid the prospect of removal but driving them into the arms of exploiters and traffickers. Forced removal at the age of 18 also has the potential, on this evidence, to adversely impact a person's wellbeing and disrupt relationships, healthcare and education. The long delays inherent in the asylum system in the UK may well mean that the applicant's claim will not be processed until after he turns 18.

[25] In relation to age assessments, Ms Marmion observes that whilst the applicant has been accepted as a minor by the Home Office, he remains vulnerable to a further assessment process in the event other information comes to light.

The Test for Leave

[26] It is incumbent on the applicant at this stage to establish an arguable case with realistic prospects of success.

The Windsor Framework Ground

[27] Article 2(1) of the Windsor Framework provides:

> "**Right of individuals**
>
> (1) The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms."

[28] The rights safeguarded by Article 2(1) are therefore set out Rights, Safeguards and Equality of Opportunity ('RSE') part of the Good Friday Agreement ('GFA'), including those referred to in Annex 1, which comprises a list of six Directives which seek to prohibit discrimination in various fields on the grounds of sex and race.

[29] There is a distinction between this provision and Article 5(4) of the WF which makes the Directives set out in Annex 2 applicable in the UK.

[30] The RSE section in the GFA recites that the parties affirm:

> "…their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:
>
> - the right of free political thought;
> - the right to freedom and expression of religion;
> - the right to pursue democratically national and political aspirations;
> - the right to seek constitutional change by peaceful and legitimate means;
> - the right to freely choose one's place of residence;
> - the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
> - the right to freedom from sectarian harassment; and
> - the right of women to full and equal political participation."

[31] The Withdrawal Agreement ('WA'), made between the UK and the EU on the former's exit from the Union provides, at article 4:

> "1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.
>
> Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
>
> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply

inconsistent or incompatible domestic provisions, through domestic primary legislation."

[32] By section 7A of the European Union Withdrawal Act 2018:

> "(1) Subsection (2) applies to—
>
> (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and
>
> (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,
>
> as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.
>
> (2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—
>
> (a) recognised and available in domestic law, and
>
> (b) enforced, allowed and followed accordingly.
>
> (3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)."

[33] The interaction of these particular statutory provisions, the WA and the GFA were considered by the Court of Appeal in *Re SPUC Pro Life Limited's Application* [2023] NICA 35. The court concluded that in order to establish a breach of article 2 of the WF, it is necessary to show:

(i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged;

(ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020;

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

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

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

(vi) This diminution would not have occurred had the UK remained in the EU. (para [54])

[34] In the instant case, the applicant's analysis is as follows:

(i) The rights enjoyed by asylum seekers in Northern Ireland fall within the concept of "the civil rights of everyone in the community" and these are therefore protected by the RSE provisions of the GFA;

(ii) These rights were given effect in Northern Ireland on or before 31 December 2020;

(iii) The Northern Irish law was underpinned by European Union law in the form of a number of Directives, including the Procedures Directive 2005/85/EC, the Qualification Directive 2004/83/EC and the Trafficking Directive 2011/36/EU;

(iv) The UK's withdrawal from the EU has removed this underpinning;

(v) The IMA has caused a diminution in the rights enjoyed by asylum seekers in a variety of significant ways; and

(vi) This diminution could not have occurred but for the UK's withdrawal since, otherwise, the supremacy principle would have ensured that the corpus of EU law prevailed over inconsistent domestic law.

[35] In *Re Angesom's Application* [2023] NIKB 103 Colton J rejected an argument that the rights protected by the GFA were "frozen in time and limited to the political context of 1998", finding that they extended to the fundamental human rights of all in the community and therefore included, where appropriate, the rights of asylum seekers.

[36] Article 8(2) of the Procedures Directive requires Members States to take decisions on asylum applications after appropriate examination. Similarly, article 4(3) of the Qualification Directive states that such an application is to be carried out on an individual basis and, by article 13, refugee status must be granted to a person who qualifies under the Directive.

[37] Once in force, the IMA provisions will deprive the applicant of a right to make an asylum application and to have it considered, still less to be granted refugee status, in the event that the section 2 conditions are met.

[38] Article 7(1) of the Procedures Directive provides that applicants be allowed to remain pending the determination of an asylum claim. This right will not exist when

section 2 conditions apply – in fact, there will be a duty to remove in such circumstances.

[39] Article 39(1) of the Procedures Directive requires that asylum applicants have a right to an effective remedy before a court or tribunal against any decision taken on their application. When the admissibility provisions of section 5(2) of the IMA apply, there will be no decision which could be the subject of judicial scrutiny.

[40] The Dublin III Regulation ((EU) No 604/2013) requires a member state to "examine any application for international protection" by a third-country national who applies on their territory (article 3(1)). Article 6(1) further provides that "the best interest of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation." Article 8(4) adds that, for an unaccompanied asylum-seeker such as the applicant, the member state responsible for determining an asylum application shall be the member state where the unaccompanied minor has lodged their application.

[41] On 31 December 2020 any unaccompanied child arriving in the UK enjoyed these directly applicable or directly effective rights, with the child's best interests to be the primary consideration. Once the IMA is in force, any such undetermined claim will be declared inadmissible if the section 2 conditions are met.

[42] In relation to age assessment, article 47 of the Charter of Fundamental Rights of the European Union ("the Charter") provides that:

> "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal…"

[43] It is clearly arguable that this applicant enjoys the protection of article 2(1) of the WF and can seek to rely on the rights enshrined in the various EU Directives, Regulations and the Charter in order to challenge the provisions of the IMA. Indeed, this is entirely consistent with the grant of leave to the NIHRC in its parallel challenge.

The ECHR Ground

[44] The applicant also seeks to contend that the statutory provisions in question are incompatible with his Convention rights and that the court ought to grant a declaration of incompatibility under section 4 of the HRA.

[45] The applicant points to the fact that no Minister was able to sign a certificate under section 19(1)(a) of the HRA that the provisions of the Act were compatible with the Convention. This is, of course, not conclusive in a compatibility challenge but is clearly indicative of its arguability.

[46] In *Ilias v Hungary* (2020) 71 EHRR 6, the Grand Chamber held that the prohibition on inhuman or degrading treatment, enshrined in article 3 ECHR, imports an obligation not to remove a person from a state if there are substantial grounds to believe he faces a real risk of being subjected to treatment prohibited by article 3 in the receiving country. This will require an assessment of such risk by national authorities and by the court. In order to arrive at this conclusion, there must be in place an adequate asylum procedure in order to evaluate the risk in the third country, which process must take place prior to removal.

[47] It is therefore arguable that the removal of any such right to an assessment of risk, and determination of an application, prior to removal in the circumstances contemplated by the IMA is incompatible with the article 3 rights set out in *Ilias.*

[48] Since the determination of a person's age will trigger entitlement to certain welfare rights, article 6 ECHR is engaged. A person affected can argue that he is entitled to a determination of his civil rights by an independent and impartial tribunal – see *Ali v United Kingdom* (2016) 63 EHRR 20.

[49] Equally, the Strasbourg jurisprudence confirms that article 8 ECHR is also in play. In *Darboe and Camara v Italy* (2023) 76 EHRR 5, the European Court emphasised the importance of age assessment procedures and the consequences which could flow from the misidentification of a child as an adult. The lack of any administrative or judicial finding and the inability to appeal led, in that case, to a finding of violation of article 8.

[50] It is clearly arguable that the section 57 regime, with the lack of any court or tribunal determination save for a limited remedy in judicial review, pending which the applicant may be removed in any event, gives rise to a breach of these ECHR rights.

[51] The proposed respondent contends that the line of authority represented by *Christian Institute v Lord Advocate* [2017] UKSC 29 and *Re Abortion Services (Safe Access Zones) (NI) Bill* [2022] UKSC 32 will require reticence on the part of a court faced with an ECHR compatibility challenge. In the latter case Lord Reed stated:

> "…where there is an ab ante challenge to a legislative provision…the striking down of the provision is only justifiable if the court is satisfied that it is incapable of being applied in a way which is compatible with the Convention rights, whatever the facts may be. If the legislation is capable of being applied compatibly with the Convention, then it will survive an ab ante challenge." (para [14])

[52] It is argued that, in the absence of established facts in the context of operative legislative provisions, it cannot be said that the IMA is incapable of being operated in

an ECHR compatible fashion. The applicant says that the provisions are such that the IMA is incapable of compliance, whatever the factual situation, and, in any event, the cases relied upon only apply to qualified rather than absolute Convention rights.

[53] I do not propose to resolve these questions in the course of this leave application. Suffice to say I am satisfied that the applicant has made out an arguable case on the ECHR grounds.

The Objections to the Grant of Leave

[54] The proposed respondent has advanced two principal reasons to support the contention that the court should refuse leave, despite the fact that the applicant's case is arguable:

(i) The Applicant Lacks Standing and Victim Status

[55] Section 7 of the HRA provides:

> "(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
> (b) reply on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act"

[56] Order 53 rule 3(5) of the Rules of the Court of Judicature states that the court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

[57] There is a debate in some of the jurisprudence as to whether the victim status requirement in section 7 extends to cases where the applicant seeks a declaration of incompatibility under section 4 of the HRA or whether it is only required in section 6 'unlawful act' cases.

[58] In *Re Ewart's Application* [2019] NIQB 88, the applicant, who had a heightened risk of pregnancy involving fatal foetal abnormality, sought to challenge the compatibility of Northern Ireland's then abortion laws with article 8 ECHR. The Attorney General argued she had no standing as she had not been the victim of an unlawful act, relying on the judgment of the majority as delivered by Lord Mance in *Re NIHRC's Application* [2018] UKSC 27. Keegan J held:

> "The European jurisprudence that has been brought to my attention seems clear to me that a person bringing a claim under the section 4 route must be able to show that he or she would be able to assert his or her human rights under Article 34 of the Convention. The ECtHR jurisprudence recognises that a person may be a victim for the purposes of the Convention where they are impacted by the possible future application to them of legislation which may be incompatible. The requirement of victimhood which is specifically found in section 7 is not present in section 4. That is most likely because there is no specific reference to an unlawful act. In other words a person directly affected can be a potential victim of an unlawful act. In *Norris v Ireland* (1989) 13 EHRR 186 this was encapsulated in the phrase that the claimant must 'run the risk of being directly affected by it. That principle was subsequently affirmed in *Ramadan v Malta* 2016 ECHR 76136/12.' [para 53]
>
> In my view the Human Rights Act scheme allows for an individual applicant to petition a court as Ms Ewart has done. Interestingly the chronological order is section 3 (interpretation), section 4 (incompatibility) and section 7-9 (public authorities). In my view it obviously makes sense to consider whether a statute can be interpreted in a Convention compliant way before proceeding to declare it compatible. If compatible the focus shifts to the act of a public authority in applying a provision because if incompatible the public authority effectively has a defence under the provisions of section 6." [para 58]

[59] I do not accept the proposed respondent's argument that section 7 victim status is a requirement for a section 4 compatibility claim. The normal judicial review rules relating to standing remain in play.

[60] If I am wrong about this, it is nonetheless possible, in light of the jurisprudence for a potential, rather than an actual, victim to enjoy the status required by section 7.

[61] In *Re Taylor's Application* [2022] NICA 21, the Court of Appeal recently reviewed the caselaw in relation to victim status, and, in particular, the concept of the potential victim. McCloskey LJ stated at para [19]:

> "In *Senator Lines GMBH v Austria and Others* [2006] 21 BHRC 640 the Grand Chamber of the ECtHR, in determining whether the particular application was admissible, reflected on the concept of "*potential victim.*" Referring to concrete examples in its jurisprudence, the

court recalled one case where an alien's removal had been ordered but not enforced and another where a law prohibiting homosexual acts was capable of being, but had not been, applied to a certain category of the population which included the applicant. The judgment continues, at page 11:

> 'However, for an applicant to be able to claim to be a victim in such a situation **he must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient** …'"
> [emphasis added]

[62] This applicant is at real risk of removal from the UK without his protection claim being determined. This is not mere conjecture or speculation since the duty to remove arises under section 2 and a power to remove is created by section 4. The evidence reveals that the UK Government intends to commence these provisions. I am also satisfied, on the evidence of Ms Marmion's experience, that he is at real risk of a further age assessment being carried out to which there would be no appeal on a factual basis.

[63] The applicant therefore enjoys the status as a potential victim, and also has sufficient interest under Order 53 rule 3(5) to bring this application for judicial review.

(ii) The Application is Premature and Academic

[64] The proposed respondent argues forcefully that these legislative provisions are not in force and therefore any application for judicial review is premature. No precedent exists, on its submission, for a declaration of incompatibility of legislative provisions which have not been commenced.

[65] Leave has been granted for an ab ante challenge to be brought by NIHRC (which enjoys particular statutory litigation rights) and there is no utility in granting leave for separate action to be brought by this applicant.

[66] In light of the evidence, which reveals that the Government is intent on bringing these provisions into force (save for sections 16-20), and the obvious impact they will have on the applicant, I am satisfied that the claim cannot be described as premature. Whether, and to what extent, a court may make a declaration of incompatibility in respect of uncommenced legislative provisions is a matter which goes ultimately to remedy rather than the grant of leave.

[67] Given that the focus of the applicant's case is on the parts of the IMA which affect unaccompanied children, and these are not issues in the NIHRC application, I am satisfied that it would be appropriate to grant leave in this case also.

[68] The applicant has clearly established an arguable case with realistic prospects of success and there are no discretionary bars to the grant of leave.

Conclusion

[69] I therefore order as follows:

(i) Leave is granted to apply for judicial review in respect of sections 2, 4, 5 and 57 of the IMA 2023 on the grounds set out in the amended Order 53 statement;

(ii) The application in respect of sections 16-20 of IMA 2023 is stayed;

(iii) I will hear the substantive application for judicial review on 14 March 2024 and thereafter deliver judgment in both this case and the NIHRC challenge.