Neutral Citation No: [2022] NICA 8	*Ref:*	**McC11765**
	ICOS No:	
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**18/02/2022**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (QUEEN'S BENCH DIVISION)

RYAN TAYLOR

Appellant:

-and-

THE DEPARTMENT FOR COMMUNITIES AND THE DEPARTMENT FOR WORK AND PENSIONS

Respondents:

Representation

Appellant: **Mr Hugh Southey QC and Mr Steven J McQuitty (of counsel) instructed by Kristina Murray Solicitors**

Respondents: **Mr Tony McGleenan QC and Mr Aidan Sands (of counsel) instructed by the Departmental Solicitors Office and the Crown Solicitor's Office**

Before: McCloskey LJ, Maguire LJ and Horner J

McCloskey LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal in judicial review proceedings. The parties are Ryan Taylor ("*the appellant*") on the one hand and the Department for Communities ("*DFC*") and the Department for Work and Pensions ("*DWP*"), collectively "t*he respondents",* on the other. The Northern Ireland Housing Executive ("*NIHE*") has been recognised as having the status of interested party and, in response to the court's direction, confirmed, very properly, that it did not seek to participate actively in this appeal.

[2] This case concerns the taxpayers' funded benefit known as Housing Benefit ("*HB").* HB is administered by NIHE on behalf of the Department for Communities.

In a nutshell, HB is designed to assist those on low income living in rented accommodation who satisfy the statutory qualifying requirements by paying their rent, rates and service charges. The appellant is said to be a member of this class.

[3] The appellant appeals against the order of Deputy High Court Judge Friedman, consequential upon his judgment delivered on 18 December 2000 – [2020] NIQB 78 - dismissing the application for judicial review. By this judgment the court determines the respondents' application for an order striking out the appeal on the grounds that the appellant has failed to discharge his duty of candour to the court both at first instance and on appeal; has failed to comply with the requirements of Order 53, Rules 5 and 6 and Order 41 of the Rules of the Court of Judicature; has not established that he is a victim within the compass of section 7(1) of the Human Rights Act 1998 ("*HRA 1998*"); and is pursuing an appeal which constitutes a misuse of the process of the court. There is a further contention that in the event of the appeal proceeding there is no basis upon which the court could, in the exercise of its discretion, provide the appellant with a remedy of practical benefit to him.

The Impugned Statutory Provisions

[4] We gratefully adopt the judge's outline of the governing statutory framework, which is contained in the Housing Benefits Regulations (Northern Ireland) 2006, as amended by the Social Security (Miscellaneous Amendments) Regulations (Northern Ireland) 2013 (67/2013) ('*the 2006 Regulations*') :

> "[*37] Regulation 7(13) of the 2006 Regulations, provides that, subject to regulation 7(17), a person shall be treated as occupying a dwelling house as his home while he is temporarily absent within Northern Ireland if (a) he intends to return to occupy the dwelling as his home; (b) the part of the dwelling normally occupied by him has not been let or sublet; and (c) the period of absence is unlikely to exceed 13 weeks. This is the period of deemed occupation for all people to whom it applies, irrespective of the reason for their absence from their home.*
>
> *[38] Regulation 7(17) provides that a person to whom regulation 7(16) applies shall still be treated as occupying his home during any period of temporary absence not exceeding 52 weeks beginning from the first day of that absence. The list of ten exceptions in Regulation 7(16) contains limited categories of persons who are absent for special reasons, which includes other than remand prisoners, the hospitalised, those caring for them, those seeking refuge from domestic violence, and various forms of study and training: see Reg. 16 (c) (ii) - (x).*
> *[39] In its original form the list included (at Reg. 16(c)(i)), persons "detained in custody on remand pending trial or, as a condition of bail, required to reside in a dwelling, other than the dwelling he occupies as his home or, detained pending sentence upon conviction".*
> *[40] The ten exceptions are essentially, involuntary; and nine of them are for benign reasons of absence that would be contrary to the public interest not*

to support, at least for some finite period. Those detained pending sentence upon conviction, would be different in that respect, but as already demonstrated, it could well be important to await the sentence to establish whether the convicted person will be released as a result of time served. That much was recognised in the English Court of Appeal decision of R(Waite) v Hammersmith & Fulham LBC and the Secretary of State for Social Security ([2002] EWCA Civ 482) [2003] HLR 3 §41.

[41] In order to be entitled to temporary absence beyond 13 weeks, Regulation 7(16)(d) also requires that "the period of… absence" for the person that falls within one of the ten exceptions contained in Regulation 7(16)(c), "is unlikely to exceed 52 weeks or, in exceptional circumstances, is unlikely substantially to exceed that period". By Regulation 7(17) the maximum period for those in deemed occupation in respect of a vacant property is 52 weeks in all the exceptions contained in Regulation 7(16)(c). There is no discretion to extend that time once 52 weeks have passed."

Factual Matrix

[5] Subject to para [32] infra – an unavoidable qualification as will become clear - the following is the chronology of material dates and events:

1. The appellant's tenancy of 162 Joanmount Gardens, Belfast ("*the house"*) apparently began on 1 June 2019. His rent was paid by HB. The identity of the landlord is far from clear.

2. The appellant was remanded in prison following revocation of his bail on or about 9 September 2019. The payments of HB continued.

3. On 9 December 2019 the appellant was sentenced to eight months imprisonment.

4. As a result, the payment of HB in respect of the house ended immediately. This was communicated in the NIHE decision of 10 December 2019.

5. The appellant's sentence of imprisonment was completed on 2 April 2020, whereupon his status reverted to that of remand prisoner in respect of further offences.

6. These proceedings were initiated on 11 March 2020.

7. Between 10 December 2019 and 2 April 2020 it is not altogether clear either that the appellant's tenancy subsisted or (if it did) rent was somehow paid. There is an assertion, unsupported by any documentary evidence, that the rental payments of £425 per month were made by the appellant's mother in respect of the months December 2019 to February 2020. According to the affidavit sworn by the appellant's solicitor on 3 March 2020 the appellant's

mother would be unable to pay the rent for that month. In an affidavit sworn by the appellant's mother on the same date, the deponent made the same claim. In a later unsworn, undated and unsigned draft statement the mother claimed that she was able to pay the rent for April 2020 "*contrary to my expectations …*" There is a further assertion of a "*very real risk*" that she would be unble to do this subsequently. There is a further draft, unsworn, unsigned and undated statement from the appellant's mother, evidently compiled circa May/June 2020, claiming that she would be unable to pay the rent for the months of July and August 2020. This document is silent as regards the months of May and June.

(In passing, it is evident that these two draft statements were generated for the purpose of the two interim relief applications.)

8. A full hearing of the judicial review application was scheduled for 22 April 2020. That was adjourned because of the COVID-19 pandemic. Thereafter the appellant was the beneficiary of two interim relief orders of the High Court, dated 01 May 2020 and 22 June 2020 respectively (see *In re Ryan Taylor's Application* [2020] NIQB 46 and [2020] NIQB 52). Pursuant to these orders the payments of HB should in theory have been restored: once again there is no documentary evidence of this. (Neither of these rulings and neither of these orders is included in the core hearing papers: the court has had to access them independently).

9. The appellant was released on bail on 18 August 2020.

10. Deputy Judge Friedman gave judgment on 18 December 2020: see [2020] NIQB 78.

11. The appellant's bail was revoked and he was further remanded into custody on 15 February 2021. On 21 June 2021 he was sentenced to three years imprisonment.

12. HB was last paid to the Applicant on 3 July 2021 – some seven months ago. There is no evidence before the court relating to payments of rent or HB since then.

[6] Summarising, the appellant, said to have had the status of tenant since 1 June 2019, was arrested and remanded in custody from 9 September 2019; on 9 December 2019, pursuant to a custodial sentence, he became a sentenced prisoner for a net period of four months; between the two aforementioned dates the payment of his rent out of public funds by *HB* had continued; this was discontinued with effect from circa 9 December 2019; his sentence served, the appellant reverted to the status of remand prisoner with effect from 2 April 2020; these proceedings having been initiated just beforehand, on 11 March 2020, the High Court granted interim relief on 1 May 2020, the effect whereof that the HB payments were due to be reinstated; the

High Court renewed this interim relief order on 22 June 2020; on 18 August 2020, having been granted bail the appellant apparently returned to reside at the premises; his bail having been revoked he reacquired the status of remand prisoner from 15 February to 21 June 2021; the last payment of HB was made on 3 July 2021*; the appellant became a sentenced prisoner again with effect from 21 June 2021; on 17 August 2021 his application for leave to appeal against sentence was refused.

[*The admissible evidence before the court does not extend beyond this point in the narrative]

[7] The identity of the appellant's landlord was unclear from the outset of the proceedings and, at this remove – some two years later – remains a mystery. In the only affidavit sworn by the appellant – his first – he described himself as "*a Housing Executive Tenant.*" This was repeated in the only affidavit sworn by the appellant's mother and in the only affidavit sworn by the appellant's solicitor. This assertion is patently incorrect. It is a matter of profound concern that this misstatement about a self – evidently fundamental factual issue has appeared in three sworn affidavits.

[8] The reason for the immediately foregoing analysis is that the only documentary evidence pertaining to the tenancy, a document which *on its face* is a tenancy agreement, has the following features. First, it describes the landlord as "John Neill and Son of 232 Ormeau Road, Belfast …" Second, the "*Signed by the Landlord/Agent*" section of the document is blank. Third, the "*Signed by the Witness*" section is similarly blank. Fourth, this document is exhibited to the affidavit of the appellant's mother and not that of the appellant.

[9] In the NIHE affidavit, provided in draft (circa April/May 2020) the Housing Benefit Operations Manager deposed that the agency identified in the document purporting to be a tenancy agreement is a letting and property management agency, adding that this may not be the "*actual landlord.*" In the same document one finds the averment:

> "*Ms Taylor avers that she spoke to the Applicant's landlord on 1st April 2020 to try to agree a short rent holiday but he refused, stating that the rent must be paid on time. Ms Taylor has not disclosed the name of the person to whom she spoke and whether in fact she spoke to the landlord, whoever that may be, or to the landlord's agent.*"

This was followed by the second of the mother's unsworn, unsigned and undated draft statements, together with an unsworn, unsigned and undated draft statement in the name of the appellant's solicitor. Notably, neither of these attempted to address the aforementioned issues raised in the NIHE affidavit.

[10] As will become apparent, this court afforded to the appellant and his legal representatives ample opportunity to address and rectify the multiple evidential

deficiencies and queries in the papers. A period exceeding four months was made available for this purpose. The invitation was not taken up.

The Appellant's Challenge

[11] What precisely is the appellant challenging? In the amended Order 53 pleading the focus of his challenge is not any decision, determination or omission on the part of either respondent. Rather, his challenge is directed exclusively to the two provisions of the 2006 Regulations rehearsed in [4] above. Notably, the relief sought is an order quashing these provisions and/or a declaration that they are unlawful. Equally of note there is no claim for damages. The grounds disclose that this is a pure human rights challenge. The appellant contends that the two impugned provisions of the 2006 Regulations are unlawful as they are –

> "*…. in breach of the Convention rights of the* [Appellant] *under articles 8, Article 1 of The First Protocol and Article 14 (within the ambit of those other Articles) ECHR*"

with a resultant breach of section 24(1)(a) of the Northern Ireland Act 1998. However, in the original pleading the challenge is also directed to the aforementioned decision of NIHE (not a respondent). Furthermore, a reconfiguration of the challenge to specified provisions of the 2006 Regulations was mooted at an early stage, inconclusively, by the appellant's representatives. This court proactively raised this issue, fundamental in nature, in September 2021. Remarkably, the appellant's representatives failed to address it, then or subsequently.

[12] The application for judicial review was dismissed. The deputy judge, in an admirably detailed and thoughtful judgment, found against the appellant: see [2020] NIQB …. It is convenient at this juncture to note just one passage from the judgment, at para [2]:

> "*No benefit system could likely afford, or justify, paying housing benefits to subsidise indefinite or prolonged periods of absence from a home occasioned by imprisonment. However, it has been a feature of social security law for several decades to secure the permission of temporary absence for both remand and sentenced prisoners for short periods, although the statutory regime under challenge in these proceedings has afforded greater temporal latitude to remand prisoners.*"

The judgment was promulgated on 18 December 2020.

The Notice of Appeal

[13] It cannot be said that the Notice of Appeal ("*NOA*") is unduly informative or intelligible. Disappointingly, it is precisely the opposite. The grounds of appeal are

of the "boilerplate", diffuse and opaque variety so frequently deprecated by this court.* There are eight grounds in total. Each of them recites that the judge "*… erred in law by his conclusion that …*", without accompanying specificity or particularisation. Grounds of appeal couched in terms of this kind are simply meaningless. While there is something to be said for the existence of a specific procedural power empowering this court to strike out such appeals in limine this court of course can have recourse to this power in the ample armoury of its inherent jurisdiction.

(*In a very recent exercise of judicial scrutiny of all live civil appeals in the Court of Appeal system, around 40 cases in total, the diagnosis was that the NOA was defective in <u>every</u> case. Not one passed muster)

Case Management of the Appeal

[14] The case management of this appeal falls into two phases. In the first phase – between April and September 2021 - this court initially promulgated a specially tailored case management directions order ("*CMDO*"), dated 25 April 2021, requiring a series of standard procedural steps to be taken, allocating a substantive hearing date of 14 September 2021 and, finally, determining a pre-hearing review date of 2 September 2021. Next the court made a comparable CMDO, dated 29 July 2021. This was followed by the pre-hearing review on 2 September 2021. On this occasion the court asked junior counsel for the appellant to confirm that everything was in order for the forthcoming hearing. The answer was an unqualified "yes." The court accepted this answer.

[15] The defective NOA was the first matter of substantial concern for the judicial panel assigned to hear this appeal on the scheduled date of 14 September 2021. It proved to be but one of a multiplicity of concerns and shortcomings which were brought to the attention of the appellant's legal representatives on the occasion of the aforementioned listing. These were all raised proactively by the court, some before the hearing. The issues were a mixture of the procedural and the substantive.

[16] The <u>other</u> issues were: the question of whether the appellant had discharged his duty of candour to the court at both levels; the existence of unsworn, unsigned and undated draft statements; the substandard and incomplete statement of agreed facts; the manifest limitations of the affidavit evidence; the question of whether the appellant would apply to the court to receive fresh evidence; the Order 53 Statement issues noted above; and the appellant's victim status within the compass of section 7 of the Human Rights Act ("*HRA 1998").* The court also highlighted other deficiencies relating particularly to the composition of the appeal papers and the prima facie unnecessary proliferation of authorities, entailing the compilation of four bulging lever arch files with circa 80 components.

[17] It was abundantly clear to the court that the hearing of the appeal could not proceed on the scheduled date of 14 September 2021. The only two possible

outcomes of the listing were a dismissal of the appeal or an adjournment. The inquiry by the court established that an adjournment was unavoidable on the following grounds:

(i) To rectify the hearing bundles.

(ii) To amend the statement of agreed facts.

(iii) To convert the unsworn, unsigned and undated draft statements into affidavits.

(iv) To consider an application to the court for the reception of new evidence.

(v) To address the Order 53 Statement issue.

(vi) To confirm whether the appellant had given instructions to pursue an appeal which if successful could not yield any practical or effective relief to his personal advantage.

[18] The court, not without considerable reservations and taking into account the generous stance on the part of the respondents, acceded to the appellant's adjournment application. It was ordered that the hearing of the appeal be adjourned with costs (in effect, public moneys) thrown away in consequence. The court was sufficiently concerned about the public funding aspect of the appeal to include in its order a direction that any further cost incurring steps on behalf of the appellant would require the prior approval of the court. A specially tailored CMDO (the third) ensued.

[19] This simulated the strike out application by the respondents noted in [3] above. The response of the appellant's legal representatives to all of the foregoing was to file a notice which included the following:

(i) A request that the court allocate the agreed date of 9 February 2022 for the purpose of hearing this application (the court agreed to this).

(ii) An assertion, consisting of double hearsay, that the appellant's instructions were to pursue the appeal, contesting the respondent's application.

(iii) A further double hearsay assertion that the appellant was "*… able to provide further evidence in the form of affidavits from him and his mother addressing the matters raised/*"

(iv) A proposed timetable for skeleton arguments and authorities bundles.

(v) A suggestion that the court remove its "legal aid moratorium" direction (*supra*), without any specification of the purpose/s for which this facility was sought.

At a later date, there was a further request that the court relax the "legal aid certificate moratorium" order noted above. This request, unlike its precursor, specified the purpose of this step. The court agreed, authorising that reasonable steps in defence of the respondents' strike out application could be taken.

[20] Thereafter, the deeply troubled procedural history of the appeal continued. Once again it fell to the court to take the initiative. Having reviewed the papers the court convened a further case management review hearing on 4 February 2022. This was another unsatisfactory event. Over four months having elapsed from the aborted listing on 14 September 2021 and with specific reference to [17] above, the court established that none of the steps mooted in the adjournment application on 14 September 2021 had been taken. No explanation for this failure was offered.

[21] Subsequently, there was an electronic communication from the appellant's solicitor. This did not propose any procedural course or step and requested no procedural facility of the court.

The Determination of the Respondent's Application

[22] The following legal rules, some of them so well established as to require no citation of authority, are in play:

(i) Judicial review proceedings entail no lis inter partes.

(ii) There is a civil burden of proof on every judicial review claimant.

(iii) Judicial review remedies are discretionary.

(iv) Both the High Court and the Court of Appeal are empowered to strike out any case which is an abuse/misuse of their process.

(v) Judicial review applications and appeals are determined on the basis of sworn affidavit evidence, unless the court determines to grant a special dispensation: Orders 38, 41 and 53 of the Rules of the Court of Judicature.

(vi) The rules of court "are there to be obeyed": *Davis v NI Carriers* [1979] NI 19 at 20, per Lowry LCJ.

(vii) Every judicial review claimant owes a duty of candour to the court from the inception of the proceedings until their ultimate conclusion: see, amongst numerous citations, *R (Mahmood) v Secretary of State for the Home Department*

[2014] UKUT 00439 and *R (Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416.

(viii) In judicial review proceedings entailing a human rights claim the claimant must establish victim status under section 7 of the Human Rights Act 1998 at the outset of the proceedings and until their conclusion: see the authorities discussed below.

[23] It is convenient to summarise the main duties of every claimant in every form of civil litigation (and, indeed, in other litigation spheres). They are: to comply with rules of court; to observe all court orders; to apply timeously for relaxation where time limits cannot be observed for good reason; to assemble all material evidence in admissible form; to be fully candid; to cooperate fully with the court at all times; and to actively facilitate the furtherance of the overriding objective. Contemporary litigation is based on a partnership between litigant and court.

Evidence in Judicial Review and Rules of Court

[24] With reference to [22] above, as to (iv) and (v) the evidence that is foundational in every judicial review application, namely sworn affidavits, consists of three such affidavits in the present case. There was evidently an intention that several further sworn affidavits would be filed and served. However, these did not progress beyond the unsworn, unsigned and undated draft witness statements noted above. It would appear that these were compiled around April – June 2020. There are four of these altogether.

[25] It would have been possible, of course, to proactively seek to agree certain facts at first instance. However, the appellant's legal representatives did not do so. It would also have been possible to request a dispensation, or waiver, from the trial court. This step was not taken either. Before this court the response to these serious breaches of the rules of court is made in the form of an assertion from the bar of the court by senior counsel for the appellant in his skeleton argument. The assertion is that:

> *"… this was a practice that had developed due to the impact of Covid-19 …"*

This assertion is unparticularised and unexplained. It is yet another example of an attempt to place evidence before the court by impermissible means. It is accompanied by (in biblical terms) a futile casting of a stone towards the respondents and interested party. Furthermore, the assertion is not agreed among the parties and this court is not disposed to take judicial notice of its content. Finally, the failure of the appellant's legal representatives to either attempt to have certain facts agreed or to apply to the trial judge for an appropriate dispensation or waiver is entirely unaddressed before this court. We make clear that any failure by

any other party to have its affidavits sworn or to procure an appropriate judicial dispensation is equally unacceptable.

[26] The court must also take into account that the unsworn, undated, unsigned draft statements did not address the evidential disparities and deficiencies highlighted above. This is particularly troubling given that these were expressly put in issue by the NIHE affidavit. One of the attempts to circumvent these multiple shortcomings consisted of a submission to this court that the interim relief judgments of the trial judge constituted "*evidence of material facts.*" There is an unmistakable element of desperation in this wholly misconceived contention. As a matter of elementary legal doctrine in the sphere of procedure and practice, the judgment of a court is incapable of providing or constituting the evidence upon which it is based. Counsel further sought to dilute and excuse these fundamental failings by pointing out that they had not been raised at first instance by either the respondents or the court. This is to fundamentally misunderstand the legal rules listed at [22] and the nature of the several duties imposed upon every claimant, outlined at [23] above.

[27] In a separate attempt to dilute or excuse the fundamental failings in play recourse was had to the decision of the Supreme Court in *DB v Chief Constable of PSNI* [2017] UKSC 7. This betrays a manifest misunderstanding of four things. First, the legal rules detailed in [22] above. Second, the series of duties owed by every litigant to both the first instance court and the appellate court, detailed in [23] above. Third, the function and duty of this court to ensure that its process is not misused. Fourth, the central theme of the respondents' application, namely abuse of process, based on the multiple failings proactively brought to the attention of the appellant's legal representatives by this court many months ago. The decision in *DB* has nothing whatsoever to do with the framework within which this court must determine the present application. Lord Steyn's memorable phrase "*misuse of precedent*" resonates strongly: see *O'Hara v Chief Constable* [1997] AC 286 at 291c/d.

The Claimant's Duty of Candour

[28] As to [22] (vii) above, namely the Appellant's duty of candour the first submission advanced on his behalf is <u>in substance</u> that this duty is in some unspecified way diluted or relaxed at the appellate level. This is simply a re-run of the misconceived *DB* argument. The second submission advanced is that it is "*wrong in principle*" to require an appellant to file further evidence on appeal. This submission is unsustainable, confounded by everything rehearsed in [22] and [23] above. It becomes even more untenable in the present context, where the court proactively and timeously raised this issue with the appellant's legal representatives <u>and</u> afforded ample opportunity of rectification.

[29] Furthermore, this was <u>not</u> a matter of "*filing further evidence*", as was submitted. Rather, what was required in the present case was, in the first place, a conscientious review by the appellant's legal representatives of the state of the

evidence before this court and the initiation of any appropriate rectification steps in consequence. These could have included an application to file further evidence in admissible form and content. Neither occurred, as a result of which it fell to the court to proactively take the lead. It then became a matter for the appellant's legal representatives to determine whether, in the discharge of their client's several duties to this court, he should be advised to make an application for leave to adduce further evidence on appeal and/or take further procedural steps. As the history recited above reveals, nothing of a procedurally proper or orthodox nature materialised, notwithstanding the court's continued proactive intervention.

[30] In its proactive intervention this court informed the appellant's legal representatives in unambiguous terms that it would be determining this appeal on the basis of sworn affidavit evidence only. Over four months later, the multiple failings in this regard remained unremedied. Once again, it was the court which took the initiative in this situation by convening yet another case management review in advance of the scheduled listing of the respondents' strike out application. The outcome of this listing was that the appellant's legal representatives were not applying to the court for any kind of procedural facility, with the result that the extant case management directions orders were not revised, updated or replaced.

[31] This discrete narrative would be incomplete without recording that on the eve of the listing on 9 February 2022 – figuratively, at the 59th minute of the 11th hour - of the respondents' application the appellant's solicitors forwarded electronically to the court three of the abovementioned unsworn, undated, unsigned draft statements in the form of sworn affidavits. As already noted, no application seeking the permission of the court to take this step had been made. Furthermore, no such application materialised in the event. This, therefore, was an empty exercise which had one consequence only, namely to incur unnecessary costs.

[32] The next submission advanced on behalf of the appellant drew attention to the NIHE documentary evidence, some few contemporaneous electronic words, indicating that with effect from 8 December 2019 the HB payments had been terminated because of the appellant's progression from the status of remand prisoner to that of sentenced prisoner. The burden of this submission was that the appellant had discharged his duty of candour to the court by providing this evidence. The first riposte is that this evidence was not provided by the appellant. Rather, it was exhibited to the affidavit of another person, namely his solicitor.

[33] Secondly, this court concludes without hesitation that all facts bearing on the HB issue as between the appellant and NIHE were material. These included, as a minimum, all of the facts relating to the alleged tenancy, about which questions crying out for an answer had been expressly raised; all facts bearing on the alleged payments of rent during the appellant's period of sentenced imprisonment; and all facts bearing on the alleged engagement between the appellant's mother and the asserted landlord. In addition, the appellant's duty of candour extended to proactively disclosing, by sworn affidavit evidence, all facts bearing on the possible

grant of a discretionary public law remedy to him whether at first instance or on appeal; and all facts bearing on the question of whether the appellant is a victim within the compass of section 7 of HRA 1998.

[34] As a result of the failure of the appellant to address any of the foregoing issues through the medium of sworn affidavit evidence there are gaping chasms in the evidence placed before both courts. This analysis is confirmed beyond peradventure by the briefest perusal of the evidence which the appellant purported to place before both courts in the four unsworn, unsigned, undated draft statements. What was the function of these if not to present material evidence to the courts?

[35] At the next stage of the exercise, the appellant seeks (again) to excuse his breach of the duty of candour by the predictable mechanism of blaming the respondents. It is said that they should have raised the evidential discrepancies and deficiencies at first instance. As a result of their failure to do so it is contended that it would be disproportionate to strike out the appeal.

[36] This argument was based on para [52] of *Khan*. This court considers that the height of this discrete passage in *Khan* is that delay on the part of a respondent in bringing an application of the present kind – in that case an application to set aside the grant of permission to appeal to the COA - might be a factor in the exercise of the appellate court's discretion whether to grant the remedy sought. This will, obviously, be an intensely contextual question. In that case the respondent's delay of six months in bringing the application did not operate to preclude granting the remedy pursued. In the present case the comparable period is approximately one month. The court considers this to be an entirely reasonable period in the circumstances of these proceedings.

[37] If and insofar as the notional clock began to run earlier, this does not avail the appellant, since (a) in the matter of candour the focus is on the appellant, (b) the *Khan* approach has greater purchase in the realm of private law proceedings, and (c) the failings in issue are both multiple and egregious. No court jealous of safeguarding its process could effective excuse the appellant's misdemeanours on the ground that the respondents were too forgiving of them for too long. This argument is manifestly devoid of merit for this amalgam of reasons.

Section 7 HRA 1998: Victim Status

[38] The final issue is that of the appellant's victim status. 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 p 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]

[39] In *Burden v United Kingdom* (2008) 24 BHRC 709 (App no 13378/05) the applicants were elderly unmarried sisters. They owned a house in their joint names worth £875,000. Each had made a will leaving all her property to the other. By ss 3, 3A and 4 of the Inheritance Tax Act 1984 inheritance tax of 40% would be levied upon the death of each. The government contested the admissibility of the application on the grounds that the applicants could not claim to be 'victims' of any violation (under Art 34 ECHR) as the complaint was prospective and hypothetical, given that no liability to inheritance tax had actually accrued and might never accrue.

[40] Rejecting his argument, the Grand Chamber reasoned and concluded as follows. In order to be able to lodge a petition in pursuance of Art 34, a person, non-governmental organisation or group of individuals had to be able to claim to be the victim of a violation of the convention rights. In order to claim to be a victim of a violation, a person had to be directly affected by the impugned measure. The ECHR did not, therefore, envisage the bringing of an actio popularis for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they considered, without having been directly affected by it, that it might contravene the convention. It was, however, open to a person to contend that a law violated his rights, in the absence of an individual measure of implementation, if he was required either to modify his conduct or risk being prosecuted or if he was a member of a class of people ***at "real risk"*** of being directly affected by the legislation. Given their age, the wills they had made and the value of the property each owned, the applicants had established that there was a real risk that, in the not too distant future, one of them would be required to pay substantial inheritance tax on the property inherited from her sister. Accordingly, both were directly affected by the impugned legislation and thus had victim status

[41] Plainly a vague or fanciful possibility of a Convention violation will not suffice. In short, "*risk*" in this context denotes *real risk*. This requires, per *Senator Lines*, a reasonable and convincing evidential foundation. Having regard to our analysis and conclusion in [22] – [33] above, there has been a manifest failure by the appellant to establish the necessary evidential foundation. We decline to speculate on what the true and actual facts are. For this reason we reject the forlorn argument that the appellant is a human rights victim because certain rental payments were paid by his mother on his behalf: in the context of a hopelessly depleted evidential foundation in this discrete respect and more broadly, the exercise of identifying a possible legal duty of account and repayment does not fall to be performed.

[42] The evidential matrix bearing on this issue is barren for the reasons explained. However, having regard to the order we propose to make, the court will refrain from determining this issue conclusively.

Discretion and Conclusion

[43] The final issue concerns the exercise of this court's discretion, the power to strike out this appeal being discretionary in nature. Summarising, there have been serious breaches by the appellant of the rules of court, a clearly demonstrated breach of the appellant's duty of candour, a failure by the appellant's legal representatives to avail of the generous facilities provided by this court to rectify the multiple failings identified and, in consequence of all of the foregoing, the investment by this court of quite disproportionate judicial and administrative resources in the processing of this appeal. Furthermore, there have been systemic and unremitting breaches of the standards and principles enshrined in the overriding objective. Allied to this the appellant has failed to establish any financial or other detriment to him.

[44] The inquiry, analysis, elaboration and exposition which this court has undertaken were not features of these proceedings at first instance. This is not to criticise either the trial judge or the respondents' representatives. We would emphasise in this respect that **these are public law proceedings**. We consider that at first instance an application to set aside the grant of leave to apply for judicial review could well have been persuasive.

[45] In the exercise of its discretion, which is one of some breadth, the court must stand back and survey everything panoramically, forming an overall evaluative judgement and giving effect to the overriding objective and the prevention of an inexcusable misuse of its process. In this kind of situation differently constituted courts could reasonably come to different conclusions. We apprehend that many judicial panels would grant the respondents the relief they pursue, namely an order striking out the appeal. Indubitably there are legitimate grounds for taking this course.

[46] On the other hand, the dismissal of any case without considering its merits is invariably a Draconian step, one which will not be routinely or lightly taken (see *Burgess v Stafford Hotel* [1990] 1 WLR 1215 at 1222). Furthermore, in this instance, we take into account in particular that most of the multiple failings identified cannot obviously be laid out the door of the appellant personally. We further take into account the breadth of the costs powers available to the court. In addition, the court is mindful of the discretion to be exercised in the matter of remedies, should that stage be reached. Not without considerable hesitation, in preference to ordering that the appeal be struck out the court has determined to make the following order:

Unless the multiple failings identified in the judgement of the court handed down on 18th February 2 022 are fully rectified by 28th February 2 022 at latest, this appeal will be struck out without more.

[47] The court, mindful of its discretion under section 59 of the Judicature (NI) Act 1978 and the provisions of Order 62, Rules 10 and 11, will defer finalisation of the issue of appeal costs incurred to date for a period of seven days. The respondent's application/submission will be provided by close of business on 22 February 2022. The appellant's response will be made by close of business on 25 February 2022. The parties' respective submissions will not exceed two pages, font size 12 minimum.

[48] The appellant has been the beneficiary of a generous exercise of this court's discretion in his favour. The substantive hearing is rescheduled to 25 March 2022.