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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 CAOLAN REYNOLDS FOR JUDICIAL REVIEW

Applicant

AND IN THE MATTER OF DECISIONS OF THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Respondent

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Fiona O'Doherty KC with Malachy McGowan (instructed by Phoenix Law, Solicitors) for the Applicant
Tony McGleenan KC with Philip McAteer (instructed by the Crown Solicitor's Office) for the Respondent

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COLTON J

Introduction

[1] This case involves another in a series of challenges brought against actions of the PSNI in the exercise of their powers to stop and search under the Justice and Security Act (Northern Ireland) 2007 ("the 2007 Act").

[2] I am obliged to counsel for their helpful written and oral submissions in this application.

[3] In these proceedings the applicant challenges the actions of PSNI officers who stopped and searched him on a series of occasions between July 2019 and July 2020. On each occasion officers of the PSNI stopped the applicant's car, required him to exit his vehicle, searched his vehicle and searched his person on the side of the road.

[4] These stops and searches were carried out under the powers contained in section 24 and Schedule 3 to the 2007 Act.

[5] In his supporting affidavit the applicant avers that he considers he has been targeted for these searches because it is believed by the security forces his brother is involved with dissident republicans. He also avers that in the past he has been asked by the security forces and/or security services to provide information to them. He believes that these stops and searches are related to this and are being used to pressurise him to provide information.

[6] The application was founded on three broad issues:

(i) Whether there was a power to search the applicant's person without reasonable suspicion (the statutory interpretation point).

(ii) Whether the PSNI have failed to comply with the safeguards identified by the Court of Appeal as required for the lawful exercise of this power in respect of providing the grounds and basis for each stop (the grounds and basis point).

(iii) Whether the PSNI have failed to comply with the safeguards identified by the Court of Appeal as required for the lawful exercise of this power in respect of ensuring monitoring of the impact of the power in different communities (the community monitoring point).

(i) The statutory interpretation point

The statutory scheme

[7] Schedule 3 of the 2007 Act confers the power to search for munitions and transmitters. Section 24 of the Act gives effect to Schedule 3. Para 4A of Schedule 3 to the Act provides for the power to stop and search persons in specified areas or locations:

> "4A(1)A senior officer may give an authorisation under this paragraph in relation to a specified area or place if the officer—
>
> (a) reasonably suspects (whether in relation to a particular case, a description of case or generally) that the safety of any person might be endangered by the use of munitions or wireless apparatus, and
>
> (b) reasonably considers that—
>
> (i) the authorisation is necessary to prevent such danger,

(ii) the specified area or place is no greater than is necessary to prevent such danger, and

(iii) the duration of the authorisation is no longer than is necessary to prevent such danger.

(2) An authorisation under this paragraph authorises any constable to stop a person in the specified area or place and to search that person.

(3) A constable may exercise the power conferred by an authorisation under this paragraph only for the purpose of ascertaining whether the person has munitions unlawfully with that person or wireless apparatus with that person.

(4) But the power conferred by such an authorisation may be exercised whether or not the constable reasonably suspects that there are such munitions or wireless apparatus." [emphasis added]

[8] Para 4A was introduced by the Protection of Freedoms Act 2012 ("the 2012 Act") subsequent to the decision of the ECtHR in *Gillan v United Kingdom* [2010] 50 ECHRR 45, which held that the previous power in the 2007 Act to stop and search individuals was not "sufficiently circumscribed nor subject to adequate legal safeguards against abuse" and it could not meet the "in accordance with the law" test.

[9] The new regime provides for an authorisation to be made by an officer of the PSNI of at least the rank of Assistant Chief Constable to permit constables to stop and search a person in the specified area or place to which the authorisation relates. Once the authorisation is in place the power may be exercised by a constable without reasonable suspicion on his part.

[10] The remainder of para 4 of Schedule 3 provides as follows:

"4(1) [A member of Her Majesty's forces] who is on duty may—

(a) stop a person in a public place, and

(b) search him for the purpose of ascertaining whether he has munitions unlawfully with him or wireless apparatus with him.

(2) An [member of Her Majesty's forces who is on duty] may search a person—

(a) who is not in a public place, and

(b) whom the [member concerned][3] reasonably suspects to have munitions unlawfully with him or to have wireless apparatus with him.

(3) A member of Her Majesty's forces may search a person entering or found in a dwelling entered under paragraph 2."

The words at notes 1, 2 and 3 were substituted by the 2012 Act.

[11] The following para was then added by the 2012 Act:

"(4) A constable may search a person (whether or not that person is in a public place) whom the constable reasonably suspects to have munitions unlawfully with him or to have wireless apparatus with him."

[12] Section 42 of the 2007 Act defines a number of terms for the purposes of the Act, which are relevant to the applicant's claims:

"'dwelling' means—

(a) a building or part of a building used as a dwelling, and

(b) a vehicle which is habitually stationary and which is used as a dwelling,

'premises' includes any place and in particular includes—

(a) a vehicle,

(b) an offshore installation within the meaning given in section 44 of the Petroleum Act 1998 (c. 17), and

(c) a tent or moveable structure,

'public place' means a place to which members of the public have or are permitted to have access, whether or not for payment."

[13] Para 2 of Schedule 3 provides for the power to enter and search premises, making a distinction between premises and dwellings. Under 2(1):

> "2(1) An officer may enter and search any premises for the purpose of ascertaining—
>
> (a) whether there are any munitions unlawfully on the premises, or
>
> (b) whether there is any wireless apparatus on the premises.
>
> (2) An officer may not enter a dwelling under this paragraph unless he is an authorised officer, and he reasonably suspects that the dwelling—
>
> (a) unlawfully contains munitions, or
>
> (b) contains wireless apparatus."

[14] Section 26 provides:

> "**26 Premises: vehicles, &c**.
>
> (1) A power under section 24 or 25 to search premises shall, in its application to vehicles (by virtue of section 42), be taken to include—
>
> (a) power to stop a vehicle … and
>
> (b) power to take a vehicle or cause it to be taken, where necessary or expedient, to any place for the purpose of carrying out the search.
>
> …
>
> (4) In the application to a place or vehicle of a power to search premises under section 24 or 25—
>
> (a) a reference to the address of the premises shall be construed as a reference to the location of the place or vehicle together with its registration number (if any), and
>
> (b) a reference to the occupier of the premises shall be construed as a reference to the occupier of the place or the person in charge of the vehicle.

(5) Where a search under Schedule 3 is carried out in relation to a vehicle, the person carrying out the search may, if he reasonably believes that it is necessary in order to carry out the search or to prevent it from being frustrated—

(a) require a person in or on the vehicle to remain with it;

(b) require a person in or on the vehicle to go to and remain at any place to which the vehicle is taken by virtue of subsection (1)(b);

(c) use reasonable force to secure compliance with a requirement under paragraph (a) or (b) above.

(6) Paragraphs 3(2) and (3), 6 and 7 of Schedule 3 shall apply to a requirement imposed under subsection (5) as they apply to a requirement imposed under that Schedule.

(7) Paragraph 6 of Schedule 3 shall apply in relation to the search of a vehicle which is not habitually stationary only if it is moved for the purpose of the search by virtue of subsection (1)(b); and where that paragraph does apply, the reference to the address of the premises shall be construed as a reference to the location where the vehicle is searched together with its registration number (if any)."

The applicant's case

[15] The applicant argues that the power to stop and search persons without reasonable suspicion when the appropriate authorisation is in place under para 4A is limited to public places only and therefore, does not permit PSNI officers to stop and search persons in their own vehicles. It is argued that under the statute vehicle constitutes "premises." A vehicle is not a "public place" within the meaning of the statute. An officer may enter and search "any premises" for the purpose of ascertaining whether there are any munitions unlawfully on the premises, or any wireless apparatus on the premises, without the need for reasonably suspecting that such items are on the premises. The statute does not expressly permit an officer to search an individual in or on a premises (including a vehicle), in the absence of reasonable suspicion. The applicant says that constitutional principle, longstanding common law authority and the requirements of article 8 ECHR support the

conclusion that the power to search persons requires explicit provision. The court has no issue with this proposition.

[16] In short, it is argued that the power created by Schedule 3 para 4A to stop and search a person for munitions or wireless transmitters can only be exercised to search a person who is in a public place, which excludes a private motor vehicle.

Discussion

[17] In reply to the applicant's case the respondent in its written submissions suggested that the proposed construction by the applicant was simply wrong. It was argued that the power under para 4A(2) to stop a person in a specified area or place and to search that person includes the power to stop and search a person in a vehicle in that area or place.

[18] In the written submissions the respondent went on to argue that the construction was consistent with the Code of Practice setting out how the powers at sections 21, 23, 24, Schedule 3 and 26 of the 2007 Act should be exercised. The Code was presented to Parliament pursuant to section 34(4) of the 2007 Act and came into force on 15 May 2013. In addition, it was argued that the construction argued for on behalf of the applicant gives rise to an obvious absurdity which would abrade with the purpose of the para 4A(2) power.

[19] At the hearing Mr McGleenan, on behalf of the respondent, argued forcefully that the issue resolved to a simple issue of construction and that nothing confined the exercise of the power to search a person under para 4A to a public place. The reference to a "specified area or place" in para 4A means that an officer is entitled to stop and search persons in vehicles (whether public or private) found within the authorised area or place without reasonable suspicion, provided the appropriate authorisation was in place.

[20] In short, Mr McGleenan argues that the answer to the statutory construction issue appears in the statute itself, properly read and properly construed.

[21] An examination of the legislative and legal background to the introduction of para 4A is instructive. In the case of *Gillan v United Kingdom* [2010] 50 EHRR 45, the ECtHR was considering police powers in relation to stop and search under the Terrorism Act 2000. The applicants in that case complained about the absence of any "reasonable suspicion" requirement in sections 44-46 of the 2000 Act which permitted police officers to stop and search members of the public. In its assessment the court said:

> "79. The applicants, however, complain that these provisions confer an unduly wide discretion on the police, both in terms of the authorisation of the power to stop and search and its application in practice. The

> House of Lords considered that this discretion was subject to effective control, and Lord Bingham identified eleven constraints on abuse of power. However, in the court's view, the safeguards provided by domestic law have not been demonstrated to constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference.
>
> 80. The court notes at the outset that the senior police officer referred to in section 44(4) of the Act is empowered to authorise any constable in uniform to stop and search a pedestrian in any area specified by him within his jurisdiction if he 'considers it expedient for the prevention of acts of terrorism.' However, 'expedient' means no more than 'advantageous' or 'helpful.' There is no requirement at the authorisation stage that the stop and search power be considered 'necessary' and therefore no requirement of any assessment of the proportionality of the measure. The authorisation is subject to confirmation by the Secretary of State within 48 hours. The Secretary of State may not alter the geographical coverage of an authorisation and although he or she can refuse confirmation or substitute an earlier time of expiry, it appears that in practice this has never been done. Although the exercise of the powers of authorisation and confirmation is subject to judicial review, the width of the statutory powers is such that applicants face formidable obstacles in showing that any authorisation and confirmation are ultra vires or an abuse of power."

[22] The court went on to consider the Code of Practice that had been issued in relation to the Act and the safeguards provided by an independent reviewer. The court ultimately concluded at para [87]:

> "87. In conclusion, the court considers that the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore, 'in accordance with the law' and it follows that there has been a violation of Article 8 of the Convention."

[23] Subsequent to the judgment in *Gillan*, Parliament enacted the Protection of Freedoms Act 2012. Schedule 6 provided for an amendment to the existing para 4 in the 2007 Act. It did so by inserting para 4A which is the subject matter of this

application. Thus, the requirements arising from *Gillan* in terms of proportionality and necessity were addressed. It will be seen that 4A referred specifically to "stopping and searching persons in specified locations."

[24] The original para 4 provided that an officer could stop a person in a public place and search him for the purpose of ascertaining whether he has munitions unlawfully with him or wireless apparatus with him. No reasonable suspicion was required. This contrasted with the power to search a person who was not in a public place which did require reasonable suspicion.

[25] Under the amendments introduced by Schedule 6 of the 2012 Act, paras (1), (2) and (3) of para 4 remained unamended. The insertion of para 4A was clearly designed to address the issues identified in the *Gillan* judgment.

[26] The features of the new regime were described by the Court of Appeal in the case of *Re Ramsey's Application* [2020] NICA 14 at para [15] in the following way:

> "(i) An authorisation permitting a constable to stop and search a person to ascertain whether he has munitions or wireless apparatus unlawfully with him whether or not the constable reasonably suspects that the person has either can only be made by an officer of the PSNI of at least the rank of Assistant Chief Constable.
>
> (ii) If no authorisation is in place a constable may not stop and search a person to ascertain whether he has munitions unlawfully or wireless apparatus in the absence of reasonable suspicion.
>
> (iii) In order to give the authorisation the officer must reasonably suspect that the safety of any person might be endangered by the use of munitions or wireless apparatus and reasonably consider that the authorisation is necessary to prevent such danger and that the specified area or place in respect of the authorisation and the duration of the authorisation are both no longer than is necessary to prevent such danger."

[27] Importantly, as per para [10] above, the 2012 Act also inserted a new para (4) to the effect that:

> "A constable may search a person whether or not that person is in a public place whom the constable reasonably

> suspects to have munitions unlawfully with him or to have wireless apparatus with him."

[28] Thus, the power under para 4A can only be exercised in circumstances where the appropriate authorisation is in place. If it is not in place, then the relevant powers are in paras (1) to (4).

Statutory interpretation – relevant authorities

[29] According to Lord Nicholls in *Barclays Mercantile Finance Ltd v Mawson* [2004] UKHL 51 at para [28] (cited also in *Bennion Bailey and Norbury on Statutory Interpretation*, cp 435):

> "The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose."

[30] Lord Bingham in *R(Quintavalle) v Secretary of State for Health* [2003] UKHL 13 described the role of the court in the context of statutory interpretation at para [8]:

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

The court's analysis

[31] I consider it significant that para 4A expressly excludes reference to a public place. The use of the term "a specified area or place" is clearly significant. The power in para 4A is not confined to a public place. A relevant protection against arbitrariness which is provided in the requirement for reasonable suspicion in the remainder of Schedule 3 is built in to the requirement for authorisation which is a condition precedent to the exercise of the power.

[32] I also consider that it is significant that the 2012 Act introduced the term "general" into the cross heading of para 4. It now reads:

> "*Stopping and searching persons [:general]*."

This is to be contrasted from the cross heading at para 4A, namely:

> "*stopping and searching persons in specified locations*."

[33] In my view, para 4(4) acts as a "fail-safe", where in the event of an authorisation not being obtained, an individual would be protected from arbitrary interference by the "general" requirements to have reasonable suspicion (whether in a public or private place).

[34] The respondent contends that this interpretation of para 4A is consistent with the Code of Practice promulgated by the Secretary of State which is a further safeguard against the unlawful use of the powers provided in the 2007 Act.

[35] In particular, Mr McGleenan refers to paras 8.59 to 8.61 which deal with the conduct of searches. Specifically, 8.59 provides:

> "8.59 The powers under para 4A(1) of Schedule 3 to the 2007 Act allow an officer to conduct searches where an authorisation is in place. As noted at paragraph 8.17, the officer conducting the search does not need to reasonably suspect that the person has munitions or wireless apparatus but may rely on an authorisation made by a senior officer. The officer may stop and search a person in a specified area or place for the purpose of ascertaining whether that person has munitions unlawfully with them or wireless apparatus with them.
>
> 8.60 However, this would not prevent a search being carried out under powers if, in the course of exercising these powers, the officer formed reasonable grounds for suspicion. For example, paragraph 4(4) of Schedule 3 also allows a constable to conduct searches if he or she reasonably suspects that a person has munitions unlawfully with them or wireless apparatus with them. Police officers should consider whether this power of stop and search may be more appropriate to use.
>
> 8.61 Where a person or vehicle is being searched without reasonable suspicion by an officer (but with an authorisation from a senior officer under paragraph 4A(1)) there must be a basis for that person being subject to search. The basis could include, but is not limited to:
>
> - That something in the behaviour of a person or the way a vehicle is being driven has given cause for concern;
>
> - The terms of a briefing provided;

- The answers made to questions about the person's behaviour or presence that give cause for concern."

[36] The table of police powers annexed to Code of Practice provides in relation to Schedule 3 para 4A that:

> "Searches may also be conducted of people travelling in vehicles."

[37] Furthermore, the independent reviewer's most recent report when summarising powers under the 2007 Act says at Annex C, echoing the Code of Practice, that "searches may also be conducted of people travelling in vehicles."

[38] Of course, the Code of Practice cannot be the source of any power, nor could it expand the power. That said, the Code of Practice is an important element in ensuring that the quality of law test is met in respect of the exercise of the powers under the 2007 Act.

[39] Ms Doherty complains that the basis for the interpretation argued for by the respondent amounts to ex post facto justification. It seems to the court that this cannot bear on the question of statutory interpretation. Either the interpretation contended for is correct or it is not.

[40] More importantly, Ms Doherty argues that, in fact, the Code of Practice is inconsistent with the interpretation now argued for by the respondent. In particular, Ms Doherty points to para 8.17 of the Code which provides:

> "8.17 Officers can stop and search in public places in a specified location if an authorisation has been given …
>
> 8.18 Alternatively, officers can stop and search persons in either a public or a private place without authorisation from senior officers if they reasonably suspect that the person has munitions unlawfully with them or wireless apparatus with them."

[41] Following on from this it is argued that this inconsistency alone is sufficient to defeat the proposed respondent's interpretation given the requirements for legal certainty as a necessary safeguard for the use of the powers under the 2007 Act.

[42] The applicant further argues that if the respondent's interpretation is correct, there would be no constraint on the power extending further to searches of persons in private dwellings.

[43] In the court's view this concern is misconceived. Firstly, it should be understood that the power under para 4A relates to "stop" and "search." By

definition one cannot stop a dwelling. Furthermore, it seems to the court that the requirement for reasonable suspicion before entering a dwelling in para 2 of Schedule 3 will ensure that para 4A could not lawfully be used to search a person within a dwelling without reasonable suspicion. The constraint in paragraph 2 pre-dated the amendments introduced by the 2012 Act and were not modified by those amendments. Thus, the power under para 4A to stop and search persons without reasonable suspicion could not be used to override the express prohibition on entering dwellings without reasonable suspicion.

Conclusion

[44] The court concludes that the power under para 4A to stop and search permits an officer to search a person within a vehicle, assuming that the appropriate authorisation is in place.

[45] This is apparent from the wording of the provision itself which provides that power can be exercised "in specified areas or locations", it is not confined to "public places", as are the rest of the "general" provisions in paragraph 4.

[46] This is also consistent with the history and context of the enactment of para 4A. It was inserted to replace the old regime of the 2007 Act, where there was a distinction between public and private places for the purposes of exercising stop and search powers. Para 4A did not maintain this distinction and instead instituted a new regime based on an assessment of the risk of endangerment to members of the public by the use of munitions or wireless apparatus and the necessity to authorise the exercise of stop and search powers.

[47] This interpretation is entirely consistent with the purpose of the particular provision and the statute as a whole.

[48] Although not determinate of the issue, the court notes that once a person has been required to leave a vehicle so that a search can be conducted pursuant to para 4A, that person could be searched in any event, without requirement for reasonable suspicion even on the applicant's construction, as he would then be present in a public place. It seems to the court that in practice this is what actually happens. As per para 11 of the applicant's affidavit:

> "On each occasion I have been stopped, I have been asked to step out of the vehicle. The PSNI then conduct a cursory search of the vehicle, and then subject me to a pat-down search of my person."

[49] Thus, it does not appear that, in fact, the applicant was searched whilst in the vehicle.

[50] Judicial review is therefore refused on the statutory interpretation point.

(ii) The grounds and basis point

[51] The parties agreed that it was not necessary for the court to rule on this issue at this stage.

(iii) The community monitoring point

[52] The Code of Practice to which the court has already referred obliges the respondent to compile statistics on the use of stop and search powers in order to ensure that there are adequate safeguards against abuse. Paras 5.9-5.14 of the Code address this issue. In particular, para 5.11 states:

> "Supervision and monitoring must be supported by the compilation of comprehensive statistical records of stops and searches at service, area and local level. Any apparently disproportionate use of the power given to officers or groups of officers or in relation to specific sections of the community should be identified and investigated."

[53] This requirement was considered by the Court of Appeal in *Ramsey's Application* [2020] NICA 14.

[54] The court held that the requirement for a basis for the stop and search and for that basis to be recorded was linked to the requirement in para 5.11 of the Code. This is because it provided a proper means of carrying out effective monitoring and supervision. Thus, at para [52] of the judgment the court considered there were two reasons for the requirement to record the basis for any stop and search:

> "[52] … First, the requirement for the officer to record the basis for the search is itself a discipline in ensuring that the officer acts in accordance with the requirements of the Code. The record need not be extensive comprising at most a sentence or two but providing sufficient information to explain why there was a basis.
>
> [53] Leading on from that the second reason relates to the requirement to monitor and supervise set out between paragraphs 5.9 and 5.13 of the Code. Paragraph 5.11 provides that supervision and monitoring must be supported by the compilation of comprehensive statistical records of stops and searches at service, area and local level. Paragraph 5.12 provides that the powers should be used only if it is proportionate and necessary. Proportionality requires the powers to be used only

> where justified by the particular situation. Effective monitoring and supervision can only be achieved if there is a record for the basis of the search."

[55] The court went on to assess what was required and determined that there was no specific methodology required under the Code for the monitoring of community background, but that the requirements of the Code established a duty on the part of the respondent to devise a methodology of enabling such monitoring and supervision and to put in place some proportionate measure in order to ensure that there could be adequate monitoring and supervision of the community background of those being stopped and searched.

[56] The court concluded:

> "[55] … Paragraph 5.9 of the Code requires, however, that supervising officers must ensure in the use of stop and search powers that there is no evidence of them being exercised on the basis of stereotyped images or inappropriate generalisations. Supervising officers can only carry out that task if they have the information which enables them to make a judgement about the manner in which the powers are exercised."

[57] The court went on to recognise that some work had been done on this issue but that establishing a methodology was not straightforward. Thus, at para [56] the court said:

> "[56] … There is evidence that such work has been undertaken by the PSNI. The Code does not impose any requirement on a member of the public to indicate anything about community background. It is not, therefore, possible to establish such background by means of questioning. There was initial reluctance on the part of the PSNI to leave it to individual officers to make an assessment of the community background of the individual stopped. In some cases that might be informed by previous experience with an individual but in others there may be little basis for making any determination.
>
> [57] The PSNI did conduct a pilot exercise in 2015 where they noted the postcode of the location in which the person stopped resided. An exercise was then carried out on the basis of census returns indicating the percentage community background in each postcode. An assessment was then made on the basis of those percentages of the community background of those

> stopped. That exercise demonstrated that a significant preponderance of those stopped came from a perceived Catholic background but that was not necessarily surprising since the DRs constitute the principal threat and are most active in those communities."

[58] Importantly, the court said:

> "[58] The evaluation of the pilot by the PSNI has tended to suggest that the best option may be assessment by the individual police officers of community background. We understand that such an option has not yet been implemented but we are satisfied that the requirements of the Code are that some proportionate measure is put in place in order to ensure that there can be adequate monitoring and supervision of the community background of those being stopped and searched."

[59] The applicant complains that despite this clear direction of the Court of Appeal no system of community monitoring has yet been implemented. It is argued on behalf of the applicant that the continued use of the power in circumstances where no such method has been devised and implemented is unlawful.

What is the evidence in relation to the respondent's compliance with 5.9 of the Code?

[60] The position of the respondent is set out in an affidavit of Assistant Chief Constable Todd. He avers that following the Court of Appeals decision in *Ramsey's Application* the matter was discussed at a Policing Powers Development Group ("PPDG") meeting, leading to the formation of a working group in Autumn 2020.

[61] The group undertook a series of actions, including reviewing previous community background monitoring, pilot findings, examining existing and related practice within the PSNI, exploring other potential good practice outside the PSNI, formally engaging with the Information Commissioner's Office ("ICO") to discuss the circumstances of legal issues arising and undertaking a formal Data Protection Impact Assessment ("DPIA"). It also engaged regularly with the Policing Board's Human Rights Adviser and the Independent Reviewer.

[62] An options paper considering potential methods of implementation was developed to facilitate analysis and discussion with external bodies. Officers met with ICO representatives on 22 December 2020 to discuss those options and the DPIA. The ICO expressed significant concerns about some of the methods of collation of data which had been proposed by external bodies.

[63] The work undertaken by the working group was discussed by the PPDG on 8 January 2021. The PPDG acknowledged that no single approach was likely to achieve the fulfilment of the monitoring obligation whilst meeting legal requirements and the needs of oversight bodies.

[64] On 4 June 2021, a paper on the issue was presented to the Senior Management Board, who decided on 9 June 2021 that it would seek legislative change to provide the police service with an explicit legal power to collect the data necessary to implement community monitoring of JSA stop and search subjects.

[65] The relevant paper has been exhibited to ACC Todd's affidavit.

[66] Thereafter, further advice was sought from the ICO. On 4 October 2021, the Chief Constable wrote to the Minister of Justice explaining that it was considered enabling legislation was the most appropriate course of action.

[67] The Minister replied on 14 October 2021 welcoming the offer of engagement and seeking to arrange discussion between the PSNI and Department of Justice officials. The letter also suggested that there should be direct contact with the Secretary of State for Northern Ireland on the basis that the relevant powers were outside the remit of the Department of Justice.

[68] On 3 November 2021, an acting ACC met with the DoJ. The DoJ proposed a workshop with the relevant interested bodies, including the Northern Ireland Office, the Equality Commission, Northern Ireland Human Rights Commission and the ICO to discuss implementation of community monitoring.

[69] On 11 November 2021, an ACC wrote to the Northern Ireland Office providing background to the issue and seeking a meeting to discuss the most appropriate means to progress the current and future legislative framework.

[70] The PSNI held two meetings on 14 and 22 February 2022 which were attended by a range of stakeholders and included representatives from the Northern Ireland Office, the Department of Justice, the Policing Board, the Human Rights Commission, the Equality Commission, the Independent Reviewer of Justice and Security Act Powers and others.

[71] Following these workshops the Northern Ireland Office agreed to take forward enabling legislation. In July 2022, the Northern Ireland Office provided an update to the PSNI confirming that it had secured the Secretary of State's agreement to proceed with amendment of the Justice and Security (Northern Ireland) Act 2007 and the Code of Practice to add a power permitting the PSNI to collect community monitoring information by carrying out stop and searches under the relevant power.

[72] Subsequently, on 12 January 2023, a different Secretary of State for Northern Ireland reviewed the case for legislative change and declined to progress this proposal.

[73] On 12 January 2023, a paper was prepared for consideration of the Senior Management Board, and it was proposed to introduce a pilot scheme and evaluate the operational approach of data collection prior to the implementation across the organisation.

[74] Again, this paper has been exhibited to ACC Todd's affidavit.

[75] Since then preparation has commenced on the creation of an implementation schedule for future consideration and approval by SMB.

[76] ACC Todd avers:

> "There are a range of operational matters to consider. Enquiries need to be made regarding electronic systems to check existing functionality or if external supplier assistance is required, and if necessary, amendments will be made to those systems. Amendment to the RRD schedule will require to be laid before the Assembly. The detail of proposed data-sets to be captured to systems will need to meet the satisfaction of the Data Protection Officer before the required amendments to the RRD can be confirmed. Stakeholder engagement will be necessary through established structures such as the Service Accountability Panel and the Northern Ireland Policing Board. The revised systems will need to undergo testing, service instructions will need to be revised and training of officers and staff will be necessary, supported by refreshed training products. Project planning will need to anticipate the risk that issues may surface through this process that impact delivery times. An outline of this project plan will be presented in the June 2023 SMP paper."

[77] Subsequent to the hearing the court invited further evidence from the respondent on the progress of the proposed scheme.

[78] The court was provided with a letter from the Assistant Chief Constable of the PSNI dated 5 March 2024 in which it referred to queries raised by the Policing Board in relation to the update on the implementation of the JSA recommendations.

[79] The correspondence referred to the working group. To this end it is recorded that the implementation of a pilot scheme had been agreed to be implemented by the end of March 2024.

[80] The important part of the correspondence is as follows:

> "Due to the fact that the term community background has no definition (ie the previously accepted definition outlined within the Fair Employment and Treatment (Northern Ireland) Order 1998, which defines community background as Catholic, Protestant, or other, is considered as outdated/not reflective of Northern Ireland communities today. The method by which PSNI will begin to gather this information will be by means of the police officer conducting the stop and search procedure, asking the following question:
>
> 'To help us monitor the necessity and proportionality of this use of stop and search powers, I will now ask you a question. You are not required to answer this question. What is your community background? Is it:
>
> - Catholic/nationalist/republican [select]
> - Protestant/unionist/loyalist [select]
> - Other [select]
>
> This will require the officer to input a meaningful free text entry:
>
> - Decline to say/refused [select].'
>
> Note – the "Other" category above, if selected by the officer, will open a mandatory free text field which will then be completed by the recording officer. The responses recorded within the free text fields during the pilot period will allow for the collection and testing of data to identify any other community backgrounds which should be included within our final community background monitoring architecture. It is worth noting that there is no provision for officer perception in gathering this data and the data sought is that of self-perceived nature only. If the subject declines to answer, then the officer must only reflect this via the "decline to say/refuse" field. Additionally, there is no power to obligate an individual to provide such

> information and no power to detain them for such purposes.
>
> In preparation of the launch of this pilot work has also been progressed in the form of guidance, supervisory officers regarding the inputting of a meaningful entry (re the 'other' field) an that officers should avoid getting drawn into what community background actually means to the subject. This guidance also outlines that supervisors may review compliance, whilst carrying out normal dip-sampling activities."

[81] The applicant is dismissive of this response and says it is woefully inadequate. In this regard, Ms Doherty draws the court's attention to various comments contained in the Independent Reviewer's reports which are part of the protections in relation to the use of powers under the 2007 Act. Thus, in the 12th Report of the Independent Reviewer published in April 2020, the report noted that concerns regarding the failure to establish such a system had also been expressed by the Criminal Justice Inspectorate for Northern Ireland and the Committee for the Administration of Justice and stated:

> "7.32 As has been noted in paragraph 5.1-5. above, the Court of Appeal in *Ramsey* has now made it clear that the Code establishes a legal duty on the PSNI to devise a methodology for monitoring the community background of those who are stopped and searched under the JSA.
>
> 7.33 No progress has been made in delivering a positive response to NIPB's recommendation. It remains the only recommendation (out of 11) made in the NIPB's Thematic Review which has not been implemented."

[82] In the 13th Report published in April 2021, the reviewer considered the work undertaken by the respondent on this issue and noted:

> "5.8 However, given the lack of progress on this subject over the past seven years, a sceptical observer might view this programme of work as an attempt to "kick the can down the road." Indeed, it could be argued that this programme of work is unnecessary."

[83] In the 14th Report published in June 2022, the new Independent Reviewer, Professor Marie Breen-Smyth stated:

> "In the last year, the PSNI have written to the DoJ and then to the NIO seeking new legislation. I have a number

> of concerns about this as a way forward for community monitoring of JSA stop and search.
>
> First, whilst this may be seen as a next step, seeking new legislation brings the PSNI no closer to specifying a methodology by which they plan to proceed with community monitoring.
>
> Second, community monitoring was first recommended in 2008, some 14 years ago, and in six successive reports by the Independent Reviewer. Awaiting the passing of new legislation will further delay the implementation of community monitoring of JSA. The pursuit of new legislation could be seen as kicking Mr Seymour's can even further down that same road."

[84] Professor Breen-Smyth acknowledged that legislation may be required to permit monitoring of other powers, but that:

> "There is an apparent legal duty for the PSNI to monitor JSA stop and search subjects. This is set out in several places, which separately or jointly provide a legal basis for the implementation of community monitoring of JSA powers."

[85] In particular, she identified the finding of the court in *Ramsey*.

[86] The court notes, of course, that this proposed pilot scheme was not introduced at the time of the impugned decision or at the full hearing of this application.

[87] That said, Ms Doherty points out that the fact remains a successful method has not yet been implemented.

[88] Ms Doherty does, however, submit that the pilot scheme will be unsuccessful in discharging the obligation.

The court's consideration

[89] Self-evidently there has been an unacceptable delay in implementing the requirement for monitoring under para 5.9 of the Code. The court accepts that devising an appropriate methodology is not straightforward.

[90] It is clear even from the respondent's own affidavit evidence that there have been significant periods when it appears that little was being done to address this issue.

[91] Having set up various working groups, liaised with relevant bodies who have expertise in the matter, having initially considered that legislation was necessary, it appears that we have, in effect, come full circle in that a proposed pilot scheme will be operated where the police officers exercising the power will record the community background of the person stopped and searched on the basis of their responses to pre-set questions.

[92] The issue for the court is whether the failure to have in place an appropriate methodology for community monitoring renders the use of the power in respect of the applicant unlawful.

[93] It will be noted that the stop and searches which are the subject matter of this application arose between July 2019 and July 2020.

[94] The judgment in *Ramsey* was delivered in February 2020, so some of the searches which are the subject matter of this challenge post-dated that decision.

[95] Significantly, the Court of Appeal whilst specifically identifying the failure to record a basis for the search as constituting a breach of the applicant's rights under article 8, did not reach the same conclusion in relation to community monitoring.

[96] In its conclusion the court said:

> "[68] Looking at the scheme as a whole we are satisfied that it contains sufficient safeguards to protect the individual against arbitrary interference. We agree with the learned trial judge that the PSNI are required to identify the basis for the exercise of the power in the information recorded as a result of the search. We are satisfied that this is an important aspect of the process of supervision and monitoring of the exercise of the power. We, therefore, conclude that there was a breach of Article 8 in respect of the searches carried out in relation to the applicant by reason of the failure to record the basis for the search in the record prepared at the time of the search or shortly thereafter."

[97] I propose to take a similar approach in relation to this application. The respondent accepts that it is subject to the decision of the Court of Appeal in relation to identifying the basis for the exercise of the power in the information recorded as a result of the stop and search. Any failure will result in the applicant succeeding in establishing that the searches were unlawful. This is why it has been unnecessary for the court to deal with the second ground of challenge.

[98] I do not consider that the lack of an adequate system for community monitoring between February 2020 and July 2020, sounds in isolation on the lawfulness of the stop and searches to which the applicant was subjected.

[99] I, therefore, do not propose to grant judicial review or grant any relief in respect of the community monitoring issue.