Neutral Citation No: [2025] NICA 28	*Ref:*	**McC12725**
	ICOS No:	**20/56944**
Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:*	**27/02/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

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

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

---

Before: McCloskey LJ, Horner LJ and Humphreys J

INDEX

McCLOSKEY LJ (*delivering the judgment of the court*)

Introduction

[1] Caolan Reynolds (the "appellant") challenges the legality of the conduct of police officers on several occasions between July 2019 and July 2020. On each occasion the impugned conduct of the officers entailed stopping a vehicle in which the appellant was travelling, searching the vehicle and searching the appellant outside the vehicle. Colton J dismissed his application for judicial review and this appeal follows. The appellant's case has two elements. It is contended that the offending searches were unlawful on the grounds of (a) *ultra vires* and (b) failure to comply with a code of practice requirement.

The Key Statutory Provision

[2] Paragraph 4A of Schedule 3 to the Justice and Security Act (NI) 2007 (the "2007 Act") provides:

> "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
>
> (ii) 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]

As will become clear it is necessary to evaluate this provision in both its full statutory context and its historical context.

[3] The stand-out feature of Schedule 3, paragraph 4A is that where the requisite authorisation has been made, the stop and search power thereby exercisable by a police constable does not require the officer to hold any suspicion. There is an array of other statutory provisions which featured to a greater or lesser extent in the arguments advanced on behalf of the appellant. These, together with Schedule 3 in its entirety, are assembled in the Appendix to this judgment.

The statutory history

[4] As explained by Colton J, the impetus for paragraph 4A of Schedule 3 was the decision of the ECtHR in *Gillan v United Kingdom* [2010] 50 EHRR 45, a challenge under Article 8 ECHR to the antecedent statutory provisions, sections 44 and 45 of the Terrorism Act 2000. This predecessor statutory scheme entailed the promulgation of a limited life geographical authorisation by a senior police officer and the consequential exercise of stop and search powers without cause. While the Divisional Court described these powers as "extraordinary" and the Court of Appeal observed that they were "unusual" inasmuch as they permitted "random stopping and searching", the judicial review challenge of the claimants, based on certain Convention rights in particular Articles 5 and 8, was dismissed.

[5] In Strasbourg, the claimants' challenge succeeded under the private life dimension of Article 8. The court was particularly concerned about the risk of the arbitrary and/or discriminatory exercise of such a broadly framed power: see paras 85 and 86. Notably, there was material before the court substantiating this concern. The ECtHR held that the impugned statutory provisions contravened the "in accordance with the law" standard as they were neither sufficiently circumscribed nor subject to adequate legal safeguards against possible abuse. The court added that recourse to the domestic court by an application for judicial review or a claim for damages failed to provide sufficient safeguards.

The rights of the citizen

[6] The common law right of the citizen in play in ***Gillan***, as in the present case, was elegantly expressed by Lord Bingham in these terms:

> "It is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence. So jealously has this tradition been guarded that it has almost become a constitutional principle. But it is not an absolute rule. There are, and have for some few years been, statutory exceptions to it."

(at [2006] UKHL 12, para [1])

The House of Lords, in dismissing the challenge, acknowledged unambiguously the twofold requirements of specific and unequivocal statutory language and adequate accompanying safeguards imposed by the principle of legality (paras 14–15).

The appellant's primary case

[7] The appellant's case is the following. It is encapsulated in the formulation of the issue to be decided by this court in response to our direction that this be prepared:

> "Does [the power in] paragraph 4A (2) of Schedule 3 to the 2007 Act to stop a person and search that person for munitions and transmitters without reasonable suspicion in an area or place specified in an appropriate authorisation include a power to stop a vehicle in a specified area or place and to search inside the vehicle an occupant thereof?"
> [emphasis supplied]

The appellant contends that this question should be answered in the negative. This core proposition advanced has the following central ingredients: the wording of this statutory provision does not expressly empower a police constable to so act; in particular, there is no mention of "vehicle" in this statutory provision; the power to stop and search a vehicle contained in sections 26 and 42 is exhaustive; the only power conferred on a police constable to search the occupant of a vehicle is that contained in section 26; and the primary proposition is reinforced by the express terms of section 21(5), which is rendered redundant by the construction espoused by the Police Service and accepted by the High Court.

Governing legal principles

[8] The appellant's submissions pray in aid certain well established judicial principles relating to the kind and quality of statutory language required for the purpose of authorising a search of the person by an agent of the executive. As a starting point, there is the celebrated statement of Goff LJ in *Collins v Wilcock* [1984] 1 WLR 1172 at 1177C-D:

> "The fundamental principle, plain and incontestable, is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery. So Hold C.J. held in *Cole v. Turner* (1704) 6 Mod. 149 that "the least touching of another is anger is a battery." The breadth of the principle reflects the fundamental nature of the interest so protected…The effect is that everybody is protected not only against physical injury but against any from of physical molestation."

Goff LJ added that as the search of a person involves an interference with fundamental rights, express statutory justification is required, and this will be strictly scrutinised by the court (see 1177C-D).

[9] In more specific terms germane to the present context, one turns to the principle expressed by Lord Diplock in *Morris v Beardmore* [1981] AC 446, at 455E-F, in these terms:

> "…if Parliament intends to authorise the doing of an act which would constitute a tort actionable at the suit of the person to whom the act is done, this requires express provision in the statute… The presumption is that in the absence of express provision to the contrary Parliament did not intend to authorise tortious conduct: and this presumption, in my view, owes nothing to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969)."

In *R (Roberts) v Commissioner of Police of the Metropolis* [2015] UKSC 79 the Supreme Court stated, at para [29]:

> "In relation to searches, the starting point is the common law, under which it is contrary to constitutional principle and illegal to search someone to establish whether there are grounds for an arrest …."

Thus, the court explained:

> "Powers of stop and search therefore require parliamentary authority."

At para [33] the court highlighted the need for constraints and safeguards bearing upon the exercise of any statutory power of stop and search.

[10] In *Osman v Southwark Crown Court* [1999] 163 JP 725, Sedley LJ formulated the principle that where a statutory power authorises the search of a person without reasonable suspicion the need for express language is strengthened (at page 729C). In two separate parts of their written submissions counsel on behalf of the appellant contend that this passage was cited "approvingly" by the Supreme Court in *Roberts* (*supra*) at para [33]. This is incorrect. The only reference to *Osman* in *Roberts* is at para [33], following the sentence:

> "Breach of section 2 would render the search unlawful…"

Contrary to the submission of counsel, the Supreme Court did not approve the passage at page 729C. However, we take into account that there was no disapproval of the relevant passage and, further, the principle which it contains was not contentious before this court.

[11] There is also a Human Rights Act dimension. In any case where either of the rights protected by Article 8(1) ECHR applies and an interference is canvassed, it is in principle open to the public authority concerned to seek to establish justification by invoking one or more of the legitimate aims specified in Article 8(2). In every such case it will be necessary for the court to determine the freestanding "in accordance with the law" requirement and the proportionality of the interference.

[12] The ingredients of the "legality" requirement have been settled at the highest judicial level, both nationally and in Strasbourg. First, the measure in question must have some basis in domestic law. Second, it must satisfy the qualitative requirement of accessibility to the person concerned. Third, it must satisfy the further qualitative requirement of foreseeability. This means that the measure must be formulated with sufficient precision to enable any person, if appropriate with the benefit of advice, to regulate their conduct. Furthermore, it must be sufficiently precise to afford a measure of legal protection against arbitrary interference by a public authority with the rights of the individual safeguarded by the ECHR. Additional to the foregoing, in order to avoid arbitrary and possibly discriminatory resort to the measure in question, there must be sufficient safeguards to satisfy the Convention requirement of proportionality.

[13] These requirements are expounded in, for example, *Sunday Times v United Kingdom* [1979] 2 EHRR 245, para 49 and *The Christian Institute v The Lord Advocate* [2016] UKSC 51, paras 79–81. The requirement of sufficient clarity is illuminated in the following passage in *Gillan v United Kingdom* [2010] 50 EHRR 45, para 77:

> "…it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the

> executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation—which cannot in any case provide for every eventuality—depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed."

[14] In *R (T) v Chief Constable of Greater Manchester Police* [2015] AC 49, the Supreme Court highlighted that the obligation of protection against arbitrary interference requires safeguards which have the effect of enabling the proportionality of any interference to be adequately examined. Lord Wilson, delivering the unanimous judgement of the Supreme Court, while acknowledging a degree of overlap between the requirements of legality and necessity emphasised that they remain distinct and, in the same passage, drew attention to the executive's margin of appreciation, at para 32:

> "….A cardinal feature of [the ECtHR's] jurisprudence in relation to necessity is to afford a margin of appreciation, of greater or lesser width, to the contours within which the member state has seen fit to draw the impugned rules. The ECtHR does not extend the margin of appreciation – and it is right that it should not do so – to its consideration of legality."

This important formulation draws attention to the consideration that every assessment of legality in cases of interference with qualified Convention rights entails a binary question: the interference is either "in accordance with the law" or it is not. The margin of appreciation principle has no application.

[15] The primary challenge mounted by the appellant requiring an exercise of statutory construction, certain familiar principles must be reckoned. In *R (on the application of O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, Lord Hodge, with whom those in the majority agreed, stated at para 29:

> "The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke Waldho-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.' (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme*

> *Ltd* [2001] 2 AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, p 397:
>
> > 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'"

[16] In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, at para 8, Lord Bingham of Cornhill explained that legislation is usually enacted to make some change, or address some problem, and the court's task, within the permissible bounds of interpretation, is to give effect to that purpose. He also approved as authoritative that part of the dissenting speech of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822, where Lord Wilberforce said:

> "In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs."

To like effect, in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684, at para 28 Lord Nicholls of Birkenhead highlighted another principle of some antiquity, namely the importance of having regard to the ascertainable purpose of the statutory provision under scrutiny:

> "...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."

[17] Further, it is a principle of equally venerable antiquity that a construction which produces an absurd, impractical, illogical, anomalous or unworkable result is

almost invariably inappropriate as this is most unlikely to have been intended by the legislature: see *R v McCool* [2018] UKSC 23; [2018] NI 181, [2018] 1 WLR 2431, paras [23] and [24]. In a celebrated passage Lord Diplock stated:

> "The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining "the intention of parliament"; but what this metaphor, though convenient, omits to take into account is that the court, when acting in its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state. Elementary justice or, to use the concept often cited by the European Court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible. The source to which Parliament must have intended the citizen to refer is the language of the Act itself."
>
> (*Fothergill v Monarch Airlines* [1981] AC 251, at 279)

This principle has particular purchase in cases (such as the present) where the legal challenge belongs squarely to the interface between the State and the citizen and, further, entails conduct by State agents which if not clearly authorised by statute would be tortious.

Schedule 3 analysed

[18] Subject to para [25]ff below, the appellant's first challenge raises an issue of pure statutory construction. We agree with Mr McGleenan that within the new Schedule 3 to the 2007 Act (introduced by the Protection of Freedoms Act 2012, with effect from 10 July 2012) two identifiable separate regimes have been devised by the legislature to address the serious mischief of the use of munitions and wireless apparatus. The statutory descriptors are, respectively:

(i) "Munitions and transmitters/search and seizure – stopping and searching persons: general."

(ii) "Munitions and transmitters/search and seizure – stopping and searching persons in specified locations."

It is convenient to describe these as the "para 4 regime" and the "para 4A regime" respectively.

[19] The para 4 regime has the following central ingredients: it empowers a member of Her Majesty's Forces on duty to stop a person in a public place and search them for the purpose of ascertaining whether they have munitions unlawfully with them or wireless apparatus with them, without cause; a member of HM Forces on duty may search a person who is not in a public place for the same purpose, but only if supported by a reasonable suspicion; this latter power extends to a person entering or found in a dwelling; and, finally, a constable may search a person in any place for the same purpose but only upon reasonable suspicion.

[20] The para 4 regime differs from its statutory predecessor in two main respects. First, previously, the first three of the four aforementioned powers were exercisable by both a member of HM Forces on duty and a constable. Second, the fourth of the powers, exercisable only by a constable, has three new features, namely (a) the expansion of "a person in a public place" to "whether or not that person is in a public place", (b) restricting the exercise of this power to a constable only and (c) the imposition of the requirement of reasonable suspicion.

[21] The para 4A regime contains new bespoke stop and search arrangements which have no precise equivalent in the predecessor legislation, which was Schedule 3 to the 2007 Act. This new regime introduces two new actors viz a "senior officer" who must hold the rank of at least assistant chief constable and the Secretary of State for Northern Ireland (the "Secretary of State"). The dominant feature of these new arrangements is an "authorisation" made by a senior officer. Associated with this feature is a series of checks and balances involving the Secretary of State.

[22] The para 4A regime has the following main elements: a senior officer is empowered to make an authorisation; the officer may do so only if (a) they reasonably suspect that the safety of any person might be endangered by the use of munitions or wireless apparatus and (b) they reasonably consider that the authorisation is necessary to prevent such danger, the specified area of place is no greater than is necessary to prevent such danger and the duration of the authorisation is no longer than is necessary to prevent such danger; an authorisation empowers a constable to stop a person in "the specified area or place" and to search such person, without cause; the purpose of the exercise of this power is strictly confined to ascertaining whether the person has munitions unlawfully with them or wireless apparatus with them; and there are associated strictly limited powers relating to removal of the subject's clothing and detention of the subject.

[23] There is an extensive suite of provisions in the para 4A regime relating to the authorisation. In summary: if the authorisation is made orally the senior officer must confirm it in writing as soon as reasonably practicable; the authorisation must contain express commencement and expiry times; the expressed expiry time must not extend beyond the period of 14 days; the senior officer must notify the Secretary of State of

the authorisation as soon as reasonably practicable; the authorisation will cease upon the expiry of 48 hours unless confirmed by the Secretary of State within that period; when confirming an authorisation the Secretary of State may substitute (a) an earlier expiry date or time and (b) a more restricted operational area or place; and the Secretary of State may cancel an authorisation at any time; the Secretary of State's powers of cancellation and substitution are also conferred on a senior officer.

[24] Regarding the discrete issue of the potential geographical scope of an authorisation, a clear insight into the contemplation of the legislature is provided by para 4H of Schedule 3. This empowers a senior officer to specify:

> "(a) The whole or part of Northern Ireland,
>
> (b) The internal waters or any part of them, or
>
> (c) Any combination of anything falling within paragraph (a) and anything falling within paragraph (b)."

Finally, in common with its predecessor, Schedule 3 establishes certain offences relating to obstructive conduct of the subject.

[25] The operation of the authorisation arrangements in para 4A of Schedule 3 is illuminated by the decision of this court in *Re Ramsey's Application (No 2)* [2021] NI 214. This court's review of the evidence in that case indicates that successive para 4A authorisations date from around the inception of the new statutory regime, ie from 10 July 2012. The authorisations have covered the whole of Northern Ireland. This court was clearly satisfied that there was ample justification for these steps on national security grounds, arising out of the assessment of the threat posed by so-called "dissident Republicans." The Independent Reviewer was similarly satisfied. In passing, the stance of the Independent Reviewer remains unchanged. This assessed threat has underpinned the continued resort to para 4A authorisations.

The appellant's first challenge determined

[26] We consider that the primary element of the appellant's case stumbles upon the following insurmountable hurdle. This follows from what Colton J noted in para [48] of his judgment, where he drew attention to para 11 of the appellant'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."

In an earlier passage of his affidavit the appellant averred:

> "I am challenging the decisions of the PSNI ... to order me from my vehicle and search my vehicle and my person."

The appellant's averments state unequivocally that he was outside the relevant vehicle on the occasion of every impugned police search.

[27] The police "order" does not feature in the other averment reproduced. Nor is it harmonious with the terminology "…requiring him to exit his vehicle…" in the PAP letter. If it were necessary for the court to determine the issue of compulsion factually, this would not be favourable to the appellant given the equivocal nature of his sworn affidavit evidence, the burden of proof resting on him and his duty of candour to the court (on both issues, see for example *Re Taylor* [2022] NICA 8, at v[22](ii) and (vii)). The evidence does not establish to the requisite standard the spectre of a powerless and helpless citizen succumbing to police coercion. However, properly analysed, we consider this issue irrelevant, since coercion of and submission by the citizen are intrinsic features of the conduct permitted by the impugned statutory provisions ie para 4A of Schedule 3 to the 2007 Act. The citizen is compelled to submit and co-operate, on pain of prosecution. Alternatively phrased, co-operation and/or consent on the part of the citizen are matters of no legal moment. In this respect we refer to *Gillan (supra)*.

[28] We consider it incontestable that on each of the occasions under challenge the appellant was in a place embraced by an authorization lawfully made under paragraph 4A of Schedule 3 to the 2007 Act. He was, in the statutory language, "a person in the specified area or place" when searched by a police officer. This analysis is in our view unassailable. There is not a shred of ambiguity in the relevant statutory provisions – ie those contained in paragraph 4A of Schedule 3 – which empower a police constable to stop a person in any part of the area or place specified in the para (1) authorisation and to search such person. As the foregoing indicates, there has been no serious exercise of statutory construction in our analysis and conclusion. In the appellant's arguments considerable energy was invested in the issues of whether the inside of a vehicle is a private place and, further, whether the para 4A authorization embraces private premises such as the inside of a house. These issues simply do not arise, for the reason explained. It follows inexorably that the exercise of the statutory power to search the appellant on each of the occasions under challenge was lawful.

[29] Independently of the foregoing conclusion we take the opportunity to highlight one discrete feature of the appellant's arguments in order to highlight its fallacious nature and with a view to providing guidance in other cases where issues concerning statutory codes of practice arise. The argument is the following:

> "The [appellant's] interpretation is also the interpretation explicitly identified in the Code of Practice."

We consider this submission misconceived for the reasons explained in *R v Perry* [2023] NICA 74, paras [22]–[24], reproduced in material part:

"[22] The sole basis on which this first contention was rejected by the trial judge was that in "…interpreting and applying Article 17(6) the Code is a matter to be taken into account." This reasoning is in our view problematic, firstly on account of the relative hierarchical status of the two measures in question. PACE COP B (like all kindred instruments) is subordinate to the parent legislation. Furthermore, it did not exist when the parent legislation was enacted and, hence, did not form part of the relevant pre-enacting history. The proposition that in any given instance the interpretation of the Code is to be informed by the provisions of the parent measure (PACE 1989) is doctrinally valid. However, we consider that the converse proposition is unsustainable absent either (a) some binding or, as a minimum, persuasive judicial authority or (b) a legislative provision to this effect. This is the first element of our analysis.

[23] As regards (a), no judicial decision supportive of the approach adopted by the trial judge has been brought to the attention of this court. Turning to (b), it seems that the trial judge probably had in mind Article 66(10) of PACE 1989 (supra). The wording of this provision requires careful examination. In the specific context of this ground of appeal, it requires the following question to be posed and answered: is paragraph 2.9 of PACE COP B "relevant to" the "question" of the correct interpretation of Article 17(6)(a)(i) of PACE? The "question" must be a "question arising in the proceedings." Article 66(10) does <u>not</u> provide "...any question arising in the proceedings, to include any question relating to the construction of PACE 1989." This in our view must be a material factor in the interpretation of paragraph (10). The second material factor is that the dominant provision in paragraph (10) is that expressed in the first clause, namely the statement that all PACE Codes shall be admissible in all criminal and civil proceedings. We consider that the issue of the admissibility in evidence of PACE Codes in proceedings is remote from any issue of construction of the parent legislation. These are two very different things. We acknowledge the breadth of the second part of paragraph (10). However, the context to which it belongs is that of the admissibility of PACE Codes in evidence. Properly analysed, we consider that the second part of paragraph (10) is directed to the

> out-workings of the immediately preceding clause. This is the second part of our analysis.
>
> [24] The third element of our analysis focuses on the language of the enabling power, namely Article 65(1) of PACE. Each of the Codes of Practice made by the Secretary of State in the exercise of this power is designed to be an instrument "in connection with" each of the subject matters which follows. In the particular case of PACE COP B the subject matter is "searches of premises by police officers." We consider that the language of Article 65(1) militates strongly against the suggestion that <u>any</u> element of a COP made thereunder can legitimately inform an exercise in construing any provision of the parent legislation.
>
> [25] The fourth element of our analysis is the following. Paragraph 2.9 of PACE COP B is not merely inconsistent with Article 17(6)(a)(i) of PACE. It positively contradicts it. Furthermore, the latter formulates a requirement in presumptively mandatory language ("shall specify…"). Applying orthodox principles COP B is subordinate to Article 17(6). In short, a measure of legislation which makes provision for a code of practice to be made thereunder must, in hierarchical terms, take priority over the ensuing code. Article 17(6) is the product of a legislative process. It expresses a specific requirement in unambiguous terms. We consider the suggestion that a contradictory requirement in the subordinate COP, made by a Minister of the executive with no involvement of the legislature, should take precedence over the parent legislative provision to be startling on its face, unsupported by authority and inimical to orthodox principles."

Similar sentiments are identifiable in the decision of the English Court of Appeal in *R (G) v Chief Constable of West Yorkshire Police* [2008] EWCA 28, at [49] and[44]-[45].

[30] Viewed through an alternative lens, in any given context the contents of any code of practice, or other subordinate measure (eg guidance), made pursuant to a provision of primary legislation are properly to be viewed as reflecting the draftperson's <u>opinion</u> of what the statutory provisions mean, require and authorise. In any exercise of construing a provision of the parent statute this opinion is in our view entirely irrelevant. It can play no part in the purely clinical, objective exercise of construction required of the court. Precisely the same analysis must be applied to the appellant's reliance upon the report of the statutory Independent Reviewer and the internal PSNI Aide-Memoire. In short, the debate about these three measures is an arid one. The analysis of Colton J at para [39] of his judgment is unimpeachable:

> "Ms Doherty complains that the basis for the interpretation [of the COP] 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."

[31] We are mindful of the decision of the United Kingdom Supreme Court in *PACCAAR v Competition Appeal Tribunal* [2023] UKSC 28 in which one of the issues considered, albeit briefly, was whether subordinate legislation made pursuant to powers contained in a parent statute, can legitimately inform the construction of the statute itself. In the majority judgment it was noted at para [44] that, as in *Deposit Protection Board v Dalia* [1994] 2 AC 367, this may be permissible, provided that the subordinate legislation is contemporaneous with the primary instrument.

[32] Taking into account *PACCAR*, in the context of the present appeal three observations are appropriate. First, the COP in question postdates the enactment of the parent statute (the 2007 Act) by some six years, having come into operation on 13 May 2013. Second, the required Parliamentary scrutiny of this COP is minimal. The only requirement imposed on the Secretary of State, per section 34(4) of the 2007 Act, is to lay it before Parliament. Neither the affirmative resolution procedure nor the negative resolution procedure applies. Third, and in any event, we can identify nothing in the COP supportive of the appellant's contention that it reinforces their statutory construction arguments. We would add, finally, that, this court received no considered argument on behalf of the appellant on this issue

[33] The exercise which we have carried out in reaching the conclusion that the appeal must fail for the reasons given exposes the fallacy in the issue formulated on behalf of the appellant, reproduced in para [7] above, and the consequential case which the appellant sought to make. This formulation of the issue is confounded by the appellant's sworn affidavit evidence. As a result, this appeal has had a distinct air of the unreal.

The appellant's hypothetical case

[34] Given the foregoing, the statutory construction issues which were the most prominent feature of these proceedings at both first instance and on appeal, arising out of the issue formulated on behalf of the appellant at [7] above, simply do not arise. This is so because they were based on the factual false premise that the appellant had on each of the occasions in question, been searched inside the vehicle which the police had stopped. Notwithstanding, as so much time, effort and resource have been invested by the trial judge and the parties in examining this pure hypothesis, this court has determined to maximise the value and utility of this judgment by addressing this alternative and hypothetical scenario.

[35] We take as our statutory point one aspect of the judgment under appeal. Colton J reasoned (in part) that the construction which he endorsed was consistent with the history and context of the enactment of Schedule 3, para 4A. He elaborated thus, at para [46]:

> "[46] 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."

We agree with this analysis.

[36] It is correct that the word "vehicle" does not feature in Schedule 3, paragraph 4A. However, we consider this to be of no moment. We have explained above the incontestable reality that on the occasion of each of his searches the appellant was, in the statutory language, a person in the "area or place" specified in the para 4A authorisation. The argument belonging to the hypothesis is that **if** the appellant had been searched inside the vehicle which he had been driving, he would not have been in the specified area or place. We consider it incontestable that the vehicle would have been in the specified area or place. The contention that this would not apply to the occupant of the vehicle is in our estimation manifestly absurd, for the following reasons.

[37] The absurdity in the appellant's argument is exposed by considering the following illustrations:

(a) A person could be "in the specified area or place" and thus liable to be searched at one moment but immune from search a moment later by virtue of being in a vehicle.

(b) The sure and swift of foot would acquire this immunity from search, by reaching the sanctuary of the inside of a vehicle, whereas the pedestrian whose physical progress is slow –due to injury or disability or age or impaired vision or some obstruction or the operation of traffic lights or the unavailability of a suitable pedestrian crossing or otherwise – would find themselves at risk of being stopped and searched.

(c) A person could indefinitely, perhaps permanently, frustrate the operation of paragraph 4A(2) by planning and ensuring their presence in a vehicle situated "in the specified area or place."

(d) An inadvertently locked vehicle or malfunctioning door would provide no refuge, and hence immunity, to the pedestrian.

[38] The examples are readily multiplied:

(e) The person need not have any proprietary interest in, or other connection with, the relevant vehicle: being in, or getting into, the vehicle is all that would be required to avoid stop and search. This would include entry by force of some other person's vehicle or the misappropriation thereof.

(f) The person leaning against the external part of a vehicle in a "specified area of place" would be vulnerable to the exercise of the stop and search power, whereas an occupant positioned inches away inside the vehicle would not.

(g) A dismounted cyclist in a "specified area or place" would be vulnerable to the exercise of the stop and search power, whereas a mounted cyclist in a "specified area or place", whether moving or stationary, would not.

(h) The courts could find themselves adjudicating on issues arising out of factual scenarios entailing, for example, a person sitting on a seat inside the vehicle with their legs dangling through an open door and perhaps their feet – or one foot - touching the adjoining public surface; or a person sitting on the vehicle's roof or bonnet.

In our estimation, the legislature could not conceivably have intended any of the consequences outlined above.

[39] There is a passage in *R v Central Valuation Officer, ex parte Edison First Power* [2003] UKHL 20 at para [116] which seems tailor made for the present context. Lord Millett, having identified "the presumption that Parliament intends to act reasonably", which, he explained, belongs to a "species of a wider genus", continued:

> "The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless …

Continuing at para [117]:

> "But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it …"

Lord Millett formulated the test of whether the impugned measure:

> ".. is so oppressive, objectionable or unfair that it could only be authorised by parliament by express words or necessary implication."

The appellant's "inside the vehicle" thesis is unmistakeably captured by the preceding quotations.

[40] Paras [37] and [38] above expose what may properly be described as a lottery. Its stand-out features are happenstance, chance, fortune and coincidence. The arbitrary and the discriminatory are other features. Further prominent traits are unpredictability and uncertainty: the very antithesis of the Convention "in accordance with the law" doctrine and its common law counterpart. We consider that the legislature cannot seriously have intended this state of affairs.

[41] We turn to one of the statutory provisions featuring prominently in the appellant's hypothetical case, section 21(5) of the 2007 Act (reproduced in the Appendix). We consider this aspect of the argument forlorn for the following reasons. The stop and question power under section 21 is entirely free-standing of the stop and search power in para 4A of Schedule 3. It exists for the quite different purpose of questioning a person about their identity and movements. It makes no provision about searching for munitions or wireless apparatus. Furthermore, section 21 does not empower the search of a person for <u>any</u> purpose. In short, there is no disharmony. Furthermore, neither section 26 nor section 42, two other statutory provisions invoked on behalf of the appellant, is directed to search of the person.

[42] A major portion of the appellant's submissions was directed to some suggested possible consequences of the assessment that the occupant of a vehicle in an area or place specified in a para 4A authorisation is "*a person in the specified area or place*". These submissions ranged over possible scenarios involving the police entry of private premises and the search of persons therein. We emphatically decline to pronounce on any of these purely theoretical scenarios. They will be addressed by courts as and when they arise in concrete factual cases. For the reasons given we conclude that the appellant's hypothetical case has no merit.

The appellant's second challenge: The COP issue

[43] The second element of the appellant's challenge is identifiable in the final amended Order 53 Statement, in this passage:

> "The Code of Practice (and in particular paragraph 5.9 of the Code) imposes a legal duty to devise and implement a methodology for monitoring the community background of those subject to stops and searches under section 24 [of]

> and Schedule 3 of [sic] of the Justice and Security (NI) Act 2007. The continued use of this power in circumstances where no such method [sic] has been devised and implemented is unlawful."

It is apparent from abundant passages of the judgment of Colton J that the provisions of the COP to the forefront of the appellant's case at the hearing were paras 5.9 and 5.11. The latter paragraph provides:

> "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."

[44] Colton J rejected this challenge. First, he concluded at para [89]:

> "Self-evidently there has been an unacceptable delay in implementing the requirement for monitoring under para 5.9 of the Code."

Having thus concluded, the judge resolved this challenge in the following way. First, he noted that the task of devising an appropriate methodology was not "straightforward." Second, he acknowledged that in *Re Ramsay's Application* [2020] NICA 14 this court had not found any violation of Article 8 ECHR in relation to this COP requirement. Third, he contrasted that with the Court of Appeal's conclusion that there had been an infringement of Article 8 ECHR by reason of the failure to record the basis for the searches of the applicant in that case: *Ramsay*, para [68]. Thus, the judge determined "...to take a similar approach in relation to this application."

[45] The issue canvassed in the Notice of Appeal is of narrow dimensions. It is contended that by a combination of para 5.9 COP and Article 8 ECHR the Police Service has "a legal duty to devise and implement a methodology for monitoring the community background of those subject to stops and searches." On behalf of the appellant Ms Doherty KC readily acknowledged that, by necessary implication, by reason of the failure to devise any such methodology every exercise of the power enshrined in Schedule 3, paragraph 4A has been unlawful since its commencement date in 2012. In argument, Ms Doherty added two further ingredients to this contention, namely section 35(3)(b) of the 2007 Act - whereby the COP may be taken into account by a court (see Appendix, para [5]) - and *Ramsey*, para [58].

[46] We consider firstly that section 35(3)(b), empowering this court to take into account any provision of the COP, adds no discernible weight to this discrete challenge. The first fallacy in the appellant's case is that this aspect of his challenge

does not entail this court "taking into account" the COP. Rather the case made is that there has been a failure to implement the relevant provisions, giving rise to illegality in consequence. Second, this statutory provision, a familiar one given its analogue in multiple statutory contexts, is of self-evidently limited effect. It manifestly falls short of either providing that non-compliance with relevant provisions of the COP will attract the draconian sanction of total invalidity or making any material contribution to this extreme consequence. Furthermore, this aspect of the argument, in common with others, fails to engage with the governing legal principles (*infra*). We would add that, given this assessment, the second element of this ground namely Article 8 ECHR does not arise. Article 8 was addressed only faintly in argument and there was no engagement and with two of the major pronouncements of this court, namely *Re Said* [2023] NICA 49, paras [49]–[52] and *Re Ni Chuinneagain* [2022] NICA 56, para [49].

[47] In *Ramsey (No 2)* the issue which this court was required to decide was whether the same statutory regime, including the COP, contained adequate safeguards to prevent abuse and/or the arbitrary exercise of the power of stop and search in paragraph 4A of Schedule 3 to the 2007 Act, as required by Art 8(2) ECHR. This court concluded that the statutory scheme as a whole contained sufficient safeguards. The specific passage upon which the appellant in this case relies is para [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."

While noting that the appellant does not challenge the introduction by the Police Service of a pilot scheme related to paras 5.9–5.11 of the COP, we shall address this passage further *infra*, at para [62].

[48] We elaborate on our observation above concerning the failure of the appellant's arguments to engage with the governing legal principles. The starting point, and cornerstone, of the analysis required of this court is that the statutory scheme contains no provision to the effect that in consequence of the absence of a finalised mechanism under paras 5.9–5.11 of the COP all of the searches of the appellant – and indeed every search post-dating the statutory commencement date in 2012 – have been unlawful.

[49] This argument requires consideration of a cohort of well-established principles. As the leading cases such as *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 and *R v Soneji* [2005] UKHL 49, make clear, the former approach of asking whether the relevant statutory requirement is mandatory or directory in character and effect has been discarded, having been substituted by a test which focuses heavily on

the intention of the legislature. The question which the court must address and determine is: what consequences did Parliament intend should flow from non-compliance with the relevant statutory requirement? In particular, did the legislature intend that non-compliance should result in total invalidity? Furthermore, the "invalidity question" subdivides into (a) invalidity in every case? or (b) invalidity in the case in question?

[50] In *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, Lord Bingham of Cornhill made the following notable addition, at para [7]:

> "The welcome tendency to prefer substance to form must generally discourage the invalidation of proceedings for want of compliance with a procedural requirement."

In *Re Duffy and others* [2022] NICA 34, the governing principles are rehearsed in extenso at paras [28]–[40]. These principles have evolved in response to the "recurrent theme" noted by Lord Steyn in Soneji (supra), namely:

> "…in the drafting of statutes is that parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply.

At para [15], Lord Steyn adverted to the –

> "…more flexible approach of focusing intensely on the consequences of non-compliance and posing the question, taking into account those consequences, whether parliament intended the outcome to be total invalidity."

Both the nature of the failing under scrutiny and the public interest engaged featured prominently as considerations to be weighed: see para [24].

[51] We distil from the authorities the following principles. In any case where there has been a failure to comply with a statutory requirement in a given process, the court, in the exercise of identifying the intention to be imputed to parliament regarding the consequences of the non-compliance in question, should normally consider and evaluate the nature, gravity and extent of the relevant act and/or omission. The court will consider it more likely that parliament intended total invalidity to be visited upon acts and/or omissions of non-compliance which may properly be considered egregious in nature, deliberate, actuated by impermissible motives or considerations or incompatible with the fundamental rights of affected persons. The more subordinate and ancillary the requirement is to the major elements of the statutory scheme the less likely it is that non-compliance was intended by the legislature to give rise to total invalidity. Finally, any material counter-balancing factors should be reckoned. The foregoing, we would emphasise, is not designed to constitute an exhaustive list.

[52] In appropriate cases the court may have to determine the question of whether delayed compliance with a statutory requirement entails unfairness amounting to an abuse of power: *National Car Parks v Baird (Valuation Officer)* [2005] 1 All ER 53, at [60]. In the last mentioned case Dyson LJ added, at [61]:

> "In my view, there is no simple answer to the question how the court should determine whether a failure to perform a statutory duty is unlawful where the statute is silent as to when the duty should be performed. The answer will depend on all the circumstances of the case. Relevant factors will at least include (i) the subject matter of the duty and the context in which it falls to be performed, (ii) the length of time taken to perform the duty, (iii) the reasons for any delay and (iv) any prejudice that is, or may be, caused by the delay."

Furthermore, the strength and rationality of the reasons proffered will be a material consideration: *National Car Parks* at para [64]. This is linked to the factor of attempted compliance or substantial compliance already noted. Prejudice may be another material consideration. Dyson LJ observed at para [65]:

> "It is self-evident that delay in performing a duty which affects liberty or life and limb is always likely (at least potentially) to cause serious prejudice. The prejudice likely to be caused by delay which only affects property or other economic interests will vary from case to case. Where the prejudice is or may be serious, the court will expect the duty to be performed more expeditiously than in circumstances where delay is unlikely to cause any significant prejudice."

[53] The subject matter of the statutory requirement in question and the context in which non-compliance falls to be considered by the court are unquestionably material factors. By illustration, *R (Noorkoiv) v Secretary of State for the Home Department* [2002] EWCA Civ 770, the court held that a failure to refer a life prisoner's case to the Parole Board before the expiry of his tariff period could constitute a breach of Article 5(4) ECHR which could not be excused on grounds of administrative necessity or lack of resources. Factually, *Noorkoiv* differs significantly from the present case. It does however indicate, that in cases where expedition is of the essence in complying with a given statutory requirement an implied intention on the part of the legislature that inappropriate delay in complying with the requirement should give rise to total invalidity is more likely to be diagnosed.

[54] It follows from all of the foregoing that we agree with the approach of Burnett J in *North Somerset District Council v Honda Motor Europe* [2010] EWHC 1505 (QB) at

paras [43]–[44] and the endorsement which this received in the English Court of Appeal in *Secretary of State for the Home Department v SM (Rwanda)* [2018] EWCA Civ 2770 at paras [50]–[52]. Certain other reported decisions have featured in these proceedings both at first instance and on appeal. These include *Re ED's Application* [2003] NI 312, *Re McCready's Application* [2006] NIQB 60 and *McGrath v Camden London Borough Council* [2020] EWHC 369 (Admin). We would observe that these are all first instance decisions which do not illuminate the correct determination of this appeal. The citation of first instance decisions which in one way or another bear on the application of the *Soneji* principles will rarely be appropriate.

[55] We are mindful of the summary in the most recent Supreme Court contributions to this subject, in *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd* [2024] UKSC 27, [2024] 3 WLR 601, paras 57-68 and *N3 & ZA v SSHD* [2025] UKSC 6, para 80. As noted in *Duffy*, para [40], we further consider that the law is correctly stated by Professor Gordon Anthony in Judicial Review in Northern Ireland (3rd ed) at para 7.18 and in *Halsbury's Laws of England* (Volume 61A) paragraph 27.

[56] We turn to address the evidential matrix to which the preceding cohort of principles must be applied. The decision in *Ramsey* makes clear that the COP community monitoring provisions were squarely before the court. In *Ramsey,* the factual matrix included the introduction by the Police Service of a pilot scheme and its subsequent evaluation: see in particular para [58]. This court observed in the same passage:

> "…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."

[57] What was the state of play some three years later, when these proceedings were initiated? The relevant sources of evidence are the Police Service affidavits, the reports of the Independent Reviewer and certain further evidence, including a second Police Service affidavit, provided at the request of the court. These several pieces of evidence disclose the following picture.

[58] In brief compass, prior to the *Ramsey* decision:

(a) The first "stop and search pilot" was introduced, in the Derry City and Strabane areas, on 1 December 2015 and had a duration of three months. During this period 506 people were stopped and searched pursuant to the impugned statutory provision. Each was provided with a questionnaire and was requested to complete same, sending it to a freepost address. No responses were received.

(b) The next pilot scheme began on 1 February 2018, in the Lisburn City and Castlereagh area, again having a duration of three months. Of the 72 persons stopped and searched, only one completed and returned the questionnaire.

[59] Post – *Ramsey*, the updated material facts are these:

(i) There is a Police Service working group.

(ii) By March 2024 the "implementation of a pilot" had been agreed.

(iii) The methodology would entail addressing a specific question to the subject of the search.

(iv) The pilot began on 30 April 2024, with a projected duration of three months.

(v) On 28 August 2024 it was agreed that this period be extended. The collection and analysis of data continued thereafter. This scheme remains active.

[60] There has been a relatively consistent theme throughout the period under scrutiny. It is articulated with clarity in the Chief Constable's Public Accountability Report to the Northern Ireland Policing Board on 11 April 2024:

> "In the absence of any legislative enabling framework and no widely recognised definition of community background, the development of an organisational approach has been challenging. There is no doubt that our initial approach will require review and adjustment as we learn from the pilot and develop a detailed understanding. The pilot has been developed through the Service Accountability Panel, supported by the external reference group members and with oversight from the NIPB Human Rights Advisor and the Independent Reviewer…"

As the most recent affidavit evidence indicates, there has also been Police Service engagement with the Northern Ireland Human Rights Commission, the Northern Ireland Commissioner for Children and Young People, and the Equality Commission for Northern Ireland.

[61] The court permitted further submissions from the appellant's legal representatives in response to this additional evidence. These submissions are roundly critical of the conduct and efforts of the Police Service in this discrete matter. They pray in aid the critical views of the Independent Reviewer, highlighting in particular their opinion that there is available a simple solution, namely:

> "…a separate assessment, after the event, based on intelligence, existing information and officer perception of the background."

While the views of the Independent Reviewer must be accorded appropriate respect, we have considered it appropriate to highlight the word "opinion."

[62] Furthermore, in a multiplicity of cases in this jurisdiction the senior courts have had first hand experience of the unique challenges and complexities of policing in Northern Ireland society. In addition, in a further passage in his April 2024 report to the Policing Board (*supra*), the Chief Constable stated, with specific reference to the scheme introduced on 30 April 2024 (and continuing):

> "This work is vitally important to promote organisational learning and continual improvement, increase accountability and transparency and build legitimacy and trust, especially around the use of police powers such as stop and search."

This evidence was not available to the trial judge. While Colton J, at para [89] considered it self-evident that there had been "unacceptable delay" in "implementing" the para 5.9 COP requirement, he added:

> "The court accepts that devising an appropriate methodology is not straightforward."

The submissions on behalf of the appellant have consistently neglected this latter statement, instead focusing exclusively on the preceding sentence. The appellant's submissions also attempt to attribute to this court in *Ramsey* the espousal of "assessment by the individual police officers of community background" as the "best option." The relevant passages in *Ramsey* at paras [56]–[58] contain a combination of the rehearsal of certain evidence and the purely discursive, falling well short of what is suggested. We would add that it would not be for an independent court of supervisory superintendence to volunteer an opinion on this topic in any event.

[63] This is one of those cases where the legislature has devised certain requirements with no accompanying time limit for compliance. In the opinion of this court the intention must have been that compliance would be effected within a reasonable period. The court is the arbiter of what is reasonable in this context. Colton J evidently considered that there had been a failure by the Police Service to give effect to the relevant COP requirements. He appears to have based this on the factor of delay. There had, therefore (he reasoned), been a breach by the Police Service of their statutory duty to devise a mechanism for the monitoring of the community background of those subjected to the relevant statutory stop and search powers.

[64] This court has had the benefit of fuller argument and further evidence bearing on this issue. Thus equipped, we find ourselves able to provide a somewhat fuller analysis. To begin with, the adjective "pilot", which has formed part of the factual equation since 2015, invites careful reflection. The fact that the Police Service have for some considerable time devised and introduced "pilot" measures in connection with the relevant COP requirements (para 5.9ff) does not, in our view, necessarily denote a failure to comply with those requirements. The adjective "pilot", of course and uncontroversially, conjures up the notion of trial and experiment, something which may be of limited rather than permanent duration. However, we are satisfied that the language of the COP does not preclude this option.

[65] The next step in the analysis, in our view, is that the successive "pilot" measures taken by the Police Service in purported compliance with their duties under para 5.9ff COP, with the accompanying monitoring and reviews of their efficacy, are to be contrasted with the scenario of a refusal, or a failure, to do anything.

[66] A further material consideration is the complex and challenging nature of policing in Northern Ireland society. In this society community background has consistently been a highly sensitive and contentious issue. Recognition of this fundamental reality is not readily identifiable in the reports of the Independent Reviewer. Allied to this, we consider that the court must accord an appropriate measure of deference to the Police Service's assessments and evaluative judgements. In addition, this court has no reason to doubt the *bona fides* of the Chief Constable's statements to the Policing Board and the appellant has made no challenge to the contrary. Furthermore, the delayed and incomplete implementation of this safeguard must be considered in the context of all the other safeguards which do exist: see paras [21] to [23] above, coupled with the oversight and accountability provided by the Independent Reviewer.

[67] Properly analysed, the substance of the appellant's complaint is that the Police Service have not yet devised a permanent scheme pursuant to the relevant COP requirements. This is superficially and partially correct only, as it is inconceivable that any such scheme would not be the subject of at least periodic monitoring and review, coupled with modification where considered appropriate. Indeed, if any such scheme lacked these characteristics, it would be vulnerable to legal challenge. Furthermore, it forms no part of the appellant's case that the measures taken to date are either non-compliant or incompatible with the COP. Nor is it contended that these measures have no legal effects or consequences.

[68] We consider that the steps taken by the Police Service, rehearsed above, are to be viewed as progressive, though incomplete, compliance with the requirements of para 5.9ff of the COP. It is not for this court to second guess the explanations ascertainable from the evidence of why finality has not yet been achieved. This court is mindful that it does not possess the expert credentials of the Police Service. Furthermore, in the most recent phase of this discrete chapter, ie from April 2024 the evidence clearly establishes a considered and careful review and monitoring of the

measure in place. There are no indications of abdication of responsibility or lack of *bona fides*. In summary, the failing which we have diagnosed is not outright in nature and is not repugnant to any overarching value or standard.

[69] We further take into account, as did Lord Steyn in *Soneji*, the public interest in play, which is the protection of the Northern Irish community against the scourge of terrorism. The potency of this public interest requires no elaboration. On the other side of the notional scales, the private interest engaged is that of protecting the appellant and others against the arbitrary exercise of the police stop and search power enshrined in paragraph 4A of Schedule 3 to the 2007 Act. The appellant and others are not unprotected. They have all the protections addressed in paras [21]–[23] and [64] above. Furthermore, they can have recourse to the court in order to establish either the tort of trespass to their person or a breach of their rights under Article 5 ECHR in any given case. Judicial review is another available remedy. In actions of this kind the court will be equipped with all material evidence, including the obligatory disclosure from the Police Service. The litigant, if so advised, will be at liberty to make the case that an individual exercise (or exercises) of the statutory stop and search power under scrutiny was/were influenced by the improper consideration of their community background: a classic unlawful motive/bad faith challenge. The ensuing judicial enquiry will unfold in what is manifestly the more appropriate forum of adversarial litigation.

[70] We have concluded that there has been partial, incomplete compliance by the Police Service of the requirements enshrined in para 5.9ff COP. The two specific aspects of non-compliance are (a) delay in finality and (b) the limited geographical scope of the measures which have been introduced. This is the failing in issue. It raises the question: what consequences did the legislature, by implication, intend to flow from this failing? In particular, did the legislature by implication intend that "total invalidity" – viz in effect a judicial condemnation of illegality in respect of every exercise of the relevant statutory power since 2012 – should result? The answer is binary: either "total invalidity" or not. "Total invalidity" would be an extreme and draconian consequence. Indeed, it is the most damning consequence imaginable. This consideration of itself invites careful consideration. The correct answer in our estimation is supplied by balancing all of the evidence and considerations identified in the preceding paragraphs and forming an overall evaluative judgement. This exercise impels to the conclusion that the notional pendulum swings clearly one way. In our view, the legislature cannot by implication have intended the consequence of "total invalidity" to flow from the failing diagnosed.

[71] The appellant's second challenge fails accordingly. We would add that, given this assessment, the second element of this ground, Article 8 ECHR, does not arise as it is parasitic upon the COP argument succeeding: see para [45] above. Separately, Article 8 was addressed only tangentially in argument and there was no engagement with two of the major pronouncements of this court, namely *Re Said* [2023] NICA 49, paras [49]–[52] and *Re Ni Chuinneagain* [2022] NICA 56, para [49].

[72] Given our primary and alternative conclusions above, there is nothing further to be addressed. We would, notwithstanding, add the following. There are three reasons why we consider that it would be inappropriate for this court to take the further step of granting a declaratory remedy. The first is that judicial review remedies are discretionary and, in this respect, the margin of appreciation available to the trial judge, who declined to grant this remedy, must be recognised. The second is that the emergence of this possible remedy has been unsatisfactory given the confirmation which this court has received that it was not canvassed before the trial judge in the wake of promulgation of his judgment. The third is that this judgment, in common with that of Colton J, speaks for itself on the COP non-compliance issue.

[73] Finally, we add the following about the issue of the search of the appellant's vehicle. A review of the primary sources ie the Order 53 pleading, the judgment of Colton J, the grounds of appeal, the appellant's written and oral submissions and, perhaps most clearly, the appellant's formulation of the primary issue for this court, in para [7] above, confirms that this issue has been at best peripheral throughout these proceedings. It has featured only faintly. In consequence this court has not received anything like sufficient argument on the point. In these circumstances we decline any attempt at uninformed judicial adjudication.

Omnibus conclusion

[74] The appellant has failed to establish that the stopping and search of his person by police officers on any of the occasions in question were unlawful. For the reasons given we dismiss the appeal and affirm the judgment and consequential order of Colton J.

APPENDIX

SCHEDULE 3 & OTHER PROVISIONS OF THE 2007 ACT

[1] Section 21:

"**Stop and question**

(1) A member of Her Majesty's forces on duty or a constable may stop a person for so long as is necessary to question him to ascertain his identity and movements.

(2) A member of Her Majesty's forces on duty may stop a person for so long as is necessary to question him to ascertain—

(a) what he knows about a recent explosion or another recent incident endangering life;

(b) what he knows about a person killed or injured in a recent explosion or incident.

(3) A person commits an offence if he—

(a) fails to stop when required to do so under this section,

(b) refuses to answer a question addressed to him under this section, or

(c) fails to answer to the best of his knowledge and ability a question addressed to him under this section.

(4) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) A power to stop a person under this section includes a power to stop a vehicle (other than an aircraft which is airborne)."

[2] Section 24:

"**Search for munitions and transmitters**

Schedule 3 (which confers power to search for munitions and transmitters) shall have effect."

[Schedule 3: OLD

" MUNITIONS AND TRANSMITTERS: SEARCH AND SEIZURE

Interpretation

1(1) In this Schedule "officer" means—

(a) a member of Her Majesty's forces on duty, and

(b) a constable.

(2) In this Schedule "authorised officer" means—

(a) a member of Her Majesty's forces who is on duty and is authorised by a commissioned officer of those forces, and

(b) a constable who is authorised by an officer of the Police Service of Northern Ireland of at least the rank of inspector.

(3) In this Schedule—

(a) "munitions" means—

(i) explosives, firearms and ammunition, and

(ii) anything used or capable of being used in the manufacture of an explosive, a firearm or ammunition,

(b) "explosive" means—

(i) an article or substance manufactured for the purpose of producing a practical effect by explosion,

(ii) materials for making an article or substance within sub-paragraph (i),

(iii) anything used or intended to be used for causing or assisting in causing an explosion, and

(iv) a part of anything within sub-paragraph (i) or (ii),

(c) "firearm" includes an air gun or air pistol,

(d) "scanning receiver" means apparatus (or a part of apparatus) for wireless telegraphy designed or adapted for the purpose of automatically monitoring selected frequencies, or automatically scanning a selected range of frequencies, so as to enable transmissions on any of those frequencies to be detected or intercepted,

(e) "transmitter" means apparatus (or a part of apparatus) for wireless telegraphy designed or adapted for emission, as opposed to reception,

(f) "wireless apparatus" means a scanning receiver or a transmitter, and

(g) "wireless telegraphy" has the same meaning as in section 116 of the Wireless Telegraphy Act 2006 (c. 36).

Entering premises

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.

(3) A constable exercising the power under sub-paragraph (1) may, if necessary, be accompanied by other persons.

3(1) If the officer carrying out a search of premises under paragraph 2 reasonably believes that it is necessary in order to carry out the search or to prevent it from being frustrated, he may—

(a) require a person who is on the premises when the search begins, or who enters during the search, to remain on the premises;

(b) require a person mentioned in paragraph (a) to remain in a specified part of the premises;

(c) require a person mentioned in paragraph (a) to refrain from entering a specified part of the premises;

(d) require a person mentioned in paragraph (a) to go from one specified part of the premises to another;

(e) require a person who is not a resident of the premises to refrain from entering them.

(2) A requirement imposed under this paragraph shall cease to have effect after the conclusion of the search in relation to which it was imposed.

(3) Subject to sub-paragraphs (4) and (5), no requirement under this paragraph for the purposes of a search shall be imposed or have effect after the end of the period of four hours beginning with the time when the first (or only) requirement is imposed in relation to the search.

(4) In the case of a search by a constable, an officer of the Police Service of Northern Ireland of at least the rank of superintendent may extend the period mentioned in sub-paragraph (3) in relation to a search by a further period of four hours if he reasonably believes that it is necessary to do so in order to carry out the search or to prevent it from being frustrated.

(5) In the case of a search by a member of Her Majesty's forces, an officer of at least the rank of Major may extend the period mentioned in sub-paragraph (3) in relation to a search by a further period of four hours if he reasonably believes that it is necessary to do so in order to carry out the search or to prevent it from being frustrated.

(6) The power to extend a period conferred by sub-paragraph (4) or (5) may be exercised only once in relation to a particular search."]

[3] Section 26:

"**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)."

[4] Section 34:

"(1) The Secretary of State may make codes of practice in connection with—

(a) the exercise by police officers of a power conferred by this Act, and

(b) the seizure and retention of property found by police officers when exercising powers of search conferred by this Act.

(2) The Secretary of State may make codes of practice in connection with the exercise by members of Her Majesty's forces of a power conferred by this Act.

(3) Where the Secretary of State proposes to issue a code of practice he shall—

(a) publish a draft,

(b) consider any representations made to him about the draft, and

(c) if he thinks it appropriate, modify the draft in the light of any representations made to him.

(4) The Secretary of State shall lay a draft of the code before Parliament.

(5) When the Secretary of State has laid a draft code before Parliament he may bring it into operation by order made by statutory instrument.

(6)The Secretary of State may revise the whole or any part of a code of practice issued by him and issue the code as revised; and subsections (3) to (5) shall apply to such a revised code as they apply to an original code.

(7)In this section "police officer" means a member of the Police Service of Northern Ireland or the Police Service of Northern Ireland Reserve."

[5] Section 35:

"Code: effect

(1) A failure by a police officer to comply with a provision of a code shall not of itself make him liable to criminal or civil proceedings.

(2) A failure by a member of Her Majesty's forces to comply with a provision of a code shall not of itself make him liable to any criminal or civil proceedings other than—

(a) proceedings under any provision of the Army Act 1955 (c. 18) or the Air Force Act 1955 (c. 19) other than section 70 (civil offences), and

(b) proceedings under any provision of the Naval Discipline Act 1957 (c. 53) other than section 42 (civil offences).

(3) A code—

(a) shall be admissible in evidence in criminal or civil proceedings, and

(b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant.

(4) In this section—

"criminal proceedings" includes proceedings in Northern Ireland before a court-martial constituted under the Army Act 1955 (c. 18), the Air Force Act 1955 (c. 19) or the Naval Discipline Act 1957 (c. 53) and proceedings in Northern Ireland before the Courts-Martial Appeal Court, and

"police officer" means a member of the Police Service of Northern Ireland or the Police Service of Northern Ireland Reserve."

[6] Certain statutory definitions in section 42:

"'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.

'vehicle' includes an aircraft, hovercraft, train or vessel." [emphasis supplied]

[7] **SCHEDULE 3:**

"**Munitions and Transmitters: Search and Seizure**

Interpretation

1(1) In this Schedule "officer" means—

(a) a member of Her Majesty's forces on duty, and

(b) a constable.

(2) In this Schedule "authorised officer" means—

(a) a member of Her Majesty's forces who is on duty and is authorised by a commissioned officer of those forces, and

(b) a constable who is authorised by an officer of the Police Service of Northern Ireland of at least the rank of inspector.

(3) In this Schedule—

(a) "munitions" means—

(i) explosives, firearms and ammunition, and

(ii) anything used or capable of being used in the manufacture of an explosive, a firearm or ammunition,

(b) "explosive" means—

(i) an article or substance manufactured for the purpose of producing a practical effect by explosion,

(ii) materials for making an article or substance within sub-paragraph (i),

(iii) anything used or intended to be used for causing or assisting in causing an explosion, and

(iv) a part of anything within sub-paragraph (i) or (ii),

(c) "firearm" includes an air gun or air pistol,

(d) "scanning receiver" means apparatus (or a part of apparatus) for wireless telegraphy designed or adapted for the purpose of automatically monitoring selected frequencies, or automatically scanning a selected range of frequencies, so as to enable transmissions on any of those frequencies to be detected or intercepted,

(e) "transmitter" means apparatus (or a part of apparatus) for wireless telegraphy designed or adapted for emission, as opposed to reception,

(f) "wireless apparatus" means a scanning receiver or a transmitter, and

(g) "wireless telegraphy" has the same meaning as in section 116 of the Wireless Telegraphy Act 2006 (c. 36).

Entering premises

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.

(3) A constable exercising the power under sub-paragraph (1) may, if necessary, be accompanied by other persons.

3(1) If the officer carrying out a search of premises under paragraph 2 reasonably believes that it is necessary in order to carry out the search or to prevent it from being frustrated, he may—

(a) require a person who is on the premises when the search begins, or who enters during the search, to remain on the premises;

(b) require a person mentioned in paragraph (a) to remain in a specified part of the premises;

(c) require a person mentioned in paragraph (a) to refrain from entering a specified part of the premises;

(d) require a person mentioned in paragraph (a) to go from one specified part of the premises to another;

(e) require a person who is not a resident of the premises to refrain from entering them.

(2) A requirement imposed under this paragraph shall cease to have effect after the conclusion of the search in relation to which it was imposed.

(3) Subject to sub-paragraphs (4) and (5), no requirement under this paragraph for the purposes of a search shall be imposed or have effect after the end of the period of four hours beginning with the time when the first (or only) requirement is imposed in relation to the search.

(4) In the case of a search by a constable, an officer of the Police Service of Northern Ireland of at least the rank of superintendent may extend the period mentioned in sub-paragraph (3) in relation to a search by a further period of four hours if he reasonably believes that it is necessary to do so in order to carry out the search or to prevent it from being frustrated.

(5) In the case of a search by a member of Her Majesty's forces, an officer of at least the rank of Major may extend the period mentioned in sub-paragraph (3) in relation to a search by a further period of four hours if he reasonably believes that it is necessary to do so in order to carry out the search or to prevent it from being frustrated.

(6) The power to extend a period conferred by sub-paragraph (4) or (5) may be exercised only once in relation to a particular search.

***Stopping and searching persons*[F1*: general*]**

Textual Amendments

F1Words in Sch. 3 para. 4 cross-heading inserted (10.7.2012) by Protection of Freedoms Act 2012 (c. 9), s. 120, Sch. 6 para. 1(5) (with s. 97); S.I. 2012/1205, art. 4(h)

4(1) **[F2**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 **[F3**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 **[F4**member concerned**]** 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.

[F5(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.**]**

Textual Amendments

F2Words in Sch. 3 para. 4(1) substituted (10.7.2012) by Protection of Freedoms Act 2012 (c. 9), s. 120, Sch. 6 para. 1(2) (with s. 97); S.I. 2012/1205, art. 4(h)

F3Words in Sch. 3 para. 4(2) substituted (10.7.2012) by Protection of Freedoms Act 2012 (c. 9), s. 120, Sch. 6 para. 1(3)(a) (with s. 97); S.I. 2012/1205, art. 4(h)

F4Words in Sch. 3 para. 4(2) substituted (10.7.2012) by Protection of Freedoms Act 2012 (c. 9), s. 120, Sch. 6 para. 1(3)(b) (with s. 97); S.I. 2012/1205, art. 4(h)

F5Sch. 3 para. 4(4) inserted (10.7.2012) by Protection of Freedoms Act 2012 (c. 9), s. 120, Sch. 6 para. 1(4) (with s. 97); S.I. 2012/1205, art. 4(h)

[F6*Stopping and searching persons in specified locations*

Textual Amendments

F6Sch. 3 paras. 4A-4I inserted (10.7.2012) by Protection of Freedoms Act 2012 (c. 9), s. 120, Sch. 6 para. 2 (with s. 97); S.I. 2012/1205, art. 4(h)

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.

(5) A constable exercising the power conferred by an authorisation under this paragraph may not require a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves.

(6) Where a constable proposes to search a person by virtue of an authorisation under this paragraph, the constable may detain the person for such time as is reasonably required to permit the search to be carried out at or near the place where the person is stopped.

(7) A senior officer who gives an authorisation under this paragraph orally must confirm it in writing as soon as reasonably practicable.

(8) In this paragraph and paragraphs 4B to 4I—

"senior officer" means an officer of the Police Service of Northern Ireland of at least the rank of assistant chief constable,

"specified" means specified in an authorisation.

4B(1) An authorisation under paragraph 4A has effect during the period—

(a) beginning at the time when the authorisation is given, and

(b) ending with the specified date or at the specified time.

(2) This paragraph is subject as follows.

4C The specified date or time must not occur after the end of the period of 14 days beginning with the day on which the authorisation is given.

4D(1) The senior officer who gives an authorisation must inform the Secretary of State of it as soon as reasonably practicable.

(2) An authorisation ceases to have effect at the end of the period of 48 hours beginning with the time when it is given unless it is confirmed by the Secretary of State before the end of that period.

(3) An authorisation ceasing to have effect by virtue of sub-paragraph (2) does not affect the lawfulness of anything done in reliance on it before the end of the period concerned.

(4) When confirming an authorisation, the Secretary of State may—

(a) substitute an earlier date or time for the specified date or time;

(b) substitute a more restricted area or place for the specified area or place.

4E The Secretary of State may cancel an authorisation with effect from a time identified by the Secretary of State.

4F(1) A senior officer may—

(a) cancel an authorisation with effect from a time identified by the officer concerned;

(b) substitute an earlier date or time for the specified date or time;

(c) substitute a more restricted area or place for the specified area or place.

(2) Any such cancellation or substitution in relation to an authorisation confirmed by the Secretary of State under paragraph 4D does not require confirmation by the Secretary of State.

4G The existence, expiry or cancellation of an authorisation does not prevent the giving of a new authorisation.

4H(1) An authorisation under paragraph 4A given by a senior officer may specify—

(a) the whole or part of Northern Ireland,

(b) the internal waters or any part of them, or

(c) any combination of anything falling within paragraph (a) and anything falling within paragraph (b).

(2) In sub-paragraph (1)(b) "internal waters" means waters in the United Kingdom which are adjacent to Northern Ireland.

(3) Where an authorisation specifies more than one area or place—

(a) the power of a senior officer under paragraph 4B(1)(b) to specify a date or time includes a power to specify different dates or times for different areas or places (and the other references in this Schedule to the specified date or time are to be read accordingly), and

(b) the power of the Secretary of State under paragraph 4D(4)(b), and of a senior officer under paragraph

4F(1)(c), includes a power to remove areas or places from the authorisation.

4I(1) Sub-paragraph (2) applies if any decision of—

(a) a senior officer to give, vary or cancel an authorisation under paragraph 4A, or

(b) the Secretary of State to confirm, vary or cancel such an authorisation,

is challenged on judicial review or in any other legal proceedings.

(2) The Secretary of State may issue a certificate that—

(a) the interests of national security are relevant to the decision, and

(b) the decision was justified.

(3) The Secretary of State must notify the person making the challenge ("the claimant") if the Secretary of State intends to rely on a certificate under this paragraph.

(4) Where the claimant is notified of the Secretary of State's intention to rely on a certificate under this paragraph—

(a) the claimant may appeal against the certificate to the Tribunal established under section 91 of the Northern Ireland Act 1998, and

(b) sections 90(3) and (4), 91(2) to (9) and 92 of that Act (effect of appeal, procedure and further appeal) apply but subject to sub-paragraph (5).

(5) In its application by virtue of sub-paragraph (4)(b), section 90(3) of the Act of 1998 is to be read as if for the words from "subsection" to "that purpose," there were substituted "paragraph 4I(4)(a) of Schedule 3 to the Justice and Security (Northern Ireland) Act 2007 the Tribunal determines that—

"(a) the interests of national security are relevant to the decision to which the certificate relates, and

(b) the decision was justified,"

(6) Rules made under section 91 or 92 of the Act of 1998 which are in force immediately before this paragraph comes into force have effect in relation to a certificate under this paragraph—

(a) with any necessary modifications, and

(b) subject to any later rules made by virtue of sub-paragraph (4)(b).**]**

Seizure

5(1) This paragraph applies where an officer is empowered by virtue of this Schedule or section 25 or 26 to search premises or a person.

(2) The officer may—

(a) seize any munitions found in the course of the search (unless it appears to him that the munitions are being, have been and will be used only lawfully), and

(b) retain and, if necessary, destroy them.

(3) The officer may—

(a) seize any wireless apparatus found in the course of the search (unless it appears to him that the apparatus is being, has been and will be used only lawfully), and

(b) retain it.

Records

6(1) Where an officer carries out a search of premises under this Schedule he shall, unless it is not reasonably practicable, make a written record of the search.

(2) The record shall specify—

(a) the address of the premises searched,

(b) the date and time of the search,

(c) any damage caused in the course of the search, and

(d) anything seized in the course of the search.

(3) The record shall also include the name (if known) of any person appearing to the officer to be the occupier of the premises searched; but—

(a) a person may not be detained in order to discover his name, and

(b) if the officer does not know the name of a person appearing to him to be the occupier of the premises searched, he shall include in the record a note describing him.

(4) The record shall identify the officer—

(a) in the case of a constable, by reference to his police number, and

(b) in the case of a member of Her Majesty's forces, by reference to his service number, rank and regiment.

7(1) Where an officer makes a record of a search in accordance with paragraph 6, he shall supply a copy to any person appearing to him to be the occupier of the premises searched.

(2) The copy shall be supplied immediately or as soon as is reasonably practicable.

Offences

8(1) A person commits an offence if he—

(a) knowingly fails to comply with a requirement imposed under paragraph 3, or

(b) wilfully obstructs, or seeks to frustrate, a search of premises under this Schedule.

(2) A person guilty of an offence under this paragraph shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

9(1) A person commits an offence if he fails to stop when required to do so under paragraph 4 **[**F7or by virtue of paragraph 4A**]**.

(2) A person guilty of an offence under this paragraph shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale."

[emphasis added]

Textual Amendments

F7Words in Sch. 3 para. 9(1) inserted (10.7.2012) by Protection of Freedoms Act 2012 (c. 9), s. 120, Sch. 6 para. 3 (with s. 97); S.I. 2012/1205, art. 4(h)

Two of the major pronouncements of this court on Article 8 ECHR: *Re Said* [2023] NICA 49, paras [49]–[52] and *Re Ni Chuinneagain* [2022] NICA 56, para [49].