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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**25/04/2022**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

Between:

AB

Defendant/Appellant

and

THE PUBLIC PROSECUTION SERVICE

Prosecutor/Respondent

_____

Mr McKenna BL (instructed by Patrick Vernon Solicitors) for the Applicant
Mr Henry BL (instructed on behalf of the Public Prosecution Service) for the Respondent.

_____

Before: Keegan LCJ and Maguire LJ

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ANONYMITY

In accordance with Article 22(2) of the Criminal Justice (Children) Order (Northern Ireland) 1998 no report shall be published which reveals the name, address or school of the appellant or includes any particulars likely to lead to the identification of the appellant.

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

Introduction

[1] This appeal concerns a prosecution mounted by the Public Prosecution Service ("PPS") against the defendant/appellant (hereinafter "the appellant"). So far as is material to these proceedings the hearing in question took place on 25 February 2021. It involved consideration of two charges against the appellant, who at that date was aged 16 years. The charges as per the charge sheet were that the appellant:

(i) On 5 August 2020 used disorderly behaviour within the vicinity of Millennium Way, Lurgan, contrary to Article 18(1)(a) of the Public Order (Northern Ireland) Order 1987.

(ii) On the same date the appellant resisted Constable Humphries, a constable in the execution of his duty, contrary to section 66(1) of the Police (Northern Ireland) Act 1998.

[2] The appellant, following a contested trial, was found guilty in respect of each count by the Youth Court. The Youth Court later dealt with sentencing on 13 April 2021, but no issue arises now about this aspect.

The initiation of these proceedings

[3] This case comes before this court by way of a case stated by the presiding judge of the Youth Court pursuant to Article 146 of the Magistrates' Court (Northern Ireland) Order 1981.

[4] It appears that an application to state a case was made to the presiding judge by the appellant's solicitor on 23 April 2021. The application was stated succinctly (half a page) and said:

> "Being dissatisfied with the decision of the court on a point of law involved in the determination of the said court as being wrong in law, I (the solicitor) hereby pursuant to Article 146 of the Order make application to you to state a case for the opinion of the Court of Appeal on the following point of law:
>
> > 'Was I correct in law in determining that at the times the offences were allegedly committed by the defendant, … police were acting in the due execution of their duty.'"

[5] The application was responded to by the presiding judge on 25 July 2021.

The Case Stated

[6] By way of summary of the facts of the case, the case stated recites as follows:

> "1. The accused, date of birth 1 June 2004, was charged with the following offences, (which are then set out in the terms referred to at [1] above).
>
> 2. The said complaint was heard on 25 February 2021 and findings of guilt were made in respect of both charges. A Youth Conference order was made upon those findings on 13 April 2001. The following facts were found on 25 February 2021.

3. On Wednesday 5 August 2020 Constables Humphries and Wallace were on duty in separate police call signs and were tasked to locate a missing person, [AB], then aged 16 years. The child had been reported missing from [C] Children's Home, Lurgan. The officers were tasked to check [an address in] Lurgan. The officers were informed that [AB] was at high risk of child sexual exploitation and, despite her age, was known to consume alcohol and drugs.

4. At approximately 0100 hours on the above date the officers located [AB] at [an address in] Lurgan. When the officers knocked the door of the property there was a delay and then two adult males opened the door. Given their concerns that [AB] was known to be at risk of child sexual exploitation they decided that it was not safe for the child to remain at the property and decided to return her to [C] Children's Home.

5. The officers stated that [AB] was initially compliant whilst inside the property, discussing her return to the Children's Home. The officers described how her attitude changed outside the property when a further male arrived. At this point Constable Wallace turned on his body-worn camera.

6. The footage from the body-worn camera was viewed by the panel before the officers gave evidence. This footage, which will be available for the Court of Appeal, shows the escalation of [AB]'s behaviour and, in the view of the Youth Court panel, the restraint shown by the two officers. A police officer asked [AB] on several occasions to get into the police car and she asked them to put her in the car several times. A police officer ultimately asked [AB] whether there was anything that he could do or say to get her into the police car and she replied "no." At this stage [AB] was told that police had no option but to use force and she was forcibly placed into the police car. At this stage, [AB] said, "go, go." The officers, in their evidence, accept that handcuffs were applied to [AB] but stated that that was necessary given the level of resistance that [AB] was exhibiting and was for her safety and that of police.

7. The officers stated that [AB] resisted attempts to get her into the police vehicle and was screaming obscenities. The footage displayed the difficulties police had in getting [AB] into the police vehicle and her behaviour once she was in the vehicle. She continually claimed that the handcuffs were too tight but it was apparent from the footage that the handcuffs had been applied over her clothing. The officers could not confirm at what point their plan to take [AB] back to the children's home changed to one of taking her into custody. The Youth Court panel's view of the footage led it to find that [AB] was feigning injury she said was caused by the handcuffs and that she was clearly trying to injure herself in the rear of the vehicle despite repeated attempts of the officers to calm her down.

8. On arrival at Lurgan Police Station police evidence, corroborated by the body-worn footage, shows that [AB] again resisted police until she was taken to the custody suite. The body-worn footage stops when [AB] is brought into the custody suite. Constable Humphries gave evidence that while initially settling down in the custody suite [AB] became agitated again when the custody sergeant was speaking to her and attempted to injure herself by trying to strike her head off the wall. [AB] was then conveyed to a cell still in handcuffs and with limb restraints applied, to prevent further attempts at self-harm.

9. Both police officers confirmed that [AB] was not cautioned at any stage due to her behaviour. Constable Humphries in his statement of evidence stated that he arrested [AB] in the police vehicle on the way to Lurgan Police Station but the body-worn footage from inside the police vehicle does not support that contention. In his evidence to the panel the officer was vague about when [AB] was actually arrested. Similarly, he was vague about whether or not [AB] was ever informed that she was under arrest.

10. Under cross-examination both officers referred to using their "common law" power to restrain and detain [AB] and take her to a place of safety. Neither officer was able to say where this common law power arose from or what it was and stated that their initial plan was to take [AB] to a place of safety. The officers could not say when

the plan changed to one of taking [AB] into police custody. The officers did not refer to any consideration of Article 65(1) of the Children (Northern Ireland) Order 1995 at the scene. Article 65(1) of that order provides:

> '**Removal and accommodation of children by police in cases of emergency**
>
> 65.—(1) Where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm, he may—
>
> (a) remove the child to suitable accommodation and keep him there.'"

[7] The summary of the facts is then followed by a section relating to the contention of the parties. This reads:

> "1. It was contended by the defence at the close of the prosecution case that the charges of disorderly behaviour and resisting arrest, should be dismissed because there was no case to answer, pursuant to the first limb of R v Galbraith [1981] 2 All ER 1060. It was submitted that the police officers had no right to restrain and detain [AB] unless they were acting in accordance with powers afforded to them by statute or otherwise. The police officers said that they were exercising common law rights, which they could not identify, when [AB] was forcibly placed into the police car. The police officers did not purport to exercise any statutory powers that may have been available to them. It was further submitted that there was no evidence from the body-worn footage that [AB] had been arrested. The defence cited Wood v DPP [2008] EWHC 1056 in support of the application. It was further contended that the officers at the scene did not reassess their initial decision to take [AB] to a place of safety. It was submitted that the officers were not therefore acting in the due execution of their duty.
>
> 2. It was contended by the prosecution that the officers had acted in the due execution of their duty and their intention was to protect the vulnerable youth. It was the escalation of her behaviour that caused the situation to deteriorate and they did not have an opportunity at the scene to caution [AB] due to her behaviour. The prosecution contended that, while the officers could not

cite the power under Article 65 of the Children (Northern Ireland) Order to remove a child to a place of safety Order 1995 (sic), that power existed and the actions of the officers at the scene represented an assessment of the risk of significant harm that would likely result if [AB] was not removed from the scene."

[8] In the third section of the case stated there is reference to the findings of fact made by the Youth Court. It is stated that:

> "1. The Youth Court panel found that there was a case to answer at the close of the prosecution case. It held that whilst the officers at the scene did not cite any particular power to restrain [AB] they were acting in the best interests of the youth and dealing with a rapidly escalating situation. The panel did find that the officers at the scene could have arrested [AB] earlier and at some stage during the portion of the incident as viewed in the body-worn footage, but that did not negate their responsibility to ensure the safety of [AB], restrain her, prevent her from committing further offences and convey her to custody. This distinguished this case from Wood v DPP as the officer's only intention throughout was to ensure the safety of the vulnerable youth. The panel found that the officers were acting under their general duty to protect the public, specifically in this instance, a vulnerable youth. I did not direct the panel to consider section 32(1) of the Police Act (Northern Ireland) 2000 but the reasoning of the panel was a reflection of that section, which provides;
>
> > **'32. General functions of the police**
> >
> > (1) It shall be the general duty of police officers—
> >
> > (a) to protect life and property;
> >
> > (b) to preserve order;
> >
> > (c) to prevent the commission of offences;
> >
> > (d) where an offence has been committed, to take measures to bring the offender to justice.'

> The panel held that the officers had been acting in the due execution of their duty, had the responsibility to safeguard [AB] and that her restraint and detention was lawful and that neither offence should be dismissed at that point under either the first or second limb of R v Galbraith. The defendant did not give evidence. Given the issue in the case the panel did not draw an inference from the fact that [AB] did not give evidence.
>
> 2. The defence renewed their submissions at the close of the defence case and the prosecution reiterated their submissions. The panel held that, while there was some failings on the part of police at the scene, they were dealing with a youth exhibiting rapidly escalating and disturbing behaviour. The panel found that an arrest should have been effected earlier but given the nature of the behaviour exhibited by [AB] there were no options available to them other than deal with her as they did. The panel found that the actions of the officers were acting in the spirit of Article 65 of the Children (Northern Ireland) Order 1995. The actions of the police at the scene were, in the panel's view a clear exercise in attempting to protect the vulnerable and to prevent further offending. This reflects the responsibilities of PSNI officers under section 32(1) of the Police Act (Northern Ireland) 2000. The panel found that the behaviour of [AB] was clearly disorderly and that she had resisted police who were acting in the execution of their duty throughout the difficult incident."

[9] Finally, at section 4 – the case stated puts forward "The question of law for the opinion of the Court of Appeal." It is in the following terms:

> "Was I correct in law in determining that at the time the offences were allegedly committed by the defendant that police were acting in the due execution of their duty?"

Commentary on the Case Stated

[10] As can be seen from the terms of the case stated, its summary of the facts, is compact. While ordinarily compactness is to be viewed as welcome and as being in the interest of economy, in this case, it seems to us that there is a tension between the limited nature of the description of events in the case stated and the court's ability to fully understand the factual and legal matrix. This has caused, on the part of the court, more than a little frustration, as it gives rise to a concern that the court has before it a document which contains more questions as to the course of events before

the lower court than answers. This has led the court to consider whether the right course to adopt in these circumstances was to remit the case to the Youth Court and ask the presiding judge to provide a fuller statement of the evidence than had been given. However, ultimately, but with a degree of reluctance, we decided to proceed with the case.

[11] In these circumstances we must rely on the materials put before us, despite on occasions there being a concern about its comprehensiveness. Thus, the apparent numerous gaps will remain unfilled in terms of the narrative as to what each of the witnesses for the prosecution said or were challenged about by the defence. We are, however, aware that the appellant did not give evidence and nor was any witness called to give evidence on her behalf.

[12] The court also feels it should make clear, what is self-evident, when one looks at the case stated, namely that despite the apparently wide range of issues which appear to have arisen from the evidence given, the court has not been asked to rule on more than the single question described as the question of law for the opinion of the Court of Appeal *i.e.* whether the police were acting in the execution of their duty at the material time when they allegedly exercised powers of coercion. In particular, the court wishes to make it clear that it has not been asked in these proceedings to determine such issues as whether the appellant was or was not lawfully arrested in the course of the events which occurred and such issues as whether gratuitous or unnecessary force was used against the appellant at or about the point when she was being placed in, and later held in, the police car. While the court has viewed the police body cam of events, it is unable to say whether the video is complete and is conscious that necessarily it can only provide, at any given point in time, a view of one aspect of what was going on. Plainly, a significant level of force appears to have been used by the police to achieve their objective to get the appellant into the police car for onward transportation to the children's home or the police station. However, in our view for the purpose of determining this case, this issue does not lie at the centre of the question posed by the Youth Court to this court. No doubt this was because the appellant's solicitor had formulated the question for the court and the presiding judge agreed to it. It does, of course, remain open to the appellant (if she has not already done so) to issue civil proceedings in respect of these matters if she wishes to do so. In these circumstances, the court will focus on the question duly identified by the presiding judge and accepted by the parties as the issue which this court has to decide.

Identifying the parameters of the central issue

[13] The following points are not in significant dispute:

(a) The applicant while technically a child for the purpose of the Youth Court and the Children's Order, in fact, is a young person aged 16 plus.

(b) At all material times, for the purpose of these proceedings, she resided at a children's home called [C] Children's Home, Lurgan. She appears to have been a Looked After Child or a child in care.

(c) It appears that the appellant was reported missing to police. While the case stated does not indicate who reported the matter to police, we were informed at the hearing before us that it was reported by staff at the home to the police.

(d) The report, at least by the time it reached police officers on the ground, appears to have been made on 5 August 2020.

(e) The officers who received it were tasked to locate a missing person, the appellant. Her name was provided to them as was her age. It is not clear if the police had prior knowledge of the appellant.

(f) The officers were told as part of the report to them that they should check a house at [an address in] Lurgan. This information, the court suspects, came from staff at the children's home.

(g) As part of the report the officers were told (again, it is assumed, by persons at the children's home) that the appellant "was at high risk of child sexual exploitation." The court has no detail as to what these words encompass.

(h) The officers were also told that despite her age she (the appellant) was known to consume alcohol and drugs. A full explanation of the implications of this is not before the court.

[14] As a result of the above information, at or about 01:00 hours on 5 August 2020 two calls signs, each containing an officer driver and another officer, went to the address they were asked to check at [an address in] Lurgan. When officers knocked at the door there was a delay and then two adult males opened the door. The case stated provides no further information about these males. While the point is not dealt with in the case stated, it may be inferred that the officers identified the appellant as being in the house and spoke to her. The officers were concerned because of the information they had been given about the appellant and child sexual exploitation. This caused the officers to decide that the address in question was not safe for the appellant to remain at.

[15] The court assumes that at some stage in the station she was in fact charged with the two offences which later came before the court. However, the court will make clear that it has not seen the collection of materials which ordinarily would be created at a police station as part of the "booking in" process.

The charges preferred against the appellant

[16] The terms of the charge sheet have already been set out at para [1] above. For completeness, the court will refer below to the language of the statutes which had allegedly been infringed. These are:

(i) Article 18(1) of the Public Order (Northern Ireland) 1987 ("the 1987 Order"). This reads:

> "(1) A person who in any public place uses—
>
> (a) . . . disorderly behaviour; or
>
> (b) behaviour whereby a breach of the peace is likely to be occasioned,
>
> shall be guilty of an offence."

(ii) Section 66 of the Police (Northern Ireland) Act 1998 ("the 1998 Act") which reads:

> "(1) Any person who assaults, resists, obstructs or impedes a constable in the execution of his duty … shall be guilty of an offence."

[17] It will be noted that only the latter provision engages directly with the issue of whether a constable was at the time acting in the execution of his duty. There is no similar reference in Article 18(1) of the 1987 Order.

[18] The above led Mr Henry BL (for the PPS) to suggest that the issue for the court arising out of the case stated only had purchase in relation to the charge found at section 66 of the 1998 Act and specifically had no purchase in respect of the public order charge. In these circumstances, it was argued that this court need not concern itself with the disorderly behaviour offence at all.

[19] Mr McKenna BL for the appellant disputed this arguing that the two offences giving rise to the two convictions were so related to one another that they both should be viewed together. If the police officers were not acting in the execution of their duty at the relevant time, counsel argued that this had an impact on both of the matters in respect of which his client was found guilty.

[20] The court considers that the submission of Mr McKenna is to be preferred as there is plainly a linkage between the two offences on the facts of this case – both offences allegedly being committed on the same occasion. If the police officers had no power to act coercively and were acting outside the execution of their duty, it seems likely to us that it would have been open to the appellant to have resisted the

officers, provided she did so in a reasonable way. There is no reason why that resistance, if justified, could not embrace both disorderly behaviour and the section 66 offence.

Concession

[21] In the court's quest to deal with the issue raised by the Youth Court, it is right to recall that Mr McKenna, in our opinion, correctly made the concession that the police officers up to the point when they exercised coercive authority will have been acting in the execution of their duty. In other words, he accepts, on behalf of the appellant, that the officers were bound by their duty to act to seek to locate and find the appellant and having done so to take reasonable steps to safeguard her against any immediate harm. What he objects to, however, is the proposition that the police enjoyed authority once the appellant had been found and had come out of the house to require the appellant to get into the police car and be driven to another location against her will. In his submission, this is a step too far and if taken by the police, he says that the appellant would be entitled to resist the officers.

[22] Thus the question for the court, when the matter is boiled down, is whether the distinction made by Mr McKenna and encapsulated in the last paragraph is correct. On this issue, we consider that the onus must have rested on the prosecution to establish that at the key point in the sequence when the officers were standing by the police car and considering what they should do, having, in effect, rescued the appellant from a place of danger, the officers had or had not the legal authority to order the appellant to get into the car and be taken to the children's home.

The search for legal authority

[23] During the hearing before the Youth Court, while the police officers who gave evidence were able to say what they were proposing to do at the point when they required the appellant to get into the police car viz that they were going to transport her to the children's home, they were, it appears, unable to provide to the court any specific reference to their alleged power to so act. In their eyes, they appear to have believed that they had been acting on the basis of an unnamed and unspecified "common law" power, but they could cite no authority to support their contention.

[24] In the case stated the presiding judge specifically has referenced Article 65 of the Children (Northern Ireland) Order 1995 ("the 1995 Order") as having been the subject of discussion with his panel but notably it appears that the panel did not decide that it provided the necessary legal authority which was being searched for, though it is mentioned that the panel felt it should act in the spirit of this provision.

[25] As a matter of fact, the panel viewed the situation as one in which the police officers had a responsibility to ensure the safety of the appellant though, it has to be said part, at least, of the officers' concern appears to have been linked to the

turbulent events inside the car as there is reference to "restraining" the appellant and "preventing her from committing further offences" and "conveying her to custody."

[26] Of more assistance to this court arguably is the panel's factual reference to the police acting under their general duty to protect the public, specifically, in this instance, to protect a vulnerable youth.

[27] The presiding judge, in the context of trying to discover the requisite legal authority in the case stated specifically stated that:

> "I did not direct the panel to consider Article 32(1) of the Police (Northern Ireland) Act 2000 but the reasoning of the panel was a reflection of that article."

This provision is set out in the case stated and is to be found above at para [8].

[28] Ultimately, the case stated goes on to say that:

> "The panel held that the offences had been actioned in the due execution of their duty, including restraint and detention."

[29] It will assist in the understanding of this judgment if the court now sets out relevant portions of Article 65 of the Children (Northern Ireland) Order 1995, as it seems to us it is the statutory provision which in this case most closely is relevant in the search for legal authority[1]. This is headed:

> "**Removal and accommodation of children by police in cases of emergency**
>
> 65.—(1) Where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm, he may—
>
> (a) remove the child to suitable accommodation and keep him there; or
>
> (b) take such steps as are reasonable to ensure that the child's removal from any hospital, or other place, in which he is then being accommodated is prevented."

[1] Part VI of the Children (NI) Order 1995 is headed "Protection of Child" and contains a variety of provisions (including Article 65) which seek to advance this aim. These include Emergency Protection Orders (Article 63); Powers to assist in discovery of children who may be in need of emergency protection (Article 67); Abduction of children in care (Article 68); and Recovery of abducted children (Article 69).

[30] Notably harm is defined for the purpose of the 1995 Order at Article 2 where it says:

> "harm" means ill-treatment or the impairment of health or development and the question of whether harm is significant shall be determined in accordance with Article 50(3)."

[31] At Article 50(3) it is said that:

> "(3) Where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child."

[32] Article 65 has a substantial substratum to it. Article 65(2) is of interest. It states that:

> "For the purposes of this Order, a child with respect to whom a constable has exercised his powers under this Article is referred to as having been taken into police protection."

Next, at Article 65(3) it is indicated that:

> "As soon as is reasonably practicable after taking a child into police protection, the constable shall secure that the case is inquired into by a designated police officer."

There is then a series of supporting provisions dealing with such issues as how a designated officer is appointed; what his or her duties entail; the measures taken to inform others of the steps which had been taken; release of the child from police protection; and the maximum period of time the child can spend in police protection.

[33] A live issue for this court is whether this is a case which fits within Article 65. In our view, it is not difficult to conclude that, whether the officers appreciated it or not, there is a case for concluding that their intention vis a vis the child was within the language of Article 65(1). Certainly, there is little reason to doubt that the officers will have viewed the case as one where they had "reasonable cause to believe" that if they did nothing the child would be likely to suffer significant harm. To have left a 16 year old girl who had been a runaway in the street at or about 01:00 hours in the morning when it was believed that she was at high risk of sexual exploitation from males present or nearby the house she had been rescued from, on the face of it, seems well within the spirit, if not the letter, of the provision. Indeed, it may be said

that it might have been expected that police officers who had been tasked to this scene, would easily have concluded that to do otherwise than they proposed might well be viewed as opening themselves up to significant criticism on the basis that they would be failing in their duty. In the course of argument a question was put by the court to Mr McKenna as to what alternative steps were open to the police officers in the circumstances, if in fact they lacked any power to do what they proposed to do? His answer was that they should have telephoned the children's home to get someone to come out for the child. But it seems to us this response is not realistic. It fails to take account of the fact that a children's home is unlikely to have a spare member of staff who could just leave it at that time in the morning and go and collect the appellant. Moreover, Mr McKenna's response is made against the backcloth that the officers, he argued, do not have the power to hold the appellant while they await someone from the home to come and get the appellant. It seems to us, therefore, that if the officers simply took the course of action suggested they would have no ability, if Mr McKenna's argument is right, to stop the appellant from leaving the scene and simply walking away from the police. To say the least, this outcome, if it transpired, would be unsatisfactory.

[34] Where a problem might arise in respect of Article 65 is with the drafting of Article 65(1)(a) which deals with the options available to officers. Where the jurisdictional pre-condition to the use of the police power is fulfilled it states that the constable may "remove the child to suitable accommodation and keep him there." While there is another option available to the officer, i.e. option (b), it does not on the facts deal with this case. The question is how should the court read option (a)? If a literal meaning is given to this language it may be said that this power is not available on the facts of this case as the words "suitable accommodation" may have to be read restrictively as a term of art which would not include a return to a children's home. Moreover, if the police have to rely on the words "and keep him there" in (a), this may imply a step inconsistent with the plan the police, in fact, had in mind. The court will return to this issue later[2].

[35] As already will have been noted from the terms of the case stated, the significance of section 32 of the Police Act (Northern Ireland) 2000 (which is set out at para [8] above) in respect of this case, does not derive from anything said or done in the course of the hearing in the court below, where it was not mentioned, but derives from the consideration of the matter by the presiding judge in response to the request on the part of the appellant to state a case.

[36] Additionally, the court notes that this provision was also relied on by Mr Henry, on behalf of the PPS.

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[2] The court has considered a protocol published by the Health and Social Care Board and the Police Service entitled "Runaway and Missing from Home and Care: the Missing Children Protocol". This refers inter alia to Article 65 but it does not enter into a discussion of the detail of the provision. It does contain a helpful discussion, in particular, of children missing from care, including children where there is a risk of child sexual exploitation, a term defined at para 6.6 of the Protocol.

[37] It is the court's view, that the way to view section 32 is to keep in mind the purpose of the provision, which is to record the "general functions" of the police. Hence, section 32(1) speaks of the general duties of police officers rather than, and to be contrasted with, the specific duties of police officers. In the view of the court, what is crucial in this case is that section 32(1) does not confer specific powers on the police for use by officers in individual cases because it is drafted to record general functions only. It further appears to the court that the general functions (sometimes referred to as the target duties owed by the police) are not intended to be or to create new powers which can be used in individual cases to enable individual police officers to act in a coercive way overrides the pre-existing rights of the individual.

[38] In short, section 32 is setting out the general functions of the police, no more and no less. It cannot be harnessed, in the court's view, to the question at issue in this appeal viz whether the police officers involved in this case could require the appellant to get into a police car and be transported to a place of safety against her will.

[39] Finally, in respect of the presiding judge's remarks in the case stated the panel does not appear to have received any examples of a common law power available for use in the circumstances with which this case is concerned.

[40] Notwithstanding this, some common law powers were referred to by PPS counsel, Mr Henry, in this court (but not the Youth Court in which Mr Henry did not appear) as possible candidates which officers could use in the sort of circumstances which might arise on the facts of the case stated. The main example put forward was said to be the common law power of the police in respect of "breach of the peace." In support of this argument counsel relied on two authorities, which the court has considered. These are the reported cases of *R v Howell* [1981] 1 QB at 416 and the House of Lords decision in the case of *R (Laporte) v Chief Constable of the Gloucestershire Constabulary* [2007] 2 AC 105.

[41] The essence of the argument in respect of these cases centred on what "breach of the peace" embraced. In this regard in *Howell* at page 426 it was stated that:

> "A comprehensive definition of the term "breach of the peace" has very rarely been formulated so far as, with considerable help from counsel, we have been able to discover from cases which go as far back as the 18th century. The older cases are of considerable interest but they are not a sure guide to what the term is understood to mean today … Nevertheless, even in these days when affrays, riotous behaviour and other disturbances happen all too frequently, we cannot accept that there can be a breach of the peace unless there had been an act done or threatened to be done which actually harms a person, or in his presence his property, or is likely to cause such

> harm, or which puts someone in fear of such harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge than attacks or threatened attacks upon a person's body or property."

[42] The author, Watkins LJ, goes on to quote from Halsbury's Laws of England, 4th Edition:

> "For the purpose of the common law powers of arrest without warrant, a breach of the peace arises where there is actual assault or where public alarm and excitement are caused by a person's wrongful act. Mere annoyance and disturbance or insult to a person or abusive language, or great heat and fury without personal violence are not generally sufficient."

[43] Watkins LJ referring to this quotation goes on to say:

> "The statement in Halsbury, is in parts, we think inaccurate because of its failure to relate all kinds of behaviour there mentioned to violence. Furthermore, we think the word "disturbance" when used in isolation cannot constitute a breach of the peace."

[44] By way of broad summary, the learned judge went on:

> "We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault or an affray, a riot, unlawful assembly or other disturbance. It is for this breach of the peace when done in his presence or the reasonable apprehension of it taking place that a constable, or anyone else, may arrest an offender without warrant."

[45] The general view which emerges from *Howell* is that violence is to be regarded as of the essence of a breach of the peace: see page 427F.

[46] The case of *Laporte* endorses the above (see para [27]).

[47] Paras [29]-[33] in the speech of Lord Bingham in *Laporte* contains a review of authorities. A factor which is found within the authorities which arises in many of the cases is the need for the breach of the peace to be imminent or about to take place before the police can act. An interesting example in this area is from the case of

Foulkes v Chief Constable of Merseyside Police [1998] 3 All ER 705 where attention was drawn to what Lord Diplock had said in his speech in the House of Lords in the case of *Albert v Lavin* [1982] AC 546. Having set out Lord Diplock's view, Beldem LJ went on in *Foulkes*:

> "In my view, the words used by Lord Diplock and in the other authorities show that where no breach of the peace has taken place in his presence but a constable exercises his power of arrest because he fears a [future] breach of the peace such apprehended breach must be about to occur or be imminent. In the present case PC McNamara acted with the best of intentions. He had tried persuasion but the plaintiff refused to be persuaded or to accept the sensible guidance he had been given but in my judgment that was not a sufficient basis to conclude that a breach of the peace was about to occur or was imminent. There must, I consider, be a sufficiently real and present threat to the peace to justify the extreme step of depriving of his liberty a citizen who is not at the time acting unlawfully. The factors identified by the recorder in the present case do not in my judgment measure up to a sufficiently serious or imminent threat to the peace to justify arrest."

[48] It seems to the court that when it applies the doctrine of the "breach of the peace" to the facts of the present case there is an insufficient basis upon which to conclude that the police officers in the present case would lawfully have been applying it. In the first place, it must be doubtful that the appellant's position in the present case can be equated with the position of the defendants in the various "breach of the peace" cases. The police in the present case, it appears to us, were seeking to protect her from harm and it seems to the court, having viewed the body worn camera, that she had been calm until the point when the officers sought to use coercive powers in respect of her. At this stage, she can hardly be said to have been engaged or preparing to engage in actions which would amount to a breach of the peace. Moreover, it does not appear to us to be a case of the police taking action against the appellant to prevent imminent harm. We repeat that the harm the police all along was seeking to protect against was harm directed by others against her and not her seeking to harm police officers.

Conclusion

[49] In the court's opinion, the central issue which this court must determine is that identified at para [22] above viz whether the police officers had legal authority to order the appellant into the police car to take her back to [C] Children's Home. If the police had such authority, the officers will have been acting in the execution of their duty at the key point of seeking to get her into the police car for the journey. As already noted, the issues of the use of force and lawful arrest are not matters which

need to be determined by the court. Equally, if the appellant, as she seems to have done, put up resistance which in turn led to charges being preferred against her, it will not have been surprising that there will have been a change of plan on the part of the police in that a decision was made to take her to the police station rather than the children's home.

[50] The heading to Article 65 of the Children (Northern Ireland) Order 1995 is in broad terms and reads: "Removal and Accommodation of children by police in cases of emergency." One then finds the specific provisions which the court has already discussed at paras [32]-[34] above.

[51] In our opinion the case which faced the police once the appellant had been traced to the house at [an address in] Lurgan, was an emergency and it was the duty of the police to take such steps as were necessary to protect her against the risk of serious harm. As the court has already explained, the officers, it seems to us, will have had reasonable grounds to believe that the appellant would be likely to suffer significant harm. In these circumstances, the officers, in accordance with Article 65(1), may exercise discretion to remove the child to suitable accommodation and, indeed, this was their plan, the suitable accommodation, in fact, being the children's home. While the court acknowledges that the words in paragraph (a) of Article 65(1) that add "and keep her there" may suggest the provision of other forms of accommodation, there is nothing in Article 65 itself which excludes the officers from bringing the appellant to the children's home and keeping her there until such time as they could effect a handover of the child to the staff of the home. The court would suggest that, in fact, this was the officers' intention at the outset.

[52] In our view, during the period the child would have been under the control of the police, the appellant's status will have been that she was under "police protection." But, such a step in this case, we consider, would have been, as the Youth Court found, entirely appropriate.

[53] We have considered whether it can be said that the approach taken by the officers, in relation to this scenario, falters by reason of the failure of the officers to engage with the procedural sub-stratum of Article 65. In this case we do not think so as it seems to us that there is no barrier within the article which prevents those officers in charge of the appellant from deciding, if they have good reason, to end the appellant's period in police protection. In this connection, there is no minimum period during which a child must be kept in police protection and if, in fact, as would be the case if the child is returned to the children's home and into the hands of those who have statutory responsibility for her, this step appear to us to be unobjectionable.

[54] The court has therefore concluded that the police plan to place her in the car and take her to the children's home in the police car with a view to handing her over to those who had statutory responsibility for her was lawfully based even if, as

seems to have occurred, the officers were unable before the Youth Court to provide chapter and verse in respect of it.

[55] Even if the above course of action had not been available to the officers in this case the court believes that a similar outcome would probably have been available by other routes. While the court's views at this point are not final, two other routes to essentially the same outcome occur.

[56] Firstly, the court could, and in our view should, have been prepared to apply to Article 65 a purposive interpretation, given the high importance which the legislature must have had in mind when dealing with the protection of a child in a circumstance such as this where there was an obvious need to protect a child from danger of sexual abuse and when the call came to the police out of office hours. It seems to us to be almost inconceivable that the legislation would not have intended to enable the police to act swiftly and decisively on the facts of this case. The principle of police protection, it seems to us, was built for dealing with this type of situation and the removal of the child to a place of safety should be available. If this meant the court being prepared to read the legislation expansively, then so be it.

[58] This approach has more than passing support from an important passage in an appeal involving the English equivalent of Article 65 – section 46 of the Children Act 1989. In *Langley v Liverpool City Council* [2006] 1 FLR 342, Dyson LJ at para [32] noted that:

> "The relevant provisions of the Act should be construed so as to further the manifest object of securing the protection of children who are at risk of significant harm. A construction of the Act which prohibits a constable from removing a child under s. 46 where he has reasonable cause to believe that the child would otherwise be likely to suffer significant harm would frustrate that objective."

[58] In our view that sentiment applies equally to the sort of issue before the court in this appeal[3].

[59] Secondly, and for similar reasons, we consider that at common law a similar or parallel power to Article 65 would surely also be available. In this regard, it is well known that the duties of police have for long been recognised as being open ended at common law: see *Rice v Connolly* [1966] 3 WLR 17 at 21. It is difficult to think of any good reason why such a power would not be available in a case such as this where a young girl is at risk in circumstances where the police can act quickly to

[3] The issue under discussion in *Langley* was that of whether section 46 could be invoked in a case where an EPO (Emergency Protection Order) was already in force. Dyson LJ ultimately concluded that in that situation section 46 should not be exercised to remove a child where the officer knows that an EPO is in force, unless there are compelling reasons to do so: see [36]. In the case before us this factual circumstance does not arise.

take her to a place of safety. To deny the existence of such a power would appear perverse.

The outcome of the Case Stated

[60] Our answer to the core of the question posed, as slightly revised, bearing in mind what is said in the text of para [22], is that at the material time the police were acting in the execution of their duty to require the appellant to get into the car and to be driven to the children's home. In principle, the police could exercise such force as was reasonably necessary to carry out their duties. Resistance by the appellant could lead to charges, such as those imposed in the case. Accordingly, it was open to the Youth Court to convict, as they did. In our view, such convictions should be upheld. We answer the case stated in the affirmative.