Neutral Citation No: [2018] NIQB 64 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC10718** **JR 2018/21654/01** *Delivered:* **04/08/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY AMM (A MINOR)
BY DM, HER MOTHER AND NEXT FRIEND
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

THE POLICE SERVICE OF NORTHERN IRELAND

and

SOSNI

_____

McCloskey J

Anonymity

[1] The grant of anonymity previously afforded to the Applicant is hereby affirmed. There shall be no publication of her identity, the identity of any member of her family or her school or of anything else which could result in her identification.

Introduction

[2] This slow moving case, in which proceedings were commenced on 01 March 2018, continues to await the court's adjudication of the Applicant's application for leave to apply for judicial review, following a series of unavoidable interlocutory steps. The first proposed Respondent is the Police Service of Northern Ireland ("*PSNI*"). The second proposed Respondent was not separately represented (see *infra*).

[3] Developments during the stages noted above have included several amendments of the Order 53 Statement which, given the stage which the

proceedings are at, have not required the permission of the court. In brief compass, the protagonists are the Applicant, her father and certain police officers. The Applicant is a girl in her mid-teens. The evidence discloses that for several years her father has routinely driven her to and from her place of secondary education. They are the two protagonists in the evidence which has been assembled. The other protagonists, unidentified, are those police officers who, it is alleged, have been involved on sundry dates in a series of events entailing the exercise of their stop and search powers under sections 21, 24 and 26 of the Justice and Security (NI) Act 2007 (the "*2007 Act").*

The Applicant's Case

[4] Evidentially the Applicant's case, as it has emerged, painstakingly so, seeks to place the focus on the interaction of police officers with her during certain of the alleged incidents. This gives rise to the primary contentions, rehearsed in the amended grounds of challenge, that the statutory powers in question have been exercised in a manner contrary to section 6 of the Human Rights Act 1998 ("HRA 1998") as they have infringed the Applicant's rights under Article 8 ECHR *simpliciter*, Article 8 ECHR in conjunction with Article 14 ECHR, the asserted discriminatory ground being age; and, secondly, that the provisions of a PSNI code, or policy instrument, described as "Code of Practice for the Exercise of Powers in the Justice and Security (NI) Act 2007" (in convenient shorthand, "*the Code*"), have either been infringed or do not afford children sufficient protection.

[5] These contentions underpin the Applicant's quest to secure various forms of declaratory relief (only). These include a declaration that the Code contravenes the aforementioned Convention rights and section 53(3) of the 2002 Act. The Applicant also seeks a declaration of incompatibility under section 4 of HRA 1998 "*on the basis that the impugned legislative provisions are incompatible with the right to respect for private life guaranteed by Article 8 ECHR in the absence of a lawful code of practice which expressly recognises the vulnerable position of children and provides adequate safeguards*". Finally, the Applicant claims damages, in the following terms:

> "*Damages, pursuant to section 8 of* [HRA 1998], *as just and equitable compensation for the past actions of* [PSNI] *officers in stopping and searching the minor applicant in breach of her rights under Article 8 ECHR and/or Article 14 ECHR.*"

[6] It is no understatement to observe that the Applicant's case was evidentially impoverished and deficient at the outset. This generated, in response to a series of case management directions, further affidavit evidence and amended pleadings. As a result of progressive concentration on the Code, the Applicant, via an amendment, seeks leave to apply for judicial review against a second Respondent, namely the Secretary of State for Northern Ireland (the "*Secretary of State*") who has an approval role as regards the Code.

[7] Ultimately, through the evolution outlined above, the Applicant's direct and personal challenge to the conduct of police officers resolves to, per her latest affidavit (sworn on 26 April 2018), the following assertions:

> "*For ease of reference for the court, I would like to confirm that my person was searched twice by the police under the 2007 Act, 13 November 2012 and 12 December 2017 .. My belongings were searched by the police on three occasions – 28 September 2016, 05 October 2016 and 09 February 2017.*"

The supporting evidence includes mobile phone photographs and two videos said to depict the alleged incidents on the following dates: 13 November 2013, 28 September 2016, 05 October 2016, 09 February 2017, 29 August 2017 and 12 December 2017.

[8] The monochrome copy photographs in the evidence do not depict any search of the Applicant or her belongings by police officers. Thus there is no photographic corroboration of the Applicant's assertions in this respect. I note that the CD evidence, which was not played to the Court, is confined to the discrete dates 28 September 2016 (one of the three occasions of alleged search of the Applicant's belongings) and 12 December 2017 (one of the two occasions of alleged search of the Applicant's person).

[9] In pre-action correspondence the Applicant's solicitors requested the PSNI to disclose all relevant stop/search records. This yielded the provision of a single record documenting a "stop and search" exercise on 28 September 2016 at an identified location involving an identified motor vehicle and containing the identity of the Applicant and her date of birth. This record states, inter alia:

> "***Power use**: JSA 21. Due to the current threat and to protect public safety in this area.*
>
> ***Objective of search**: Stop and question re identity, movements.*"

[10] With the exception of the act of disclosing the aforementioned contemporaneous police record, the PAP correspondence emanating from the PSNI's legal representative contains nothing of note. In the PAP response (dated 08 March 2018) on behalf of the Secretary of State, the following of note is stated:

> "*The Secretary of State is not in a position to comment on the specific factual circumstances of each stop and search carried out by PSNI but does note the PSNI position is that all exercise of powers under the JSA of the proposed Applicant during this period were conducted in a lawful*

> *manner, in accordance with the statutory powers and applicable code of practice.*"

The response directs specific attention to paragraph 6.11 of the Code which, under the rubric "Vehicles", provides:

> "*Section 21(5) provides that the power to stop a person includes the power to stop a vehicle. If a vehicle is stopped officers may question the occupant or occupants separately or jointly to establish identity and movements, as set out at paragraphs 6.3 – 6.8. If children or young people are present, officers will have due regard for their protection. The PSNI also carry information cards which they may give to children or young people who are stopped and searched.*"

Reference is also made to a related PSNI instrument namely "PD13/06 – Policy Directive – PSNI Policing with Children and Young People", which forms part of the assembled evidence.

[11] Summarising, the Applicant's challenge has two identifiable separate elements. In the first, which the Applicant purports to bring on behalf of all children and young people, the challenge is to the human rights compatibility of the Code. This challenge gives rise to claims for declaratory relief. The second element of the Applicant's case is personal to her: she alleges that on the five dates in question spanning intermittently the period November 2012 to 12 December 2017, she and her belongings were the subject of unlawful police searches. It is this aspect of her case which gives rise to the claim for damages.

Conversion to Writ?

[12] The Court activated a debate with the parties' representatives concerning Order 53, Rule 9(5) of the Rules of the Court of Judicature (the "Rules"). This provides:

> "*Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by Writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had begun by Writ; and Order 28, Rule 8 shall apply as if the application had been made by summons.*"

An evaluative assessment on the part of the Court, of the type set forth in the text of the Rule, is an essential pre-requisite to the exercise of the judicial discretion to make

a conversion Order. I am satisfied that it is open to the Court to make this assessment at any stage of the proceedings. This entails a purposive construction of the words "*the application*" in the penultimate clause, together with due observance of the Court's unqualified duty under Order 1A(3)(b) to give effect to the overriding objective when interpreting any provision of the Rules.

[13] The Court's main motivation for raising this discrete issue is uncomplicated. It is a well - established litigation reality that claims for damages for the allegedly unlawful exercise of police powers are brought by private action against the Chief Constable either in the County Court or by Writ of Summons in the Queen's Bench Division of the High Court. Cases of this kind are particularly suited to the inter-partes adversarial forum of those two Courts. This is so *inter alia* because they lend themselves so readily to the main adversarial trappings of that forum: detailed pleadings, interrogatories and sworn replies where appropriate, discovery of documents both general and particular, sworn *viva voce* evidence, cross examination of parties and witnesses and appropriate judicial intervention. It is an indelible reality that factual minutiae are one of the dominant features of litigation of this kind. In my judgement, the mechanisms and procedures of the private law action are demonstrably superior to those available in the judicial review forum of supervisory review in which the material facts are, more often than not, undisputed and the role of the Court is to apply the relevant legal rules and principles to a factual matrix which is either uncontentious in the main or can be readily established by straightforward fact finding where this is required.

[14] Having considered the affidavit evidence progressively generated on behalf of the Applicant, it seems to me that the observations in the immediately preceding paragraph apply fully to the present case. The exception to this assessment potentially relates to her allegations of events on 28 September 2016. However, this would be a limited exception because whereas the Applicant specifically avers in her latest affidavit that her belongings – and not her – were searched by the police on this date, this is not recorded in the police record of the same date and, further, the PSNI's letter of 23 December 2016, duly supported by the text of the contemporaneous record, clearly makes the case that the police interaction with the Applicant on this occasion was confined to stopping and questioning her: in short, there is rich potential for a lively *inter – partes* adversarial battle.

Delay

[15] At this juncture it is appropriate to record the relatively new provisions of Order 53, Rule 4 which, given the date of commencement of these proceedings, apply fully to all aspects of the Applicant's case. In its new and refreshingly uncluttered version, the Rule has removed the requirement for judicial review leave applications to be made "*promptly*", substituting a time limit of –

> "*.. within three months from the date when grounds for the application first arose unless the Court considers that*

there is good reason for extending the period within which the application shall be made.

In the great majority of cases grounds for bringing judicial review applications first arise on a readily ascertainable single date to which the most important event pertaining to the proposed respondent's conduct belongs. This event generally takes the form of an act or decision final in nature and having juridical effects and consequences. In the present case I consider it clear that the grounds for the Applicant's application for leave to apply for judicial review seeking the remedy of damages arose and were complete on each of the individual dates of the police conduct of which she complains, as summarised in [7] above. Furthermore, while acknowledging the dispensing power available to the Court, I am unable to identify in the Applicant's affidavit evidence any "*good reason*" for extending time in respect of the first four of the five events alleged by her. The fifth and final event is alleged to have occurred on 12 December 2017 and, by virtue of the date of initiation of the proceedings (01 March 2018) it gives rise to no time frailty. The Applicant's case – per [37] and [38] of her latest affidavit – is that she was physically searched by a police officer on this occasion.

Conclusion

[16] Giving effect to the analysis above, I conclude:

(a) Most of the Applicant's case is defeated by delay. The exception to this assessment is her case in respect of the alleged search of her person by police on 12 December 2017.

(b) No good reason for extending time is demonstrated.

(c) It follows that leave to apply for judicial review is to be refused in respect of the first four alleged incidents.

(d) To impose on the Applicant a conversion order under Rule 9(5) of Order 53 would, in my estimation, be inappropriate as it may involve a degree of judicial coercion which would set in trail a series of litigation events in another division of the High Court in a context where the Applicant and her legal representatives have set their store against this litigation mechanism and, therefore, cannot be presumed to be willing to subscribe to it. It might also intrude on public funding issues. The clearly preferable course in my view is to leave the Applicant, her next friend and legal representatives to absorb this judgment and its consequences and to make their own, independent decision on the desirability of instituting separate proceedings in the appropriate forum – which almost certainly would be the County Court, rather than the Queen's Bench Division of the High Court – if so desired and

advised, in circumstances where there is no identifiable time bar presently evident.

(e) I grant leave to apply for judicial review based only on the Applicant's case in respect of the alleged events on 12 December 2017 on the basis that the public law dimension of the Applicant's challenge is, as a minimum, as important as the (essentially) private law claim for damages and requires adjudication by the Court of legal issues and, if appropriate, the grant of remedies lying outwith the jurisdictional competence of the County Court and possibly the Queen's Bench Division of the High Court (with the rider that the Court has received no considered argument on this discrete issue).

(f) The grant of leave to apply for judicial review confined to the alleged incident on 12 December 2017 extends to the challenge to both PSNI and the Secretary of State.

(g) The parties' representatives shall, by **29 August 2018** at latest, provide the Court with their agreed litigation timetable, incorporating all necessary procedural steps culminating in a substantive hearing (time allocation one day) which shall be not later than **December 2018**. The Court will consider this and make such Order as it adjudges appropriate.

(h) Meantime, the Court confines itself to the single direction that both Respondents shall provide their affidavit evidence by **28 September 2018** at latest.

[17] Costs are reserved and there shall be liberty to apply.