Neutral Citation No: [2021] NIQB 11	*Ref:* **KEE11386**
	ICOS No: **16/122892**
Judgment: approved by the Court for handing down (subject to editorial corrections)*	*Delivered:* **02/02/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY AS1 (A MINOR ACTING BY HER MOTHER AND NEXT FRIEND) No. 2

_____

Mr Lavery QC with Mr Bassett (instructed by Brentnall Legal Ltd) for the Applicant
Mr Tony McGleenan QC with Ms Laura Curran (instructed by the Crown Solicitors Office) for the Respondent

_____

KEEGAN J

Introduction

[1] This case relates to video recording by police which occurred in 2016. The recording captured the image of a child during a lawful search under terrorism legislation. I decided that the actions of the police were lawful pursuant to the domestic and European law in *AS1's Application for Judicial Review* [2018] NIQB 46. That decision was appealed by notice of 12 June 2018. I am informed that when the case was first opened before the Court of Appeal counsel was asked to address the retention issue as well as the capture issue. Counsel told the court that evidence was not filed relating to the retention point and it was not argued before me. So, new evidence was obtained and an affidavit was filed on 10 February 2019 by ACC Todd on the issue of retention.

Retention

[2] The affidavit of ACC Todd explains that there are two regimes which govern the Police Service of Northern Ireland ("PSNI") legal obligations in relation to the retention and disposal of its records namely the Public Records (Northern Ireland) Act 1923 and the Data Protection Act 2018. At paragraph 4 of his affidavit ACC Todd states that "in order to ensure compliance with these obligations and to enhance transparency, PSNI has prepared and published a dedicated Service Procedure SP 3/2012 Records and Management. He states that this was first issued

on 27 February 2012 and contains the Review Retention and Disposal Schedule in its Appendix ("RRD Schedule") ACC Todd also refers to the policy context at paragraph 5 and 6 of the affidavit and he references the Code of Practice for police forces known as the "MoPI guidelines."

[3] At paragraph 12 of the affidavit ACC Todd states that "the arrangements for review, retention and disposal of any particular record depends on the type of record". The RRD Schedule identifies 16 broad categories of record held or generated by police with periods of time for review, retention, destruction and transfer also set out. He states at paragraph 17 of the affidavit that "the disposal actions set out in the RRD Schedule with regards to some categories of policing records makes reference to the need to undertake a risk assessment". At paragraph 27 he explains the position in this case as follows:

> "In this case, the footage captured potential offences within the property. It was therefore mastered and given an exhibit number. The footage also recorded events which formed the subject of a complaint against the police to the Police Ombudsman. For the purposes of the proper investigation of that complaint, the footage was obtained and viewed by the investigating officer, and was found to corroborate the officers account. As a result, there was insufficient evidence to support the complaint of an invasion of privacy."

[4] The evidence of ACC Todd is that this type of record relates to minor offences. He states that it was retained rather than deleted within 31 days because it captured potential offences and there was a potential complaint to the Police Ombudsman. ACC Todd also refers to a potential civil claim which may be ongoing. In relation to the other matters he confirms that no further action will be pursued and the file has been closed. So, he states that the file will be subject to risk assessment review by the record reviewer in line with the RRD Schedule. ACC Todd also states that as far as he is aware no application has been made under Section 47 of the Data Protection Act to have the footage erased.

[5] After this evidence was obtained the case was going to proceed before the Court of Appeal however due to another decision of mine in *Re Cavanagh's Application No. 2* [2019] NIQB 89 the matter was remitted for me to deal with the retention issue. In the *Cavanagh* decision I found that the retention of information for 100 years without adequate review was unlawful and I made a declaration to that effect.

The revised RRD Schedule

[6] The point at issue in this case has narrowed considerably because on 7 October 2020 a new RRD Schedule came into force. Following from that the

Respondent has filed an affidavit of ACC Jonathan Roberts in these proceedings which sets out the basis on which the video footage is now retained. The affidavit is dated 3rd November 2020 and I have considered it in these proceedings. In particular, paragraph 5 states:

> "The previous RRD Schedule, exhibited at Tab 4 pages 37-92 of the exhibits to the affidavit of ACC Todd, governed the retention of the service records within PSNI including specifically the video footage at issue in this case in the period immediately after its capture and until the coming into force of the new RRD Schedule. The new RRD Schedule dictates the management of the video footage from 7 October 2020 onwards, and provides the legal basis on which the footage is now retained."

[7] Paragraph 10 of the affidavit refers to the application of the new RRD Schedule to the video footage and states that:

> "Schedule 7.1 of the RRD Schedule deals with the general operational policing records. The approach to the record is determined by whether the digital data is evidential, or non-evidential. Non-evidential digital data, like video footage other than body worn video is reviewed after 31 days. If it does not serve any purpose at that time it should be destroyed. This is in accordance with the draft national guidance on the minimum standards for the retention and disposal of police records, issued by the National Police Chiefs Council."

[8] Paragraph 14 states:

> "In this case the offence for which charges might have been brought was assault on police. This constitutes a Group 2 offence, being a violent offence specified in the Home Office Counting Rules."

[9] Finally, paragraph 15 refers as follows:

> "The relevant action for records relating to a Group 2 offence is to review the record after an initial 10 year clear period. If the subject is deemed to pose a high risk of harm, the record should be retained and reviewed after a further 10 year clear period. If this standard is not met the final action for the record should be taken, which under Section 7.1.23 is destroy."

The remaining issues

[10] In his submissions before me Mr Lavery accepted that the new RRD Schedule satisfies the quality of law requirements of both the European Convention on Human Rights ("ECHR") and European Union Law. He confirmed that there is no remaining issue between the parties on that front. Rather, he said that this challenge now relates to the existence of a legal basis for the retention of video footage prior to the revised RRD Schedule becoming effective in October 2020.

[11] Therefore, the question is narrow whether or not I should grant the declaratory relief sought which is pleaded as "a declaration that the decision of the respondent to retain the video tape footage, obtained during the entry and search of the applicant's home on 3 August 2016 was unlawful." Counsel addressed me on these points by way of written arguments and succinct oral submissions. There are two limbs to my consideration firstly, whether retention was unlawful at the time and then secondly, if retention was unlawful whether I should grant declaratory relief.

[12] In determining these questions I bear in mind Mr McGleenan QC's submissions that this point is academic in the sense of *R v Secretary of State for the Home Department ex parte Salem* [1990] 1 AC 450 and that "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[13] Applying the principles from *Salem* there is clearly no need to hear this matter to guide future cases given that the issue is now resolved by the amended RRD Schedule. However, the argument is whether or not the court should make a declaration if it considered the previous policy did not meet the quality of law test. The reason why the court might consider this is because Convention rights are engaged. I do not consider it appropriate to simply dismiss the case on *Salem* principles particularly as the substantive case is being examined on appeal. So, I will proceed to answer the two questions.

Whether or not the retention at the time was unlawful?

[14] I have considered the arguments in relation to this. In doing so I stress that the *Cavanagh* decision was determined by consideration of the part of the Schedule dealing with retention for 100 years without adequate review. Also, in my original decision in this case, I decided that the capture of the video footage finds a basis in domestic law. Logically, this extends to some retention as otherwise the capture

would have no purpose to meet the policing purposes for which it is designed. However, a further question arises as to the duration of the retention. Clearly, as *S & Marper v UK* [2008] 48 EHRR 50 established, blanket and indiscriminate retention does not strike a fair balance.

[15] Also, a legality issue arises if the governing policy and procedure is not sufficiently clear, foreseeable and accessible. The precision with which the law must be defined is related to the measure in question. In *Ramsey's Application* [2020] NICA 14 the Court of Appeal also stated that "the nature of the power and the extent of the interference" is relevant in assessing Article 8 compliance. The broader legislative and policy framework must ensure that retention of footage is in accordance with the law. There is a difference between covert surveillance and overt means.

[16] In this case, the interference with Article 8 is overt and as a result the need for precision and protection is of a different character as in the covert surveillance cases. At the relevant time the RRD Schedule was accompanied by the SP3/12 information management framework. This is explained in the affidavit of ACC Todd which I accept as the evidence in this case. This affidavit states that the footage was retained as it potentially captured minor offences and that it was evidential in nature as there was the potential for prosecution. There was also a complaint raised by the applicant's family which became part of a Police Ombudsman's investigation and the prospect of civil litigation. One of the questions in the risk assessment is whether the events are anticipated to be the subject of subsequent litigation, internal/external inquiry or other investigation. In my view there were therefore valid reasons to retain the footage.

[17] All of the information set out in SP3/12 of the RRD Schedule was publicly available on the PSNI website at the time of its operation. In the ECHR consideration of the *Catt* case reported at [2019] ECHR 76, the court said that for domestic law to meet the requirements of accessibility and foreseeability "…it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope and discretion conferred on the competent authorities and the manner of its exercise." I consider that the regime explained by ACC Todd satisfies these requirements. I also consider that this case is very different from *R (Bridges) v Chief Constable of South Wales* [2020] EWCA Civ 1058 where, in relation to automatic facial recognition, the Divisional Court found that too much discretion was left to the police particularly as to who could be placed upon a watch list.

[18] The Policy Framework has been replicated in the new RRD Schedule and it does appear that the framework has largely been read across into the new schedule into a better format. Therefore, I do not accept that in the circumstances of this case, the retention was unlawful at the time given that there was ongoing evidential use being made of the information. That is sufficient to deal with this case as it stands. Obviously if the capture were found to be unlawful, the position would be different.

[19] The second question is whether the duration of the retention is proportionate in order to comply with Article 8. In the circumstances of this case, I cannot see that the interference was disproportionate given the valid basis for retention of the material. The evidence also establishes that there was an adequate system of review for this category of material. Finally, I accept the argument that the Data Protection Act 2018 provides a remedy for erasure pursuant to Article 47.

Whether declaratory relief should be granted

[20] In any event, I would not have been minded to grant declaratory relief pursuant to Section 8(1) of the Human Rights Act 1998 given that there is a revised RRD Schedule in place.

[21] Therefore, this application is dismissed and the case will be concluded before me without any further order.