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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

IN THE MATTER OF AN APPLICATION BY AILISE NI MHURCHU

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

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Before: Morgan LCJ, Lord Stephens and Maguire LJ

MORGAN LCJ delivering the judgment of the court)

[1] This case concerns the lawfulness of the use of powers to stop and search children without reasonable suspicion on foot of section 24 and Schedule 3 of the Justice and Security (NI) Act 2007 ("the 2007 Act"). Colton J rejected the appellant's challenge that the powers exercised by the PSNI pursuant to the statutory provisions failed to meet the "quality of law" test required for interference with the appellant's Article 8 ECHR rights, that the respondents acted contrary to section 6 of the Human Rights Act 1998 read with Articles 14 and 8 ECHR on the basis of a failure to ensure different treatment for children and that the respondents failed to meet their obligations under section 53 (3) of the Justice (Northern Ireland) Act 2002 to have the best interests of children as a primary consideration in the exercise of their functions in the youth justice system.

Background

[2] The appeal arises from a stop and search conducted on 12 December 2017. The appellant was 16 years old at the time. She and her younger brother were passengers in a vehicle driven by her father along Shaws Road, Belfast. Constable Fivey was the lead officer in a police vehicle containing Constable Phair and two

other police officers. He saw the appellant's father driving the car and in accordance with intelligence briefing information given to him in respect of the appellant's father he took the decision that there should be a stop and search of the father, the vehicle he was driving and any person in the vehicle. There was no challenge to the intelligence briefing information being an appropriate basis for the stop and search of the father and the vehicle.

[3] The search of the appellant's father occurred first so that he could observe the search of his children. Constable Fivey conducted the search of the appellant's father, his son and the vehicle. Constable Phair searched the appellant. Part of the search was recorded on video. The appellant was known to Constable Fivey. She was nearly 17 at the time of the search. He believed she had no disability or other condition which he should take into account. Her presentation on the day was calm. She exhibited no signs of distress, agitation or concern. Had she been unduly distressed by the circumstances he believed that she would have made that clear. In light of the fact that she was travelling in the same vehicle as someone whom he had good reason to search and given the risk of her being used to hide munitions he decided it was appropriate and in her best interests that she should be searched.

[4] Section 24 of the 2007 Act gives effect to Schedule 3 which confers power to stop and search. The original provisions of the 2007 Act dealing with the power to stop and search were considered by this court in Re Fox's Application [2013] NICA 19. The stop occurred in March 2011 and the object was to search for munitions. Although section 34 of the 2007 Act made provision for the making of a Code of Practice no such code had been made at the time of the search. The court rejected the submission that the power in section 24 and Schedule 3 could never have been validly exercised in the absence of a reasonable suspicion that the appellants had munitions or wireless equipment unlawfully with them. The terms of any code made under section 34 were not bound to exclude the possibility of requiring or permitting searches to be carried out on some basis other than the presence of reasonable suspicion of unlawful conduct by the party stopped and searched.

[5] The court followed the approach of the ECtHR in Gillan v UK [2010] 28 BHRC 420 on the question of whether Article 8 was engaged so that any interference had to be justified. The power in the 2007 Act was a broad discretionary power which did not of itself provide guarantees or safeguards against abuse. It was widely framed and did not contain any rules designed to ensure that the power was not arbitrarily exercised. In the absence of a suitably framed code of practice the court concluded that the quality of law test was not satisfied.

[6] In light of the decision of the ECtHR in Gillan the Protection of Freedoms Act 2012 substituted a new regime for stop and search by police officers in Schedule 3 of the 2007 Act. The relevant provisions are set out in Annex A to this judgment.

[7] The features of the regime are as follows:

(i) An authorisation permitting a constable to stop and search a person to ascertain whether he has munitions or wireless apparatus unlawfully with him whether or not the constable reasonably suspects that the person has either can only be made by an officer of the PSNI of at least the rank of Assistant Chief Constable.

(ii) If no authorisation is in place a constable may not stop and search a person to ascertain whether he has munitions unlawfully or wireless apparatus in the absence of reasonable suspicion.

(iii) In order to give the authorisation the officer must reasonably suspect that the safety of any person might be endangered by the use of munitions or wireless apparatus and reasonably consider that the authorisation is necessary to prevent such danger and that the specified area or place in respect of the authorisation and the duration of the authorisation are both no longer than is necessary to prevent such danger.

(iv) Any authorisation has effect beginning with the time when the authorisation is given.

(v) It can be limited both temporally and geographically but must end on a specified date or time no greater than 14 days beginning with the day on which the authorisation was given.

(vi) The authorising officer must inform the Secretary of State as soon as reasonably practicable.

(vii) The 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.

(viii) When confirming an authorisation the Secretary of State may limit it temporally or geographically.

(ix) The Secretary of State or a senior officer may cancel the authorisation with effect from the time identified by him and a senior officer can also limit the authorisation temporally or geographically.

[8] The Secretary of State promulgated a Code of Practice under section 34 of the 2007 Act shortly after the decision in Fox. There was a further challenge to the compatibility of the quality of law provisions of the 2007 Act as amended and supported by the new Code of Practice which this court dealt with in Ramsey's (Steven) Application (No 2) [2020] NICA 14. The court found in agreement with the trial judge that the provisions were in accordance with law.

[9] The principal challenge in this case is based on the proposition that the exercise by constables of the power to stop and search children is still not in accordance with law. That phrase implies that the legal basis for the power must be accessible and foreseeable. The legal basis is contained in section 24 and schedule 3 of the 2007 Act. Foreseeability requires that the rule is formulated with sufficient precision to enable any individual if need be with appropriate advice to regulate his conduct. In addition, there must be a measure of legal protection against arbitrary interference by public authorities and it is contrary to the rule of law for unfettered power to be given to the executive to interfere with fundamental rights.

[10] There was no dispute between the parties that the law was accessible and foreseeable by virtue of the provisions of the 2007 Act. There was no dispute about the authorisation regime. As previously discussed the authorisation process was subject to review by the Secretary of State for Northern Ireland and unless affirmed by the Secretary of State within 48 hours the authorisation would fall. The Independent Reviewer, for which provision was made in section 40 of the 2007 Act, exercised a further check in this process and confirmed that there was significant challenge as a result of this process. Regrettably the continuation of the assessment of the terrorist threat in Northern Ireland as severe has resulted in the renewal of an authorisation in respect of the whole province since these provisions came into play. The authorisation was, of course, open to challenge by way of judicial review. The purpose of the authorisation was restricted to the ascertainment of munitions and wireless apparatus and the use of the powers was similarly constrained. All of this and the background to the terrorist threat was considered by this court in Ramsey (No 2).

The Code of Practice

[11] The judgment in Fox was given on 9 May 2013. By that stage the Secretary of State had consulted on a proposed code of practice. The Code was laid before Parliament and came into operation on 13 May 2013. The purpose of the Code is to set out how the powers of stop and search should be exercised by the PSNI. The Code emphasises that great care should be taken to ensure that the selection of people is not based solely on ethnic background or perceived religious or other protected characteristic and that individual behaviour or specific intelligence should be the basis for making operational or investigative decisions about who may be involved in criminal activity.

[12] Chapter 5 of the Code sets out the general principles governing the exercise of police powers under section 24/Schedule 3 of the 2007 Act. That includes the requirement that the powers must be exercised in accordance with the obligations of public authorities under the Human Rights Act 1998. Paragraphs 5.9 to 5.14 of the Code deal with monitoring and accountability. Supervising officers have to satisfy themselves that the practice of officers under their supervision in stopping, searching and recording is fully in accordance with the Code. Supervision and monitoring must be supported by the compilation of comprehensive statistical

records of stops and searches at service, area and local level. Apparently disproportionate use of the power by particular officers or groups of officers or in relation to specific sections of the community should be identified and investigated. The power should be used only if it is proportionate and necessary and that requires that the power be used only where justified by the particular situation and on the basis provided for in the 2007 Act. It is the responsibility of senior officers to take action if they do not feel that the power is being used appropriately.

[13] Chapter 8 deals with stopping and searching persons beginning at paragraph 8.16. The Code deals with authorisation at 8.22. The authorising police officer must be satisfied that the powers are necessary to prevent endangerment and that the use of these powers is required to help deal with the perceived threat. Consideration should also be given to whether the power to stop and search is the most appropriate power to use in the circumstances. In determining whether the use of the power is necessary the senior authorising police officer must also take into account the proportionality of the use of without reasonable suspicion search powers, that authorised searches may be exercised only for the purpose of discovering unlawfully held munitions or wireless apparatus, the suitability of other search powers including those that require reasonable suspicion and the safety of the public and the safety of officers.

[14] Paragraph 8.50 provides that powers of search should only be used by officers who have been briefed about the powers. The briefing should make officers aware of relevant current information and intelligence, including current threats. They should be as comprehensive as possible in order to ensure officers understand the nature and justification of the operation. Officers should use the information provided in a briefing to influence their decision to stop and search an individual. The approach which officers should take is set out at paragraph 8.61:

> "8.61 Where a person or vehicle is being searched without reasonable suspicion by an officer (but with an authorisation from a senior officer under paragraph 4A(1)) there must be a basis for that person being subject to search. The basis could include but is not limited to:
>
> - that something in the behaviour of a person or the way a vehicle is being driven has given cause for concern;
>
> - the terms of a briefing provided;
>
> - the answers made to questions about the person's behaviour or presence that give cause for concern."

Both parties are agreed that the reference to "cause for concern" in this paragraph must mean concern about possession of munitions or wireless apparatus.

[15] The Code provides at paragraph 8.75 the information that must always be included in a record of the search even if the person does not wish to provide any personal details:

> "8.75 The following information must always be included in the record of a search even if the person does not wish to provide any personal details:
>
> (i) the name of the person searched, or (if it is withheld) a description;
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> (ii) the date, time, and place that the person was first detained;
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> (iii) the date, time and place the person was searched (if different from (ii) above);
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> (iv) the purpose of the search;
>
> (v) the basis for the use of the power, including any necessary authorisation that has been given;
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> (vi) the outcome of the search (e.g. arrest, seizure or no further action);
>
> (vii) a note of any injury or damage to property resulting from it; and
>
> (viii) the officer's identification number and the name of the police station to which the officer is attached."

In Ramsey (No 2) this court agreed with the trial judge that the basis for the use of the power required a brief explanation of the trigger for the stop.

[16] The Code of Practice deals specifically with stopping and searching vehicles at paragraph 6.11.

> "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 (reference to Policy Directive 13/06 "Policing with Children and Young People"). The PSNI also carry

> information cards which they may give to children or young people who are stopped and searched."

The reference to Policing Directive 13/06 and information cards for children were inserted as a result of the consultation exercise conducted in June 2013 in which those protections in respect of children were raised by the Northern Ireland Human Rights Commission.

Policy Directive 13/06

[17] Policy Directive 13/06 is the governing policy document issued by the PSNI dealing with its engagement with children and young people. The policy draws on the aims and objectives identified at national level through the Association of Chief Police Officer's Strategy for Children and Young People. It notes that a report on the attitudes and experiences of young people in North Belfast has shown many young people have negative views of the police and this should be borne in mind when dealing with them. It advises officers that it is important to remember that in all interactions with police the vast majority of children and young people do not engage in antisocial or criminal behaviour. Police should understand and address their concerns and pursue the most appropriate way to engage for each individual.

[18] One of the objectives of the policy is to treat children and young people with dignity, understanding and respect and listen to their views on key policing issues which affect them. This is a feature of the human rights of children protected by the ECHR. The policy notes that the United Nations Convention on the Rights of the Child ("UNCRC") requires that the best interests of the child must be paramount. Children have a right to be heard and to have their opinions taken into account. Officers are required to ensure that they have regard to the welfare of children and young people while exercising their core functions in order to comply with section 53(3) of the Justice (NI) Act 2002. Attention is drawn to the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).

[19] The Policy Directive places considerable emphasis on the process of training in order to ensure that the outworkings of the policy objectives are secured in practice. As part of this process a review of training in respect of stop and search was carried out by the PSNI's Human Rights Training Adviser in 2017 following a visit by Dr John Topping from Queen's University, Belfast and the College of Policing to review the training arrangements. Dr Topping had been the author of the report dealing with perceptions of children and young people in North Belfast.

[20] The reviewer concluded that the stop and search training programme provided sufficient guidance to enable officers to appropriately justify the lawful use of the relevant stop and search powers where such encounters involved adults. Gaps, however, existed in relation to developing officers' understanding and skills in relation to potential stop and search encounters with children and young people. In light of the adverse criticism experienced by PSNI in relation to such encounters and

recognising the legal obligations under the Human Rights Act 1998 and the UNCRC it was recommended that training inputs consider the use of stop and search encounters with children.

[21] Training now specifically incorporates exercises in relation to the treatment of children demonstrating how the policy objectives can be secured. Service Policy SP1316 requires that officers must use Body Worn Video in stop and search encounters involving children, young people and vulnerable persons. A Community Impact Assessment must be completed for every search where a child, young person or vulnerable person is believed to be present. Officers are reminded that while stop and search powers do not specifically rule out searches of children of any age there are obvious public confidence issues involved in addition to the statutory and international protections.

Independent Reviewer

[22] As required by section 40 the Independent Reviewer has prepared annual reports on the operation of the 2007 Act. In each case it was confirmed that the Independent Reviewer had received full cooperation from the relevant police and government agencies including access to necessary documentation. He availed of briefings from the police and military authorities about the security situation and reviewed sample documentation in respect of the making of authorisations. In each of the reports it was concluded that the basis for the authorisations was established in terms of reasonable suspicion of endangerment. The reviewer also examined the issues of geographic extent and duration. In each case the reviewer was satisfied that the manner of operation of the terrorist groups upon which he had been briefed together with the porous nature of boundaries within Northern Ireland established the necessity for authorisations for the 14 day period throughout Northern Ireland.

[23] The reviewer also had full access to the documentation in respect of the role of the Secretary of State. That documentation included the detailed account of the intelligence picture including classified material. Each authorisation had to be based on a fresh assessment of the available information. Detailed information was provided in relation to the geographic extent and duration. The reviewer was also in a position to judge the extent to which there was challenge and was satisfied that the process was carried out to a high standard.

[24] The reports from the Independent Reviewer indicated that the principal threat in Northern Ireland came from the dissident Republicans ("DRs"). By way of example in the seventh report dealing with the period from 1 August 2013 to 31 July 2014 the Independent Reviewer noted that 81% of the stop and searches on multiple occasions were of individuals suspected to be DRs or their associates. The remaining 19% of the searches included 7% who had significant criminal association, 3% who had loyalist association, 1% were firearms related, 1% were related to interface disorder and 8% were of unspecified background.

[25] In the ninth report the reviewer set out the figures for arrest showing that less than 1% of those stopped under the section 24 power were arrested. It is clear, however, that the use of the power can also act as a preventative or disruptive measure on foot of intelligence. An example within the same report referred to the increasing risk of terrorist activity in the run-up to the centenary of the Easter rising in Dublin in 1916. Other examples through the reports refer to intelligence in respect of bombing campaigns in or about Christmas which led to increased use of the power and also acted as a preventative and disruptive measure. Overall, however, it is clear from the reports that the use of the power is on a downward trend indicating a more focused approach with the passage of time and the gaining of experience.

[26] There is no real dispute that the proper exercise of the power having regard to paragraph 8.61 of the Code was set out by the Independent Reviewer in his eighth report as follows:

> "7.9 So the power should not be exercised wholly at random but on the basis of intelligence or other factors that might indicate the presence of munitions or wireless apparatus. The power should be targeted at the threat based on informed considerations (which can include the officer's training, briefing and experience). If the power is properly exercised therefore it will be used against known DRs and others otherwise involved in munitions.
>
> 7.10 However –
>
> (a) the power to stop and search without reasonable suspicion under section 24/Schedule 3 does not give the police an unfettered discretion to stop a known DR at any time or place. There needs to be a basis for the use of the power and the purpose must always be to search for munitions or wireless apparatus – so where there is no basis a person cannot be stopped and searched simply because of his known DR profile;
>
> (b) the purpose of the search can never be to put pressure on an individual, to remind him that the police are monitoring him, to disrupt his activities or to get intelligence – the sole statutory purpose is to search for munitions et cetera. If as a result of a legitimate search these collateral benefits accrue then that does not render the use of the power unlawful;

(c) if the circumstances are such that the police officer has a reasonable suspicion that the individual is carrying munitions then the officer should exercise the JSA powers which require reasonable suspicion."

[27] In his ninth report dealing with the period from 1 August 2015 to 31 July 2016 the Independent Reviewer commented on the use of the powers near schools when children were present. He acknowledged the research suggesting that a bad encounter with police at an early age can have a damaging impact on a young person and in the context of Northern Ireland it had the potential to radicalise on sectarian grounds. He recommended that consideration should be given to keeping an internal written record of what triggered any decision to stop and search in all cases where an individual has been repeatedly stopped and searched and in all cases involving a stop and search near a school or when the individual is accompanied by a child or young person at the time he is stopped and those records should be made available to the Independent Reviewer

[28] That recommendation was not accepted by the PSNI who considered that it would not be feasible and was not required by the Code of Practice under the 2007 Act. In his 10th report the Independent Reviewer considered that this was not an issue of strict legal compliance or sufficiency. The College of Policing in England stated that a stop and search is most likely to be fair and effective if the search is justified, lawful, stands up to public scrutiny and was the most proportionate method the police officer could use to establish whether the person had a prohibited article. The Independent Reviewer considered that although it was not a legal obligation to maintain the record he recommended that it would assist in the internal monitoring and supervision of the most appropriate use of these powers and place the PSNI in a stronger position in the event of a subsequent challenger complaint. Body worn video could demonstrate that the stop and search was conducted professionally and with courtesy but would not explain what caused the person to be stopped in the first place.

[29] In his 11th report the Independent Reviewer referred to research carried out by Dr John Topping in July 2018 about the use of stop and search of children under PACE and Misuse of Drugs Act 1971. He found that the use of stop and search in Northern Ireland was at a higher rate and with poorer outcomes than the rest of the United Kingdom. It was used in a repeated and arbitrary manner to control marginal male populations. The rate was over twice the total rate in England and Wales and 50% greater than Scotland.

[30] Dr Topping noted that in the exercise of powers under PACE and the Misuse of Drugs Act the proportion of children stopped and searched was 17% of the total of 21,599 stopped. Under the 2007 Act the proportion was 3.4% being 247 children and young people out of a total of 7190 who were stopped. No children or young people were stopped under the Terrorism Act. The Independent Reviewer noted

that the trend of stops under the 2007 Act was down and recommended increased use of body worn video. That was acted upon.

[31] In February 2020 this court gave its judgment in Ramsay (No 2) explaining that the requirement to record the basis for the stop and search included the need to identify the trigger. The Independent Reviewer delivered his 12th report in April 2020 and noted that the Chief Constable had recognised that if stop and search powers were used arbitrarily and excessively in respect of minors it could have an effect on confidence in and support for the PSNI. The Independent Reviewer noted that his discussions with community representatives indicated that things generally were not good between young people and the police and there was a perception the children were often treated in the same way as adults during a stop and search. It was suggested that new police recruits were unaware of the need to treat children differently and some young people did not see normal policing in the areas in which they lived. It was also suggested that the PSNI did not recognise that they had a problem with young people.

[32] Prior to the hearing of this appeal the PSNI indicated that it was now accepted in light of the decision in Ramsey (No 2) that there was a legal duty to record the trigger for the search within the record of the search. The Blackberry device used by PSNI officers has now been reprogrammed to give officers a choice of the options contained in paragraph 8.61 of the Code. In addition to this work is ongoing to enable free text to be added to that section identifying the particular issues leading to the decision to conduct the search in respect of each person.

[33] In particular these arrangements will now require PSNI officers to identify in a summary way the reasons for deciding to conduct a search of children. The database created will be searchable as a result of which monitoring and supervision can be carried out by the relevant senior officers and the details generated will be available for inspection by the Independent Reviewer. That accords with his outstanding recommendations in respect of this area.

[34] Considerable research on the impact of stop and search powers on young people was carried out in Scotland by the Scottish Centre for Crime and Justice Research. The researchers established that in 2010 the rate of stop and search per capita in Scotland was nearly 4 times higher than the comparable rate per capita in England and Wales. There had been a marked increase in the use of stop and search between 2005 and 2010. The rate of stop and search in Strathclyde was more than double that of the Metropolitan police and had increased by more than 50% by 2012/13. The research concluded that proactive stop and search tended to impact disproportionately on younger age groups over and above the probability of offending. Young people were significantly more likely to be searched on a non-statutory basis and approximately 500 children aged 10 years and under were stopped and searched by the police. Detection rates tended to be lower among younger age groups due to the large number of searches carried out on young people.

[35] This research did not examine powers under the Terrorism Act 2000 and the powers under the 2007 Act do not apply in Scotland. Essentially the research looked at statutory powers generally requiring reasonable suspicion and so-called voluntary searches. This report was published by the University of Edinburgh in January 2014 as a result of which the Advisory Group on Stop and Search made recommendations to the Scottish government.

[36] That led to the issue of a Code of Practice on the Exercise by Constables of Powers of Stop and Search of the Person in Scotland issued on 11 January 2017. The Code was designed for stop and search generally but excluded stop and search under terrorist legislation.

[37] Chapter 7 of the Code deals with additional considerations where a child or young person is involved. Much of the chapter is concerned with advising officers about the national and international protections for children and young people which largely mirror the contents of Policy Directive PD 13/06 in this jurisdiction. There are, however, some helpful examples of things to look out for. There is an inherent power imbalance between a constable and the child or young person. Just because the young person is compliant does not mean that they are comfortable. Behaviour which arouses suspicion may be related to communication or disability and learning problems. Age-appropriate language is necessary. The well-being of the child should be the primary consideration.

Consideration

[38] The relationship between children and young people and the police has been problematic both in this jurisdiction and in other parts of the United Kingdom. There is a clear recognition by those in charge of the relevant police forces of the detrimental effect upon children and young people from encounters with police that are perceived as oppressive and disrespectful. That explains the importance of the proportionate use of powers to stop and search in the 2007 Act.

[39] The complaint in this case is that the use of the powers is not in accordance with law. There was no dispute about the legal test which was discussed by this court in Ramsey (No 2) between paragraphs [37] and [46] at Annex B to this judgment. The issue in this case is whether the law indicates with sufficient clarity the scope of any 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.

[40] The sources of law in this case are the 2007 Act, the Code of Practice and Policy Directive PD 13/06 which has been incorporated within the Code of Practice. We consider that the Independent Reviewer is also part of the legal mechanism

designed to protect against arbitrary use of the power. The publication of the Independent Reviewer's report provides in itself a basis for consideration of whether the power is being lawfully used.

[41] In addition to that obvious function the making of recommendations by the Independent Reviewer which are designed to address any perception of arbitrary use required a considered response from the PSNI. It was not until the confirmation by the appeal court of Treacy LJ's decision in Ramsey (No 2) that the Independent Reviewer and the PSNI recognised the legal duty flowing from paragraph 8.61 of the Code to record the trigger for the search in order to protect against arbitrary use of the power. Steps have now been taken by the PSNI to address that issue by reconfiguration of the Blackberry devices used by officers engaged in such searches.

[42] We consider that the absence of that information prevented appropriate monitoring and supervision of the use of these powers in respect of children and young people. This was an area of considerable sensitivity and its importance was recognised in the Code between paragraphs 5.9 and 5.14. There was well documented research evidence about the difficulties arising from encounters between police and children and young people. Monitoring and supervising to confirm the proportionate and necessary use of the powers was particularly important in relation to this cohort.

[43] We agree that the detailed guidance as to the matters to take into consideration when interacting with young people within the Scottish Code is particularly helpful to those officers engaged in utilising stop and search powers and consideration should be given to formally incorporating similar guidance to PSNI officers. To some extent this is already happening as a result of the provision of training flowing from the 2018 review. We do not accept that the absence of such guidance from the Code gives rise to any unlawfulness. Guidance cannot predict every possible scenario.

[44] In our view the protections against arbitrary use of the powers in relation to children and young people contained in the 2007 Act, the Code of Practice and Policy Directive PD 13/06 together with the role of the Independent Reviewer provide an adequate basis for the protection of children and young people from the arbitrary use of the stop and search power. We recognise, however, that until its recent acceptance of the obligations flowing from the legal regime the PSNI did not adequately give effect to all parts of the relevant protective measures.

[45] We can deal more briefly with the remaining points of appeal. The case made on Article 14 within the ambit of Article 8 was based on the proposition that children and young people were treated like adults. That assertion is plainly wrong. Policy Directive PD 13/06 was specifically incorporated into the Code of Practice to recognise and apply the specific protections in relation to children and young people flowing from international conventions and domestic law. This is a case, therefore, where different groups have been treated differently. We do not accept, therefore,

that there was any breach of the principle in Thlimmenos v Greece [2001] 31 EHRR 15 at [44].

[46] The final point of appeal relates to section 53(3) of the Justice (Northern Ireland) Act 2002 which provides:

> "53 **Aims of youth justice system**
>
> (1) The principal aim of the youth justice system is to protect the public by preventing offending by children.
>
> (2) All persons and bodies exercising functions in relation to the youth justice system must have regard to that principal aim in exercising their functions, with a view (in particular) to encouraging children to recognise the effects of crime and to take responsibility for their actions.
>
> (3) But all such persons and bodies must also—
>
> (a) have the best interests of children as a primary consideration; and
>
> (b) have regard to the welfare of children affected by the exercise of their functions (and to the general principle that any delay in dealing with children is likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development."

[47] It is common case that this provision is specifically referred to in Policy Directive PD 13/06. Paragraphs [18]-[22] above explain how the obligations set out in section 53 (3) are delivered in guidance and practice. There was no particularity beyond the complaint in respect of the failure to implement provisions similar to the Scottish Code in respect of this ground and we do not accept that it was unlawful not to rehearse what was contained within that Code.

Conclusion

[48] For the reasons given we consider that the arrangements put in place for the exercise of stop and search powers under the 2007 Act were in accordance with law but we accept that the PSNI failed to implement that scheme. The PSNI has now altered its position and we do not consider, therefore, that any declaration is required. The remaining grounds of appeal are dismissed.

Annex A

Paragraph 4A-G of Schedule 3 of the 2007 Act

"*Stopping and searching persons in specified locations*

4A.(1)A senior officer may give an authorisation under this paragraph in relation to a specified area or place if the officer—

(a) reasonably suspects (whether in relation to a particular case, a description of case or generally) that the safety of any person might be endangered by the use of munitions or wireless apparatus, and

(b) reasonably considers that—

(i) the authorisation is necessary to prevent such danger,

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

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

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

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

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

(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.

Annex B

Paragraphs 37 to 46 of Ramsey (No 2)

Recent relevant case law

[37] The Supreme Court recently considered whether legislation was in accordance with law within Article 8 (2) of the European Convention on Human Rights ("the Convention") in Re Gallagher [2019] 2 WLR 509. Lord Sumption delivered the judgment of the majority and approved the principle of legality stated in Christian Institute v Lord Advocate 2017 SC (UKSC) 29.

> "79. In order to be in accordance with the law under article 8.2 of the [Human Rights Convention], the measure must not only have some basis in domestic law which it has in the provisions of the Act of the Scottish Parliament but also be accessible to the person concerned and foreseeable as to its effects. These qualitative requirements of accessibility and foreseeability have two elements. First, a rule must be formulated with sufficient precision to enable any individual if need be with appropriate advice to regulate his or her conduct (The Sunday Times v United Kingdom, para 49; Gillan v United Kingdom, para 76). Secondly, it must be sufficiently precise to give legal protection against arbitrariness: [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 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 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: Gillan, para 77; Peruzzo v Germany, para 35.
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> 80. Recently, in R (T) v Chief Constable, Greater Manchester Police, this court has explained that the obligation to give protection against arbitrary interference requires that there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. This is an issue of the rule of law and is not a matter on which national authorities are given a margin of appreciation."

[38] There are two earlier relevant decisions of the Supreme Court delivered on the same date dealing with the nature of the safeguards which are required to enable the proportionality of the interference to be established in cases involving detention in the absence of reasonable suspicion. In Beghal v DPP [2016] AC 88 the appellant, a French national resident in the United Kingdom, went to visit her husband who was in custody in France in relation to terrorist offences. On her return she was stopped at an airport and questioned by police officers under powers conferred by section 53(1) of and Schedule 7 to the 2000 Act, which allowed nominated officers, without the need for reasonable suspicion, to stop, to question and if necessary to detain for up to nine hours, later reduced to six hours, persons passing through ports or borders in order to see whether they appeared to be someone who was or had been concerned in the commission, preparation or instigation of acts of terrorism. During a process which lasted, from her being stopped until being told that she was free to go, for one and three-quarter hours, the officers asked the appellant a number of questions regarding her family, her financial circumstances and her recent visit to France, most of which she did not answer. She was cautioned and charged with wilfully failing to comply with a duty imposed under or by virtue of Schedule 7, contrary to paragraph 18(1)(a) of that Schedule.

[39] She was convicted but appealed, inter alia, on the basis that the detention interfered with her Article 8 rights and the safeguards did not satisfy the quality of law test. The Supreme Court rejected that submission. Lords Hughes and Hodge noted that the exercise of the powers was restricted to those passing into and out of the country, that there were restrictions on the duration of questioning and the type of search, the powers could only be used for the statutory purpose by trained and accredited officers, there was a requirement to provide explanatory notice, the opportunity to consult a solicitor, the requirement for records, the availability of judicial review and the continuous supervision of the Independent Reviewer. Lords Neuberger and Dyson identified the impressive supervision by the Independent Reviewer, the prosecutions and intelligence gathered as a result of the exercise of the powers, the deterrent effect noted by the Independent Reviewer on terrorist activity at the ports and the slight interference. No equally effective but less intrusive proposal was forthcoming. Lord Kerr dissented noting that a criminal sanction including imprisonment for failing to answer questions constituted a significant interference with Article 8 rights and he considered that there was no articulated reason why a suspicion-less power was required to stop and detain.

[40] The second case was R (Roberts) v Commissioner of Police for the Metropolis [2016] 1 WLR 210. A police superintendent of the Metropolitan Police made an authorisation under section 60 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") authorising police officers to exercise the powers conferred by that section for a period of 17 hours in certain wards within a London borough. The authorisation was made because during the previous weeks there had been an escalation in gang violence in the area. The appellant, who was of African-Caribbean heritage, travelled on a bus without paying her fare and gave a

false name and address to a ticket inspector. A police officer was called and, because the appellant appeared nervous and was keeping a tight hold on her bag, the officer considered that she might have an offensive weapon inside it. She was searched by the police officer pursuant to section 60, which permitted an officer to stop and search any person for offensive weapons whether or not he had any grounds for suspecting that the person was carrying such a weapon. No offensive weapons were found. The claimant sought judicial review of the decision to stop and search her on the ground, inter alia, that section 60 of the 1994 Act was incompatible with the right to respect for private life under Article 8 of the Convention since authority given under it was arbitrary and so not "in accordance with the law".

[41] The Supreme Court unanimously rejected the appeal. The court noted that in Gillan the ECtHR was above all concerned that the breadth of the discretion given to the individual police officer, the lack of any need to show reasonable suspicion, or even subjectively to suspect anything about the person stopped and searched, and the risks of discriminatory use and of misuse against demonstrators and protesters in breach of Article 10 or 11 of the Convention. In such circumstances it was likely to be difficult if not impossible to prove that the power was properly exercised.

[42] The court noted, however, that in Colon v The Netherlands [2012] 55 EHRR SE55 Strasbourg declared inadmissible a complaint about a Dutch power under a byelaw designating most of the old centre of Amsterdam as a security risk area for a period of six months and again for a period of 12 months. That enabled the public prosecutor to order that, for a randomly selected period of 12 hours, any person within the designated area might be searched for the presence of weapons. The prosecutor had to give reasons for the order by reference to recent reports. The applicant in that case refused to submit to a search when stopped and was arrested and prosecuted. The complaint concerned the ineffectiveness of the judicial remedies available and in particular the absence of prior judicial authorisation. The ECtHR pointed out that the authorisation was subject to an objection and appeal mechanism and that the criminal courts could examine the lawfulness of the use made of it. The intended effect of helping to reduce violent crime in Amsterdam was sufficient to justify the inconvenience to the applicant.

[43] In Roberts the Supreme Court noted the limited scope of the power in section 60 itself. It noted that any abuse of the power would give rise to a judicial remedy under section 8 of the Human Rights Act 1998. It considered the codes of practice under PACE which contained similar provisions to the Code under the 2007 Act. In particular the Code stressed the importance of explaining and recording the reasons for and the monitoring of stop and search powers to guard against evidence that they were being exercised on the basis of stereotyped images or inappropriate generalisations.

[44] The Supreme Court noted that the authorisation had to be necessary rather than merely expedient, could only be for a very limited period of time, could only be reviewed once for a further limited period and could only cover a limited

geographical area. Prior briefing of those involved in the operation should be given if possible. The officer had to explain to the detained individual the power under which he was acting, the object of the search and why he was doing it. That had to be recorded in writing. The person searched was entitled to a copy of the form and the purpose of the search was limited. The court considered that in particular the obligation to give reasons both for the authorisation and for the stop should make it possible to judge whether the action was necessary for the prevention of disorder or crime.

[45] The disappointed appellant in Beghal pursued an application to the ECtHR. The court examined whether the scheme as a whole contained sufficient safeguards to protect the individual against arbitrary interference. It noted that the powers were wide in scope as a result of their permanent application at all ports and border controls but in light of the very real threat of international terrorism acknowledged that this did not run counter to the principle of legality. The discretion afforded to examining officers was broad since terrorism was widely defined but the court accepted that its jurisprudence did not suggest that the existence of reasonable suspicion is in itself necessary to avoid arbitrariness. In that case the Independent Reviewer had identified the use of these powers to secure convictions and gain intelligence. The basis for the use of the powers was centred on evidence about terrorist activity. The Independent Reviewer also supported the contention that the powers were not being abused.

[46] The ECtHR concluded, however, that the power to stop and examine persons was neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. It noted that the power could result in detention for a period of up to 9 hours during which time the person could be compelled to answer questions without any right to have a lawyer present. It also considered that the possibility of judicially reviewing the exercise of the power would be limited. Those factors together with the absence of a requirement for suspicion which the Independent Reviewer had recommended in relation to the power to detain led to its conclusion.