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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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JR1's Application [2011] NIQB 5

IN THE MATTER OF AN APPLICATION BY JR1 FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND TO INTRODUCE TASERS FOR USE BY THE POLICE SERCVICE OF NORTHERN IRELAND

AND IN A MATTER OF THE DECISION OF THE NORTHERN IRELAND POLICING BOARD TAKEN ON 2 OCTOBER 2008

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MORGAN LCJ

[1] The applicant is an eight-year-old child. She seeks an order quashing the decision of the Chief Constable to introduce tasers for use by the Police Service of Northern Ireland. She further seeks an order quashing the decision of the Northern Ireland Policing Board (the Board) that the decision to deploy tasers was an operational matter for the Chief Constable and an order quashing the decision of the Board to support the Chief Constable's proposal to introduce tasers.

[2] In addition to the written and oral submissions made on behalf of the applicant and respondents I have also had the benefit of written representations on behalf of the Equality Commission for Northern Ireland (the Commission), the Northern Ireland Commissioner for Children and Young People and the Children's Law Centre. I would like to record my appreciation for the care and skill with which all of the submissions in this case were made by the parties involved.

Tasers

[3] A taser is a device which can be used to point and fire at an individual. When the taser is pointed a red laser sight dot appears on the target prior to

the discharge of the cartridge. When the cartridge is discharged it releases a barbed dart attached to the main device by insulated wires. The dart attaches to the target and an electrical current is transmitted from the main device through the wires and into the body of the target thereby incapacitating them by reason of electric current flowing into the body causing loss of muscular control and pain. It appears that the device has an operational maximum range of 35 feet although the PSNI guidance recommends its use within 21 feet of the target.

[4] Tasers have been available to police forces in Great Britain since 2003 and are also used by An Garda Síochána. It is contended that they are a far less lethal option for deployment at incidents which merit the deployment of firearms by officers. In December 2005 Her Majesty's Inspectorate of Constabulary recommended that the PSNI examine the acquisition of tasers for this purpose.

Medical evidence

[5] Research into the medical effects of the use of tasers was conducted by Kornblum and Reddy in the United States. They analysed sixteen deaths associated with the use of tasers in Los Angeles in the period 1983 to 1987. The deceased were males within the age ranges 20 to 40 who had a history of abuse of controlled substances. The research suggested that the deaths were not associated with the use of the taser but largely were attributable to drug use. The research was criticised by Allen in 1992. It was noted that the research did not report the location of the taser wounds on the body nor was the number and duration of taser shocks reported. Allen concluded that the taser contributed to nine of the sixteen deaths. His assessment was that the taser may be generally safe in healthy adults but pre-existing heart disease, psychosis and the use of drugs may substantially increase the risk of fatality.

[6] In August 2004 the Canadian Association of Chiefs of Police commissioned the Canadian Police Research Centre to conduct a comprehensive review of the existing scientific research and data and provide a national perspective on the safety and use of tasers in police work in Canada and across the world. The report, published in August 2005, concluded that definitive research or evidence did not exist that implicated a causal relationship between the use of taser and death. Studies indicated that the risk of cardiac harm to subjects of taser was very low in healthy subjects but the research called for a greater understanding of taser effects on vulnerable subjects such as those engaged in substance abuse or mentally ill. Excited delirium was noted as a possible contributor to deaths as a result of taser use and police officers needed to be aware of the adverse effects of multiple, consecutive taser cycles on a subject. Few other injuries had been noted although there had been instances of muscular contractions, falls and ocular trauma as a result of a barb striking the eye.

[7] There is limited research on the effects of tasers on children. A 2005 study investigated the effects of neuromuscular incapacitation devices such as tasers on the hearts of pigs. The study used pigs chosen to simulate human body weights of between 30 kg and 120 kg. The study found that the safety index strongly correlated with increasing weight. In March 2005 the Joint Non-Lethal Weapons Human Effects Centre of Excellence conducted a study to assess the risk of ventricular fibrillation. It concluded that although healthy adults and larger children would not be at significant risk from ventricular fibrillation the absence of information meant that the possibility of highly sensitive children experiencing ventricular fibrillation could not be ruled out.

[8] It has also been suggested by Neil Corney, a research associate for the Omega Foundation, that the distance between the skin of a child and his or her vital organs is less than in adults. He considers that this makes it easier for the metal barbs to penetrate blood vessels and vital organs and thus increases the likelihood of causing significant damage. Despite the fact that tasers have been used for approximately 30 years no evidence of such injuries was advanced in the course of this hearing.

[9] The US National Institute of Justice published an interim report in June 2008 reviewing deaths related to tasers. The report noted that the Taser X26 was the device largely used now by law enforcement agencies. The report found there was no conclusive medical evidence within the state of current research that indicated a high risk of serious injury from the direct effects of taser. The report also concluded that there was no medical evidence to suggest that exposure to tasers produced sufficient metabolic or physiological effects to produce abnormal cardiac rhythms in normal healthy adults. It was acknowledged that many aspects of the safety of taser technology were not well known especially with respect to its effects when used on populations other than healthy adults. It concluded that the reported safety margins of taser deployment in normal healthy adults may not be applicable in small children, those with diseased hearts, the elderly, those who are pregnant and other at risk individuals. It was also noted that the medical risks of repeated continuous taser exposure were unknown.

[10] Prior to the introduction of tasers in Great Britain the Defence Science and Technology Laboratory undertook a wide ranging review of information for the Defence Scientific Advisory Council Sub-committee on the Medical Implications of Less Lethal Weapons (DOMILL). The advice concluded that the risk of life-threatening or serious injuries from the high power M26 taser appeared to be very low. It was noted that excited, intoxicated individuals and those with pre-existing heart disease could be more prone to adverse effects from the M26 taser. Although it was recommended that research should be undertaken to clarify the cardiac hazards associated with the use of the taser on individuals who could be considered to have a greater risk of

adverse effects it was not considered essential from a medical perspective that this was completed before approval was given for a trial of tasers. An operational trial commenced in April 2003 and was reviewed in 2004. It was concluded that there had been no primary or secondary injuries that could be classed as life threatening, unexpected or potentially leading to disability. A further report in July 2004 noted that officers should be aware that the risk of an adverse response may be higher in drug impaired individuals but repeated the conclusion that the risk of life-threatening or serious injuries from the M26 taser was very low.

[11] The taser with which this application is concerned is the X26 which was first manufactured in May 2003. The Defence Science and Technology Laboratory concluded in January 2005 that this taser had about half the charge per pulse of the previous taser and about one tenth of the energy per pulse. It was considered unlikely that the discharge from the taser would influence cardiac rhythmicity by a direct action on the heart and the risk of a life-threatening event was less than the low risk of such an event from the M26.

[12] The present medical position is reflected in the PSNI operational guidance which notes that pregnant women, juveniles and children, persons of low body weight, persons under the influence of certain illegal drugs, person suffering from mental illness and persons with pre-existing heart conditions are generally considered to be more vulnerable to serious medical consequences as a result of taser use. Since the effects of tasers on children and/or pregnancy have not been fully explored and the research in these areas is in its infancy all parties in this application were content to classify tasers as potentially lethal weapons rather than lethal or non-lethal weapons.

The international perspective

[13] The UN Human Rights Committee and the UN Committee against Torture have both considered the lawfulness of the use of tasers and have concluded that tasers can legitimately be used in some circumstances but that those circumstances should be strictly limited and closely regulated. The applicant contends, however, that the more recent comments of the UN Committee against Torture suggest a different approach. Article 1(1) of the United Nations Convention against Torture states:

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason

> based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 16 of the Convention deals with cruel, inhuman or degrading treatment.

> "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

[14] In its report on Portugal published in January 2008 the UN Committee against Torture made the following comments in relation to the use of taser X26 weapons.

> "The committee is deeply concerned about the recent purchase by the State party of electric `Taser X26' weapons for distribution to the Lisbon Metropolitan Command, the Direction Action Corps, the Special Operations Group and the Personal Security Corps. The Committee is concerned that the use of these weapons causes severe pain constituting a form of torture, and that in some cases it may even cause death, as recent developments have shown (Articles 1 and 16). The State party should consider relinquishing the use of electric `Taser X26' weapons, the impact of which on the physical and mental state of targeted persons would appear to violate Articles 1 and 16 of the Convention."

[15] The applicant also relies on the report of 3 October 2008 by the UN Committee on the Rights of the Child following its examination of the United Kingdom's report when it made the following comment.

> "The Committee, while welcoming the State party's abolition of the use of plastic baton rounds as a means of riot control in Northern Ireland, is concerned that they were replaced by Attenuating Energy Projectiles whose less harmful nature has

> not been proven. The Committee is also concerned at the authorisation of Taser guns for police officers in England and Wales, and in Northern Ireland as a pilot project, in both cases of which they can be used on children. The State party should treat Taser guns and Attenuating Energy Projectiles as weapons subject to the applicable rules and restrictions and put an end to the use of all harmful devices on children."

[16] The respondents place considerable emphasis on the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and rely particularly on the following passage.

> "Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons."

The Evolution of the Decision to Deploy Tasers

[17] The Chief Constable had already decided to proceed with the introduction of tasers prior to the recommendation from Her Majesty's Inspectorate of Constabulary. In June 2005 ACC Toner wrote to the Chairman of the Board indicating that it had been decided to equip a limited number of specially trained officers with tasers. In September 2005 the Chief Executive of the Board was advised that PSNI would not be introducing taser equipment nor purchasing nor training any staff until there was an opportunity to brief the Board and obtain feedback. In January 2006 the PSNI made a presentation on tasers to the Board and in a letter dated February 2006 the Chief Constable indicated that the PSNI was keen to move forward to adopt the taser technology as quickly as was reasonably possible.

[18] At a meeting of the Board on 28 March 2006 there was a discussion about the need for consultation and the issues included the real concern about the use of tasers against children. In May 2006 the Chief Constable indicated that it had always been his intention to conduct a screening of the introduction of tasers under Section 75 of the Northern Ireland Act 1998 and in September 2006 letters to commence the screening exercise were sent. By May 2007 the Board had retained Mr Starmer QC and Miss Gordon as human

rights advisers. They advised the Board that before tasers were introduced the Board should satisfy itself that the PSNI had devised clear and robust guidance, policy and training to ensure that the use of tasers complied with the Human Rights Act 1998. They criticised the capability gap identified by the PSNI and raised questions as to whether the ACPO guidance for the use of tasers was sufficiently clear to comply with Article 2 of the ECHR. Although in a letter dated 6 June 2007 the Chief Constable confirmed that an equality impact assessment would not be necessary by August 2007 it was decided to commence such an assessment in tandem with the pilot use of tasers by Special Operations Branch officers.

[19] This decision was opposed both by the Commission and the Board. Each of these bodies argued that there should be no deployment of tasers until after the completion of the Equality Impact Assessment. Despite these views the Chief Constable was authorised by the Secretary of State to purchase and use tasers pursuant to Section 45(1)(f) of the Firearms (Northern Ireland) Order 2004 for the duration of the pilot scheme. Tasers were introduced for use in Northern Ireland on a pilot basis on 25 January 2008 and at the same time the EQIA consultation process commenced. The screening process identified a need to consider in particular the impact of the introduction of tasers in respect of children and young people.

[20] The EQIA consultation process closed in April 2008. In October 2008 the Board adopted a resolution supporting in principle the Chief Constable's decision to permanently issue tasers to Specialist Operations Branch and to Armed Response Vehicles subject to completion, in respect of the latter, of a satisfactory pilot. The EQIA report was finalised in November 2008. On 30 November 2008 the Secretary of State gave his authorisation under Article 45 of the Firearms (Northern Ireland) Order 2004 for the Chief Constable to purchase and acquire up to 88 X26 tasers for police purposes on condition that they were only used by authorised and trained firearms officers. Since 1 December 2008 tasers have been deployed on a permanent basis in accordance with operational guidelines published on 3 October 2008.

The issues

[21] In his comprehensive and attractive oral argument Mr O'Donoghue QC for the applicant identified four issues which the court needs to determine. The first is the submission that the Board erred in concluding that the decision to introduce tasers was an operational decision for the Chief Constable. The applicant submits that the decision should have been taken by the Board. The second issue concerns the decision to proceed with the introduction of tasers on a pilot basis despite the fact that the EQIA had not been completed. The applicant contends that this was irrational. The third issue concerns whether the applicant is a victim for the purposes of the Human Rights Act 1998 and the fourth issue is whether the decision to

introduce tasers for use by the PSNI is contrary to Article 2 of the ECHR. The applicant accepts that if the use of tasers is compliant with Article 2 then the arguments on Article 3 must necessarily fall and that no new argument arises in relation to Article 14.

The powers of the Board

[22] The Board was established by the Police (Northern Ireland) Act 2000 (the 2000 Act). It is an independent oversight body which was recommended by the Patten Commission. Its functions are set out in Section 3 of the 2000 Act.

> "3. - (1) The Board shall secure the maintenance of the police in Northern Ireland.
>
> (2) The Board shall secure that-
>
> (a) the police,
> (b) the police support staff, and
> (c) traffic wardens appointed by the Board under section 71,
>
> are efficient and effective.
>
> (3) In carrying out its functions under subsections (1) and (2) the Board shall-
>
> (a) in accordance with the following provisions of this Act, hold the Chief Constable to account for the exercise of his functions and those of the police, the police support staff and traffic wardens;
>
> (b) monitor the performance of the police in-
>
> (ia) complying with section 31A(1); [added 2003 c.6 from 8 April 2003]
>
> (i) carrying out the general duty under section 32(1);
>
> (ii) complying with the Human Rights Act 1998;
>
> (iii) carrying out the policing plan;
>
> (c) keep itself informed as to-

(i) the workings of Part VII of the 1998 Act (police complaints and disciplinary proceedings) and trends and patterns in complaints under that Part;

(ii) the manner in which complaints from members of the public against traffic wardens are dealt with by the Chief Constable under section 71;

(iii) trends and patterns in crimes committed in Northern Ireland;

(iv) trends and patterns in recruitment to the police and the police support staff;

(v) the extent to which the membership of the police and the police support staff is representative of the community in Northern Ireland;

(d) assess-

(i) the effectiveness of measures taken to secure that the membership of the police and the police support staff is representative of that community;

(ii) the level of public satisfaction with the performance of the police and of district policing partnerships;

(iii) [in force 15 April 2002] the effectiveness of district policing partnerships in performing their functions and, in particular, of arrangements made under Part III in obtaining the views of the public about matters concerning policing and the co-operation of the public with the police in preventing crime;

(iv) the effectiveness of the code of ethics issued under section 52;

(e) make arrangements for obtaining the co-operation of the public with the police in the prevention of crime."

[23] The obligations in Section 3(1) and 3(2) to secure the maintenance of the police in Northern Ireland and to secure that the police are efficient and effective are general and unspecific duties. Of themselves they could not be the source of a power which enabled the Board to determine whether tasers should be either provided or deployed. This interpretation gains further support when one looks at the provisions of Section 3(3) which requires the Board, in carrying out its functions under subsections 3(1) and 3(2), to hold the Chief Constable to account for the exercise of his functions and those of the police in accordance with the following provisions of the Act. Section 3(3) demonstrates that the principal method by which the Board carries out its Section 3 duty is by monitoring, information gathering, assessment and engagement with the public. This section does not, therefore, support the existence of any power or duty on the part of the Board to direct whether or not tasers are provided or deployed.

[24] The applicant next seeks to rely on Section 6 of the 2000 Act.

> "6. - (1) The Board may provide and maintain buildings and equipment for police purposes.
>
> (2) The Board may enter into arrangements with any other person for the maintenance, on such terms as the Board may determine, of equipment used by that person; and maintenance of equipment carried out in pursuance of any such arrangements shall be treated for the purposes of this Act as maintenance of equipment for police purposes.
>
> (3) The powers of the Board under this section shall be exercised, on behalf of and in the name of the Board, by the Chief Constable."

[25] It is undoubtedly the case that any buildings or equipment provided for police purposes are the property of the Board. The effect of Section 6(3) is, however, to delegate the decision on the provision and maintenance of buildings and equipment for police purposes to the Chief Constable. The point is that the provision and use of equipment is, therefore, one of the functions of the Chief Constable for which the Board must hold him to account in accordance with section 3. That construction of the provision is also supported by the funding arrangements. Section 9(1) provides that the Department of Justice shall for each financial year make to the Board a grant for pension purposes and a grant for other police purposes. Section 10(4A) and 10 (5) provide that the Board must put such monies at the disposal of the Chief Constable for police purposes.

[26] The submission that the Board has a power or duty to direct the provision or deployment of tasers is also inconsistent with Section 32 which provides for the general functions of the police and Section 33 of the 2000 Act which states that the police shall be under the direction and control of the Chief Constable. As the earlier correspondence made clear the decision to obtain and use tasers is designed to assist police in the resolution of dangerous situations on the ground by reducing or preventing the need to use lethal force. If the Board had power to direct the provision and deployment of tasers that would necessarily have conflicted with the direction and control function which is reserved by the statute to the Chief Constable. By contrast there is no provision enabling the Board to direct and control the Chief Constable. The Board has the high level function of issuing a policing plan but it was not suggested that this gave the Board any direction or control function. I do not accept, therefore, that the Board has any power to give any direction in relation to the provision or deployment of tasers.

Section 75 of the Northern Ireland Act 1998

[27] Section 75(1)(a) of the Northern Ireland Act 1998 (the 1998 Act) provides that a public authority in carrying out its functions relating to Northern Ireland shall have due regard to the need to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation. The statute contains an enforcement mechanism for these obligations in Schedule 9 of the 1998 Act by imposing an obligation on the Commission to keep under review the effectiveness of the duties imposed by Section 75, offer advice to public authorities and others in connection with those duties and carry out the functions conferred on it by the provisions of the Schedule. The Schedule provides that public authorities are required to submit schemes to the Commission for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity. On the publication of such assessments the public authority is required to state the aims of the policy to which the assessment relates and give details of any consideration given by the authority to measures which might mitigate any adverse impact of that policy on the promotion of equality of opportunity and alternative policies which might better achieve the promotion of equality of opportunity.

[28] Paragraph 10 of Schedule 9 provides that if the Commission receives a complaint of failure by a public authority to comply with a scheme it shall investigate the complaint or give the complainant reasons for not investigating. Paragraph 11 deals with investigations and provides that the Commission, which may institute an investigation on its own behalf, shall send a report of the investigation to the public authority concerned, the Secretary of State and the complainant. Where the Commission considers that action on its report is not taken within a reasonable time it may refer the

matter to the Secretary of State and the Secretary of State may give directions to the public authority in respect of the matter referred.

[29] The nature of the obligation to pay due regard to equality of opportunity is both general and wide-ranging. It is to be contrasted with the provisions in relation to discrimination by public authorities in Section 76 of the 1998 Act. By virtue of Section 76(1) it is unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate or to aid or incite another person to discriminate against a person or class of person on the ground of religious or political opinion. By Section 76(2) of the 1998 Act an act which contravenes the section is actionable in Northern Ireland at the instance of any person adversely affected by it and the court may grant damages or an injunction. Sub-sections 76(5) and 76(6) also make provision for subordinate legislation which offends Section 76(1) to be declared invalid.

[30] The contrast between the particularity of these obligations and the enforcement mechanisms within the 1998 Act has given rise to debate about the extent to which the requirements of Section 75 can be enforced other than through Schedule 9. It is common case that there was no complaint to the Equality Commission about the failure of either respondent, both of whom are public authorities under the 1998 Act, to comply with Section 75 and no investigation was independently pursued by the Commission under paragraph 11 of the Schedule.

[31] This issue was considered in Peter Neill's Application [2006] NICA 5. The applicant in that case lived in Housing Executive property. The Executive had been inundated with complaints and expressions of concern about his behaviour from other tenants. In May 2005 the applicant was served with a summons to answer a complaint of anti-social behaviour under Article 3 of the Anti-Social Behaviour (Northern Ireland) Order 2004. He sought an order of mandamus directing the Secretary of State for Northern Ireland to instruct the relevant public authorities to suspend the issue of applications under the 2004 Order by reason of the failure of the Northern Ireland Office to comply with Section 75 of the 1998 Act. The essence of the application was that the legislation had a differential effect upon young people and no EQIA had been carried out to assess that impact as required by the Guidelines issued by the Commission pursuant to paragraph 4(3)(a) of Schedule 9 to the 1998 Act. A complaint had been made to the Commission which had carried out an investigation which concluded that an EQIA ought to have been carried out by the Northern Ireland Office. The court found at paragraph 28 of the judgment that the juxtaposition of Sections 75 and 76 with contrasting enforcing mechanisms for the respective obligations contained in those provisions strongly favoured the conclusion that Parliament intended that, in the main at least, the consequences of a failure to comply with Section 75 would be political, whereas the sanction of legal liability would be appropriate to breaches of the duty contained in Section 76. At paragraph 30

the court accepted that there may be occasions where a judicial review challenge to a public authority's failure to observe Section 75 would lie but declined to speculate on the circumstances where such a challenge might arise.

[32] Although there has been no further consideration of this issue in Northern Ireland a body of case law has arisen in England and Wales in relation to similar statutory schemes relating to race, sex and disability. In R (Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ. 141 Dyson LJ considered what is meant by the "due regard" duty.

> "What is *due* regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing."

[33] In R (Brown) v Secretary of State for Work and Pensions [2008] EW8C 3158 Aikens LJ considered whether there was a statutory obligation on public authorities to carry out an equality impact assessment when discharging their functions. He held that the "due regard" duty imposed at most a duty on a public authority to consider undertaking an impact assessment, along with other means of gathering information, and to consider whether it was appropriate to have one in relation to the function or policy at issue. In assessing countervailing factors the judgment of the public authority could only be attacked if unreasonable or irrational.

[34] I consider that these cases inform the way in which the court should deal with the criticism that it was irrational for the Chief Constable to proceed with a pilot on the use of tasers prior to the completion of the EQIA. This decision was taken despite advice from the Chief Commissioner of the Commission, repeated in his letter of 15 January 2008, that procurement and deployment of tasers should await the completion of the EQIA. Similarly in a letter dated 15 February 2008 the Chairman of the Board indicated its view that the PSNI should complete an equality impact assessment prior to making tasers available for deployment even as part of an operational pilot.

[35] In a letter dated 13 September 2007 Assistant Chief Constable Toner set out the rationale for the decision to proceed with a pilot scheme in relation to 12 tasers issued to Special Operations Branch while the EQIA process was continuing. ACC Toner noted that there was already available the extensive work and consultation that had gone into the equality screening process and the extensive amount of information available nationally on the use of tasers.

He also noted that Article 2 of the ECHR placed a positive obligation on the PSNI to take steps to protect life and to use the minimum degree of force possible. Tasers had been available to police services in Great Britain since 2003 and were now provided to non-firearms officers in ten police services there. An Garda Síochána was given authorisation to purchase and use tasers from 3 April 2007. PSNI were, therefore, vulnerable as the only police force in the islands which did not have tasers available for use as a less lethal option. He explained that there would be no deployment of tasers until operational procedures and guidance had been approved. Those would closely mirror the ACPO guidelines and national standards which would be forwarded to the human rights advisors retained by the Board. Their advice would be integrated into training, procedure and guidance.

[36] By letter dated 13 December 2007 the human rights advisors retained by the Board advised that they were satisfied in substance with the legal test for the use of tasers which remained unaltered in the Taser Operational Guidelines issued on 21 January 2008. In a letter dated 27 November 2007 the human rights advisors indicated that they intended to advise the Board that the PSNI draft Operational Procedure and Guidance complied with the Human Rights Act. They were satisfied that some of the examples provided by ACC Toner provided clear evidence of a capability gap and on that basis they considered that the case for need for the tasers had been met. Training took place on 21/22 January 2008 and was observed by Ms Gordon. In a letter dated 14 February 2008 Ms Gordon said that having reviewed the scenarios in training and additional notes for instructors she was largely content subject to two matters. She confirmed in a letter dated 9 April 2008 that overall she was satisfied with the police response to the two outstanding concerns.

[37] Although the applicant points to the apparent reluctance of the Chief Constable in March 2006 to engage in consultation and the subsequent determination in June 2007 not to conduct any EQIA as evidence of a failure to have due regard to the need to promote equality of opportunity it is in my view of some significance that in each case after discussion with the Board and in the latter case the Commission the Chief Constable decided both to engage in a screening exercise and to conduct an EQIA. That suggests, therefore, a preparedness to enter into dialogue and to alter one's position as a result of that dialogue. Although the Board were opposed to the pilot being conducted prior to the EQIA it is of significance that the human rights advisors retained by the Board were satisfied that the deployment and operational guidance and training were in accordance with the Human Rights Act 1998. The reasons advanced in relation to less lethal technology are clearly significant and although I accept that a reasonable decision maker might have made a different decision I am entirely satisfied that the decision to deploy tasers on a pilot basis was well within the range of rational decisions that was available to the Chief Constable. I conclude, therefore, that

the decision to deploy in the circumstances did not constitute a breach of Section 75 of the Northern Ireland Act 1998.

Is the applicant a victim?

[38] In order to maintain a claim under Section 7 of the Human Rights Act 1998 it is necessary for the applicant to establish that she is a victim. The law on this issue was set out by the Court of Appeal in Northern Ireland Commissioner for Children and Young People's Application [2009] NICA 10. Girvan LJ set out the relevant principles at paragraphs [11] and [12].

> "[11] Section 6 of the Human Rights Act makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. Section 7(1) provides that a person who claims that a public authority has acted or proposes to act in a way which is unlawful under section 6(1) may bring proceedings in the appropriate court or tribunal and may rely on Convention rights concerned in any legal proceedings. He may do so only if he is a victim of the unlawful act. Under section 7(3) a person is a victim only if he would be a victim for the purposes of article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of the relevant Act. Article 34 of the Convention states:-
>
> > 'The court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of one of the rights set forth in the Convention or the protocols thereto.'
>
> [12] In Klass v Germany [1978] 2 EHRR 214 the victim requirement was extensively discussed. The court stated:-
>
> > 'Article 34 requires that an individual applicant should claim to have been actually affected by the violation he alleges. Article 34 does not institute for individuals a kind of actio popularis for the interpretation of the Convention; it does not permit individuals to complain against a law in abstracto simply

> because they feel that it contravenes the Convention. In principle it does not suffice an individual applicant to claim that the mere existence of a law violates his rights under the Convention: it is necessary to show that the law should have been applied to his detriment. Nevertheless as both the Government and the Commission pointed out, a law may by itself violate the rights of an individual if the individual is directly affected by the law in the absence of specific measures of implementation.'
>
> This last sentence introduces a degree of flexibility into the concept of victimhood but it still requires that a claimant must show at least the potential for *his* rights to be affected by the impugned law. A relevant example can be found in Campbell and Cosans v UK [1982] 4 EHRR 293 in which a pupil was able to show that he was a victim when he complained that corporal punishment was inhuman treatment simply because his attendance at the school put him at risk of being exposed to inhuman treatment. What emerges from the Strasbourg case law is that the test of standing under the Convention does not permit a public interest challenge or *actio popularis* nor does the making of a complaint entitle the Court to review the law in the abstract. It has consistently emphasised in its decisions that it will confine itself to the particular facts of concrete cases. "

[39] There are a number of particular circumstances which the applicant advances as being relevant to this issue. The first is that she is the granddaughter of a lady who was killed in disputed circumstances in July 1981 by a plastic bullet fired by police. It is said that the child fears a similar fate might befall her mother. Neither of these factors has any bearing on the present application. The unhappy events of 1981 and the consequences thereof are entirely divorced from the deployment of tasers. There is no suggestion that the effects or operational guidance in relation to the use of these weapons are similar. Plastic bullets were designed to be used in situations of public disorder. The operational guidance in relation to tasers indicates that they should never be used in such circumstances.

[40] Next it is suggested that the child lives in an area of west Belfast where there is a notorious feud between two families. The feud gives rise from time

to time to incidents of violence and disorder on nearby streets. Insofar as this raises issues in relation to public disorder the fact that the taser is not suitable for use in those circumstances argues against any direct effect so far as the child is concerned. In any event there is no material before the court to indicate any circumstance in which this child was or might be in a situation which might lead to the deployment of a taser in her vicinity. I consider that on the facts of this case this applicant is in no different position to any other child in Northern Ireland.

[41] Even in those circumstances Mr O'Donoghue submitted that the applicant was directly affected by the implementation of the deployment decision by virtue of the fact that the applicant was in a group which was noted to be vulnerable in relation to the use of tasers. I accept that a person can be a victim in circumstances where he is required either to modify his conduct or risk being prosecuted or if he is a member of a class of people who risk being directly affected by the decision (see Burden v United Kingdom [2008] 47 EHRR 38). Campbell and Cosans v UK was an example of the latter kind because the attendance at a school where corporal punishment might have been used put the applicants at real risk. In Klass the surveillance system applied to any piece of mail and in any event victim status was necessary to make the right effective. That is not the case here. In this case no factual scenario was put forward which raised any material risk that this applicant would be exposed to the possible use of a taser. I do not accept that it can be said that this applicant was directly affected by the decision to deploy and authorise the use of tasers either on a pilot basis or permanently and I conclude, therefore, that she is not a victim for the purpose of the Human Rights Act 1998.

Article 2 of the Convention

[42] Although that means that the applicant cannot succeed in her claim under section 7 of the Human Rights Act I consider that I should express my view in relation to the substance of the argument on that point. Article 2 of the ECHR protects the right to life and is one of the fundamental rights protected by the Convention.

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

It applies in any circumstance in which the state deprives the individual of life irrespective of whether the force used is described as lethal, non-lethal or potentially lethal. In McCann v UK (1995) EHRR 97 the European Court stated that Article 2(2) did not primarily define instances where it was permitted intentionally to kill but described situations where it was permitted to use force which may result, as an unintended outcome, in the deprivation of life. The use of force in such circumstances must be absolutely necessary.

[43] The Court went on to explain the nature of this test in paragraph 149.

> "149. In this respect the use of the term "absolutely necessary" in Article 2 para. 2 (art. 2-2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2) of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2"

[44] The test adopted by the Chief Constable is set out in the Taser Operational Guidelines.

> "The use of Taser will be justified where the officer honestly and reasonably believes that it is necessary in order to prevent a risk of death or serious injury."

The Guidelines indicate that the test is set at a slightly lower threshold than that for the use of lethal force which requires an honest belief that such use is absolutely necessary to prevent death or serious injury. It is intended to cover a situation where an officer honestly believes that the situation is in immediate danger of escalating to a point where the use of lethal force may be required.

[45] The Human Rights Advisers retained by the Board recommended that the belief required of the officer should be that the use of Taser was immediately necessary in order to prevent a real risk of death or serious injury. The underlined qualifications were rejected in correspondence from ACC Toner on the basis that they might inappropriately hinder the use by officers of a less lethal option. The Chief Constable relies upon the fact that these Guidelines sit within a framework of law which governs the use of force and which by virtue of the Human Rights Act 1998 must be interpreted in accordance with the Convention.

[46] The extent to which it is necessary to reflect the terminology of the Convention in domestic law was considered by the Court in McCann v UK. In that case Article 2 of the Gibraltar Constitution was similar to Article 2 ECHR except that the standard of justification for the use of force which resulted in the deprivation of life was that of "reasonably justifiable". Although the Convention standard appeared to be stricter than the domestic standard the Court did not find a violation.

> "153. The Court recalls that the Convention does not oblige Contracting Parties to incorporate its provisions into national law (see, inter alia, the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, p. 47, para. 84, and The Holy Monasteries v. Greece judgment of 9 December 1994, Series A no. 301-A, p. 39, para. 90). Furthermore, it is not the role of the Convention institutions to examine in abstracto the compatibility of national legislative or constitutional provisions with the requirements of the Convention (see, for example, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 18, para. 33).
>
> 154. Bearing the above in mind, it is noted that Article 2 of the Gibraltar Constitution (see paragraph 133 above) is similar to Article 2 (art. 2) of the Convention with the exception that the standard of justification for the use of force which results in the deprivation of life is that of "reasonably justifiable" as opposed to "absolutely necessary" in paragraph 2 of Article 2 (art. 2-2). While the Convention standard appears on its face to be stricter than the relevant national standard, it has been submitted by the Government that, having regard to the manner in which the standard is interpreted and applied by the national courts (see paragraphs 134-35 above), there is

> no significant difference in substance between the two concepts.
>
> 155. The Court's view, whatever the validity of this submission, the difference between the two standards is not sufficiently great that a violation of Article 2 para. 1 (art. 2-1) could be found on this ground alone."

[47] The Human Rights Advisers retained by the Board accepted that the test proposed by the Chief Constable complied with the Convention and in my view they were right to do so. The Taser Operational Guidance issued to officers reminded them of the existing legal statutory framework and the international obligations on the use of firearms as well as Article 3 of the UNCRC which requires the best interests of the child to be the primary consideration for public authorities.

[48] Although the applicant placed considerable emphasis on the recent views of the UN Committee against Torture and the UN Committee on the Rights of the Child I consider that these remarks have to be read within the framework of Article 2 ECHR which requires the state to take steps to preserve life. The taser is a means of using less lethal force for that purpose. There is certainly international evidence of the device being used on a much more extensive and frequent basis but criticisms of such use cannot prevent use that would otherwise be lawful. I do not consider that the test propounded can be said on its own to contravene the Convention. Although this issue does not involve the consideration of a legislative or constitutional provision the passage in McCann at paragraph 46 above emphasises the need to bear in mind the extensive legislative framework within which provisions such as these are found. It is argued that there is a lack of specific guidance on the operational approach to incidents involving children although it is accepted that there is specific reference to the need to ensure that training should minimise the potential for adverse differential impacts. There is also, however, the need to ensure compliance with section 3 of the Criminal Law Act (Northern Ireland) 1967 as well as other relevant statutory and common law requirements. These provide a substantial framework of law governing the Guidelines and taser use.

[49] It follows from the fact that the use of the taser is designed to reduce or prevent recourse to the use of lethal force that it must be demonstrated that there must be circumstances which either have occurred or may occur where taser use would be appropriate. Although some of the past scenarios presented to the Board under cover of a letter dated 4 October 2007 may or may not have been appropriate for taser use some at least were. Perhaps the most obvious was an incident where a male carrying a machete and knife threatened police smashing their windscreen. Officers drew their personal

issue weapons but he continued his attack on police vehicles. In order to deal with the incident an officer drove his landrover at the male knocking him down. Fortunately no injuries requiring hospital treatment were sustained. In my view this incident is the clearest example of the capability gap which tasers can satisfy.

Conclusion

[50] For the reason set out above I consider that the Board had no authority to prevent the Chief Constable from procuring and deploying tasers and that it was not in breach of any duty imposed by the Police (Northern Ireland) Act 2000. I consider that the decision to do so by the Chief Constable did not constitute a breach of any duty imposed by section 75 of the Northern Ireland Act 1998. I find that the applicant is not a victim for the purposes of section 7 of the Human Rights Act 1998 and in any event I do not consider that the procurement and deployment of tasers by the Chief Constable constituted a violation of Article 2 of the Convention.

[51] For those reasons I dismiss the application for judicial review.