Neutral Citation No: [2018] NIQB 83	*Ref:* TRE10646
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 01/11/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY STEPHEN RAMSEY FOR JUDICIAL REVIEW ("No 2")

_____

TREACY LJ

Introduction

[1] By this judicial review the applicant challenges the decisions to stop and search him pursuant to section 24 and Schedule 3 paragraph 4(1) of the Justice and Security Act (Northern Ireland) 2007 ("JSA") as being unlawful and a breach of Article 8 of the ECHR. Relatedly he seeks a declaration that the impugned decisions are incompatible with Article 8.

[2] The facts underpinning the challenge have by agreement been limited to 7 incidents involving the exercise of the impugned power against the applicant between May 2013 and August 2013 which reflects the date on which the Code of Practice made pursuant to section 34 JSA was enacted.

[3] In my earlier judgment I dismissed the application for judicial review. The matter was appealed to the Court of Appeal. Arguments raised before the Court of Appeal included matters not raised before or adjudicated upon by me. The Court of Appeal therefore directed an amended Order 53 Statement and remitted the matter back to consider the new grounds of challenge.

[4] Subsequent to the remittal the Order 53 Statement was again amended. At this stage the court is only concerned with the new grounds of challenge contained in the amended Order 53 Statement.

[5] Before I summarise the new grounds of challenge with which the court now has to deal I note that there have been, since my judgment, further detailed annual

reports from the Independent Reviewers which have been extensively canvassed in argument. Whilst the court, where appropriate, has had regard to the contents of the up-to-date reports I do not propose, for reasons of brevity, to recite them in any great detail save were necessary. The reports in broad terms provide little, if any, assistance to the applicant.

[6] In paragraph 53 of my earlier judgment I referenced the decision of the English Court of Appeal in *Roberts*. The Supreme Court has now given judgment in that case at [2015] UKSC 79. The respondent submits that the decision of the Supreme Court points towards a dismissal of the new and extant grounds of challenge to which I now turn.

Amended grounds of challenge

[7] The additional relief sought by the applicant includes a declaration that the impugned power is not subject to adequate legal safeguards to prevent it being used arbitrarily, and that in the absence of such safeguards its use is in breach of Article 8; a declaration that the Code of Practice under the JSA does not satisfy the quality of law test, as required by Article 8(2) and does not provide adequate safeguards to prevent the power being used arbitrarily and in breach of Article 8. Pursuant to leave of this court the applicant now also seeks a declaration that the PSNI's policy/practice whereby it directs police officers that they do not need to record any basis/grounds for stopping and searching an individual pursuant to the impugned power, other than the fact that an authorisation is in existence, amounts to a breach of the requirements of the Code of Practice at paragraphs 8.61 and 8.75(v) and Article 8. Paragraph 3(b)(i)–(viii) of the amended grounds particularise the general complaint that the impugned power fails the quality of law test. The particulars in support of this general claim are:

(i) The authorisation regime does not act as an effective limitation upon the use of the power in the circumstances set out at 3(b)(i).

(ii) There is no effective means of challenging the grant of an authorisation.

(iii) The authorisation regime lacks transparency in that the public are not informed of the existence of an authorisation regime despite its being a continuous force.

(iv) The Code of Practice imposes insufficient safeguards to ensure the impugned power is not exercised arbitrarily in particular because it makes no express provision for monitoring the use of the power on the basis of perceived religious or political opinion of individuals and in consequence there is no practical or effective means of determining differential impact between religious or political groups, nor any practical or effective means of determining whether individual officers have engaged in discriminatory conduct.

(v) In the alternative the failure to monitor the use of the power on the basis of perceived religious or political opinion is in breach of paragraphs 5.9, 5.10 and 5.11 of the Code of Practice.

(vi) The Code of Practice imposes insufficient control on the conduct of individual officer's use of the power in particular because it does not put in place any mechanism whereby supervising officers can effectively supervise the use of the power by officers under their supervision.

(vii) There is no effective means of challenging an individual use of the power. The Independent Reviewer does not provide an adequate safeguard because his powers are confined to reporting on the general operation of the statutory provisions.

(viii) The Order 53 Statement complains that the searches of the applicant were also Article 8 incompatible because the PSNI had failed to develop a mechanism which enables supervising officers to undertake reliable examinations of the records of the use of stop and search powers according to the name of the officer and the name of the person searched. Further it is claimed that in breach of paragraph 8.61 and 8.75 of the Code of Practice police failed to identify and record the basis for persons being stopped.

[8] It is important to note that the amended grounds of challenge in 3(b)(i)-(viii) and (c)(ii) are in support of the applicant's claim that the lack of effective safeguards means the impugned power fails the quality of law test and is not in accordance with law, in breach of Article 8. Paragraph 3(f) of the challenge claims that the PSNI are as a matter of policy and practice refusing to record the basis for the use of the power in breach of the Code of Practice and in breach of Article 8.

[9] In short the additional grounds embrace a challenge to the contents and adequacy of the Code of Practice specifically:

(i) the authorisation regime;

(ii) the recording requirements; and

(iii) the monitoring requirements.

None of these points were raised before me and have not been determined in my earlier judgment. The relevant statutory framework has already been set out in my earlier judgment and there is no need to repeat it here. The criticisms detailed in the amended Order 53 Statement and developed in argument regarding the alleged ineffectiveness of the safeguards in my view leave out of account key features of the impugned provisions when read together with the Code of Practice and a range of

other safeguards. The submissions ignore the "other constraints" to which the impugned power is subject. As I said at paragraph 53 of my earlier judgment:

> "The basis of the Court of Appeal finding in Fox was that a properly formulated *code* "qualifying and guiding" the exercise of the power when read together with the relevant section "could provide a legal framework that would satisfy the "quality of law" test" [see para 46-50 and 59]. In the present case the Code does purport to qualify and guide the exercise of the impugned power. On its face the Code seeks to ensure proportionality in the exercise of the impugned power and specifies the circumstances which justify its exercise [see the detailed provisions of section 8 of the Code including paras 8.49-8.58 entitled "Briefing of officers; 8.59-8.68 entitled "Conduct of searches" which deals, inter alia, with the basis for searches; paras 8.69-8.72 entitled "Steps to be taken prior to a search" and 8.73-8.78 entitled "Stopping and searching persons: Records"]. In light of the Court of Appeal finding this Code would appear to plug the gap identified by the court in that case. In addition there is also the new authorisation regime which offers additional safeguards including some oversight by the Secretary of State, the oversight by the Independent Reviewer and scrutiny by the Policing Board. I am satisfied that there are now sufficient safeguards against arbitrariness to render the power compatible with the Convention. I reject the submission that the powers are disproportionate. The impugned power, underscored by the Code of Practice and within the framework of the authorisation regime, does not fall into the category of arbitrariness. (See to similar effect the judgment of the Court of Appeal in *R (Roberts) v Commissioner of Police of the Metropolis & Ors* [2014] EWCA Civ 69 at paragraph 26)."

[10] The 9th report of the Independent Reviewer on the JSA reports covers the period from 1 August 2015 to 31 July 2016. So far as the authorisation regime is concerned he records at paragraph 2.7 of the Executive Summary that the authorisations permitting the use of stop and search without reasonable suspicion were examined in detail. He noted that the process is painstaking but completed thoroughly and properly on each occasion. At paragraph 9.1 he identified the four main criticisms of the authorisation process which echo those of the applicant in this judicial review. He did however repeat one recommendation which he had previously made and that was that the JSA should be amended to allow the authorisation to remain in place for at least 3 months instead of 14 days provided the

security situation in Northern Ireland remains as it is and sufficient safeguards remained in place. At paragraph 9.3 he repeated his rejection of the criticisms of the process. At paragraph 9.4 he provides an analysis of the authorisation process which involved him studying nearly half of the authorisations made in the relevant reporting period and expressed himself satisfied that the work was carried out properly and thoroughly on each occasion.

Code of Practice

[11] The operation of the amended provisions of the JSA are supplemented by the Code of Practice issued under section 34(4) of the Act. The absence of a Code, the defect identified by the Court of Appeal in Fox, was purportedly remedied by both Houses of Parliament. They debated the Code, approved it and promulgated it on 15 May 2013. Prior to its promulgation the Code had been issued in draft form for consultation in December 2012 and ultimately came into operation on 15 May 2013.

[12] Before I turn to consider the criticisms that are levelled at the Code of Practice I want to deal firstly with the applicant's arguments in relation to the authorisation regime summarised at Ground 3(b) of the Order 53 Statement. The alleged failings in the authorisation regime are:

(i) The test for the grant of an authorisation is insufficiently robust.

(ii) The Executive oversight of the authorisation is insufficiently robust.

(iii) There is no independent oversight of the process.

(iv) The consequence is that authorisations have been in force whole of Northern Ireland on a continuous basis since the legislation came into force (save for a period of one week following the Court of Appeal's decision in Canning).

(v) There is no effective means of challenging the grant of an authorisation.

(vi) The authorisation regime lacks transparency.

[13] The authorisation regime is independently reviewed on an annual basis and it is subject to detailed and careful scrutiny by the Independent Reviewer. The criticisms of the authorisation regime at the heart of this challenge reflect the four principal criticisms of the process that were also considered by the Independent Reviewer in Chapter 11 of his 8th Report. He concluded that the four main criticisms of that process were without foundation. Those criticisms were that:

(a) The authorisations are simply done on a "rolling basis".

(b) They cover the whole of Northern Ireland and should be limited to just those parts of Northern Ireland where a risk of harm caused by the use of munitions is highest.

(c) The authorisation process is a rubber stamp exercise.

(d) There is no independent element in the process – decision is made by a senior PSNI officer and confirmed by the Secretary of State.

[14] At paragraph 9.3 of his 9th Report he notes that nothing has happened during the latest reporting period to cause the Independent Reviewer to change his rejection of those criticisms of the process.

The test for the grant of an authorisation is insufficiently robust

[15] This criticism, in my view, overlooks or fails to give due weight to key elements of the statutory scheme. Under paragraph 4(a)(i) of Schedule 3 prior authorisation can only be given by an officer of the PSNI of at least the rank of Assistant Chief Constable ("ACC"). The ACC (or above) can only grant an authorisation in relation to a specified area or place if he reasonably suspects that the safety of any person might be endangered by the use of munitions or wireless apparatus *and* reasonably considers that the authorisation is necessary to prevent such danger, the specified area or place is no greater than is necessary to prevent such danger and the duration of the authorisation is no longer than is necessary to prevent such danger. The effect of the prior authorisation is that it authorises any constable to stop a person in the specified area or place and to search that person. A constable may only lawfully exercise the discretionary power conferred by an authorisation for the sole purpose of ascertaining whether the person has munitions unlawfully with that person or wireless apparatus. The power may be exercised whether or not the constable reasonably suspects that there are such munitions or wireless apparatus. 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 jacket, a jacket or gloves. Where a constable proposes to search a person by virtue of an authorisation he 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. An ACC (or above) who gives an authorisation orally must confirm it in writing as soon as reasonably practicable. It can therefore be seen that the amended statutory scheme has the following key features:

(i) It introduces a prior authorisation scheme which affords a discretion to an officer of ACC rank or above.

(ii) The authorisation discretion requires that the ACC reasonably suspects that the safety of any person may be endangered by the use of munitions or wireless apparatus.

(iii) The ACC must also reasonably consider that the authorisation is necessary to prevent the danger to the safety of a person and that the scope and duration is no greater than is necessary.

(iv) When an authorisation is in place a constable's power to stop and search is specifically limited to the purpose of ascertaining whether the person has munitions or wireless apparatus in their possession.

(v) The search can be conducted whether or not the constable has a reasonable suspicion that there are such munitions or apparatus.

(vi) An authorisation ceases to have effect 48 hours after it has been issued by the ACC (or above) unless confirmed by the Secretary of State within that period.

(vii) An authorisation confirmed by the Secretary of State will have a maximum duration of 14 days.

(viii) The Secretary of State may also cancel the authorisation given by an ACC or amend the duration or geographical extent of the authorisation.

[16] The prior authorisation is made by an officer of ACC rank or above. In coming to that decision he also has the assistance of the PSNI Human Rights legal adviser. It is then the subject of consideration and scrutiny by NIO officials and lawyers before being presented for consideration to the Secretary of State who can confirm, cancel or amend the authorisation. There is a statutory requirement for an independent external audit of that process which has repeatedly found it to be robust.

[17] At paragraph 192 of his 6th Report the Independent Reviewer stated as follows:

> "The new authorisation power under Schedule 3 is therefore tightly limited – and rightly so – to the dangers represented by munitions or wireless apparatus. The range of activity to be prevented is much narrower than the corresponding provisions in section 47A (TACT) 2000, is closely related to the activities of residual terrorist groups in Northern Ireland, with their customary reliance on munitions (which means weapons and explosives) and wireless apparatus."

[18] The impugned power is unique to Northern Ireland and is designed to deal with the specific nature of the threat from residual terrorist groups in Northern Ireland.

Insufficiently robust Executive oversight of the authorisation

[19] Once an authorisation is given pursuant to the impugned power it must be passed to the Secretary of State as soon as is reasonably practicable. The Code of Practice at paragraphs 8.30-8.41 set out in detail the role of the Secretary of State. Paragraphs 8.32-8.37 demonstrates the level of information that must be provided to the Secretary of State:

> "8.32 **Intelligence Picture**: The authorising officer should provide a detailed account of the intelligence which has given rise to reasonable suspicion that the safety of any person may be endangered by munitions or wireless apparatus. This should include classified material where it exists.
>
> 8.33 If an authorisation is one which covers a similar geographical area to one which immediately preceded it, an authorisation must be based on a fresh assessment of the available information. If previous information remains relevant there should be a confirmation that it has been reassessed and is considered relevant and why.
>
> 8.34 **Geographical Extent**: Detailed information should be provided to identify the geographical area(s) or place(s) covered by the authorisation and why it is no wider than is necessary. If helpful in describing the area covered by the authorisation, maps may be included.
>
> 8.35 **Duration**: The maximum period for an authorisation is 14 days, and authorisations should not be made for the maximum period unless it is necessary to do so, on the basis of the intelligence about the particular threat. Justification should be provided for the length of an authorisation, setting out why that time period has been sought. If an authorisation is one which is similar to another immediately preceding it, information should be provided as to why a new authorisation is justified (for example, why the period of the initial authorisation was not sufficient). However, this is not necessary if an authorisation is similar in duration and extent to a preceding authorisation, but relates to different threat information.

> 8.36 The duration and the geographical extent should not be greater than is necessary or justified to prevent the endangerment of the public which rendered the authorisation necessary.
>
> 8.37 **Briefing Provided**: Information should be provided which demonstrates that all officers involved in exercising stop and search powers receive appropriate briefing on the use of the powers, including the provisions of this Code and the basis for the use of the powers."

[20] The process of the authorisation regime at NIO level includes scrutiny from legal advisers and advice from officials in relation to the authorisation and that the authorisation will not proceed to the Secretary of State until all questions and clarifications sought have been answered or provided.

[21] At paragraph 11.3 of his 8th Report the Independent Reviewer stated:

> "The authorisation form (Annex F) when populated with the required detailed information and intelligence is a substantial and highly classified document. I have sampled about 20 of the authorisations made during this period and I am satisfied that the process has been thorough and that there was sufficient material before the senior police officer and the Secretary of State to take their decisions."

[22] Before going on to consider the remaining criticisms that the applicant makes against the prior authorisation process I make it clear that I do not accept that the applicant has established that the test for the grant of the prior authorisation or its Executive oversight is insufficiently robust. Having regard to the terms of the impugned provision, the detailed provisions of the statutory Code of Practice, and the evidence and material before the court as to how the process operates in practice these criticisms are not made out.

Lack of independent oversight of the authorisation process

[23] It is incorrect to contend that there is no independent oversight of the authorisation process. It is self-evident that there is and that it takes place on an annual basis. Whilst the Independent Reviewer has no role to play in the actual authorisation process itself and the Policing Board is confined to retrospective analysis it is clear from the terms of the various annual reports that the authorisation process has been subject to annual and ongoing independent oversight. The authorisations have been examined in detail by the Independent Reviewer. He has

concluded that the process is painstaking, completed thoroughly and properly on each occasion.

[24] In its 6th Report the Independent Reviewer stated as follows:

> "257. Although authorisation procedures of this kind are not new in the UK domestic law (the previous section 44 of the Terrorism Act was most similar in practice and intent) the requirement in Northern Ireland to ensure meticulous attention to detail is stringent, so as to reflect the many checks and balances in the system. …
>
> **Making the case for an authorisation**
>
> 259. This action is at the heart of the authorisation process, as I described in paragraphs 227-230 of the 5th Report. To summarise what I say at the end, the authorisation process must fulfil the specified criteria and meet specified standards. It must be justified for the geographical area to which it applies, and should include references to the security incidents which have occurred recently and, more important, the intelligence which prompts the need for the power over the succeeding 14 days.
>
> 260. It also includes references to the level of threat (which has remained unchanged as classed at SEVERE throughout the reporting year), the number of terrorist attacks in the year to date, the underlying methods of the terrorists and their attack planning, and the targeting of police officers.
>
> 261. I have no doubts of any kind about the strength of the intelligence picture which has driven the authorisations this year. What is compelling is the weight of the material and the direct links made with a known intent and capability of terrorist groups operating in Northern Ireland. Every authorisation has been supported with detailed and specific intelligence traces about the kind of terrorist attacks being planned. From my detailed comparison of each intelligence case with its immediate predecessor I am satisfied that both new intelligence and a fresh assessment of the intelligence had been provided in every new application."

[25] At paragraph 288 the Independent Reviewer records that he reviewed all the authorisations in the period 16 August 2012 – 6 August 2013 stating that:

> "In my judgment the process has been carried out to a high standard throughout the year. It is exhaustive and reflects the requirements in the statutes, … senior police officers have shown diligence and care. This has been mirrored within the Northern Ireland Office both by officials and by the Secretary of State and the Minister of State."

[26] At paragraphs 682-684 he stated:

> "682. My analysis of every one of the authorisations under the Justice and Security Act this year has satisfied me that each one has met the statutory tests and has furthermore been justified on its merits.
>
> 683. All concerned in the PSNI and the Northern Ireland Office have been conspicuously careful to ensure that the detailed requirements in the authorisation form are worked through on every occasion, for example in the refreshing of the intelligence supporting each application, and in the involvement of District commanders. Legal advice, both in PSNI and the NIO, has infused the process at every stage.
>
> 684. The culture in which these authorisations are being prepared rightly reflects the need to question assumptions and treat each application as if it were the first of its kind. Challenge is built into the process at several stages as the authorisation progresses within the PSNI, from the PSNI to NIO officials and from NIO officials to NIO Ministers."

[27] The Northern Ireland Policing Board ("the Board") in October 2013 published its "Human Rights Thematic Review on the use of police stop and search and question under the Terrorism Act 2000 and the Justice and Security (NI) Act 2007". The report extensively analyses the authorisation regime and responds to criticisms raised in a report by the Committee on the Administration of Justice. In its report at page 72 the Board said as follows:

> "Having considered the issues carefully, having inspected a number of authorisations and having spoken to relevant officers and officials it was apparent to the Policing Board's Human Rights adviser that

> authorisations are considered so as to limit, rather than widen, their extent and that the PSNI are conscious of the need to justify each and every authorisation on the basis of intelligence. The authorisations are detailed, critical and well-reasoned. In the authorisations viewed by the Human Rights adviser each contained a fresh analysis (as they must) of the necessity for the use of the powers. Furthermore, each and every authorisation is carefully considered by the Secretary of State and her officials before being confirmed, cancelled or varied."

[28] In its conclusions at page 112 the Board's conclusions were:

> "What became clear during the course of this thematic review was that the PSNI have gone to enormous efforts to put in place a rigorous regime that seeks to guarantee that the powers are always used in accordance with the law and appropriately. The PSNI has taken its obligations very seriously and is acutely aware of the potential for inappropriate exercise of the powers to undermine the progress that has been made in police/community relations."

[29] In his 7th Report the Independent Reviewer again stated that he had scrutinised a large number of the authorisations and concluded that the process is thorough and undertaken with great care - a conclusion that is made in successive reports. In his 7th Report he observed the training provided to police officers who may be required to exercise the impugned power noting at paragraph 5.6 that the standard of training is very high. That it covers in detail the legal powers available to the police and the procedure and etiquette that must be followed on each occasion. At paragraph 7.7 of the same report he expressed himself satisfied that the PSNI used the impugned powers on an intelligence led basis and that the use of stop and search powers may be the result of specific briefing about an individual or intelligence about a specific threat within a geographic area in a given timeframe. He said that the power is used on the basis of threat and not in an arbitrary way or for no legitimate purpose.

[30] The applicant in this case argues that the low arrest rate is indicative of a lack of proportionality. This argument is addressed by the Independent Reviewer who stated at paragraph 7.18:

> "To test the need and validity for such a power by the number of arrests would be to misunderstand the purpose of the power. It is not intended primarily as a method of triggering the prosecution process – though clearly on occasions it has that effect … The bar is

> therefore a preventative device to stop being killed or injured by explosives."

I would add that if the power was used in an arbitrary way for no legitimate purpose that would not be a lawful exercise of the discretionary power and would give rise to a claim in damages and expose the relevant police officer(s) to disciplinary proceedings. At paragraph 9.12 the Independent Reviewer addressed the geographic extent of the authorisation throughout the jurisdiction of Northern Ireland stating:

> "I agree with my predecessor's assessment of the geographic extension of authorisation. Sadly, there has always been sufficient material to justify this Northern Ireland wide geographic application during the period covered by this review."

In relation to the rolling nature of the authorisations he stated at paragraph 9.13:

> "Some concern has been expressed about the fact that, since POFA 2012 came into force, authorisations under the JSA have been in place continually … however, it has to be remembered that the security threat in Northern Ireland has been at "SEVERE" since 2009. There has been a constant residual DR terrorist threat from the use of munitions and wireless telegraphy apparatus that shows no signs of diminishing in the immediate future … It is clear that there is rigorous security in relation to each new authorisation. Each one is based on the latest intelligence in relation to all 8 police districts and the material set out in each one is different. It is a very time consuming and laborious process which is undertaken diligently by all concerned – not least because the PSNI understand that these powers are crucial to keeping people safe and they have every incentive to ensure that the process is undertaken thoroughly and in a professional way on each separate occasion. It is clear that there is rigorous scrutiny in relation to each new authorisation."

[31] He concluded that it was "very important" that the powers in the JSA should be retained, that there were appropriate safeguards in place in the JSA/Code of Practice and there was appropriate redress available for those who wished to complain about the use of the powers.

[32] I agree with the respondent that the materials before the court demonstrate that the impugned powers have been subject to detailed independent scrutiny for

many years. On each occasion the Independent Reviewer has addressed the very complaints that the applicant has made in this judicial review and has recommended the retention of the impugned powers.

Continuous authorisations for the whole of Northern Ireland

[33] The need for continuous authorisations and the geographic extent of those authorisations to cover the whole of Northern Ireland addressed in some of the extracts from the reports which I have quoted earlier. The authorisations have been subjected to ongoing and extensive scrutiny. The need for these authorisations throughout Northern Ireland on a continuous basis is merely reflective of the reality that a severe risk of terrorist attack throughout Northern Ireland has existed on an ongoing basis. It is the ongoing activities of residual terrorist groups in Northern Ireland, with their customary reliance on munitions (weapons and explosives) and wireless apparatus and the threat that they pose explains and underpins the geographic reach on a continuous basis since the inception of the authorisation regime. The criticism of that state of affairs by this applicant has been specifically considered in successive reports from the Independent Reviewer and as earlier pointed out he has rejected that criticism and the independent overview was satisfied that authorisations were required throughout the entirety of the periods the subject of the annual reports from the Independent Reviewer. It is clear that extensive work is required by the PSNI to prepare for each authorisation as each is made and has to be made on the basis of fresh intelligence and a fresh assessment of intelligence. In his 8th Report the Independent Reviewer stated as follows:

> "11.5 … it has been said that the fortnightly authorisation process is a rubber stamp exercise. A number of senior people in both the PSNI and NIO scrutinize the papers which go before the ACC and Secretary of State all of whom are acutely aware of the risk of legal challenge if this process is not carried out properly. I have looked at internal NIO correspondence and the level of challenge is high."

[34] In his 8th Report the Independent Reviewer addressed the geographical remit of the authorisations noting at paragraph 11.4 that in the relevant reporting period there had been national security attacks throughout Northern Ireland. He noted that the absence of attacks in a particular area might simply mean that the exercise of the powers had been effective or that potentially dangerous activity had not been detected. He noted that Northern Ireland is a small geographical area with porous boundaries between different police districts and an open border with the Republic of Ireland. Limiting the authorisations to identifiable areas within Northern Ireland would result in terrorist operatives being given notice that they could concentrate their activities in areas where there was less risk of being subjected to stop and searches.

[35] I note that a somewhat similar argument about the geographical extent of the stop and search powers was an issue in *Gillen* [2006] UKHL 12 where Lord Bingham dispatched it in trenchant terms. For the foregoing reasons I consider that the applicant's complaint about the geographical reach and temporal continuity of the existence of prior authorisation is not made out.

No effective means of challenging the grant of an authorisation

[36] I do not accept the applicant's complaint that there is no effective means of challenging an authorisation. It is the existence of the authorisation which confers the power on the constable to stop and search for munitions (ie weapons and explosives)/wireless apparatus. No challenge has in fact been brought to the making or confirmation of the authorisation which underpins the 7 stop and search incidents the subject of this judicial review. This is despite the fact that the underpinning legal basis required to justify an authorisation are clearly set out in the impugned statutory provisions. Moreover, the basis for the ongoing need for authorisations throughout Northern Ireland on a continuous basis have been extensively examined and set out in the annual reports of the Independent Reviewer. If the applicant wished to challenge a particular authorisation he could bring a judicial review. He has in fact through the present judicial review sought to argue that the impugned power fails the quality of law test and is not in accordance with law for the particular reasons which have been set out earlier. The criticism in the present judicial review is to the alleged absence of adequate safeguards, not mala fides or any of the traditional grounds upon which a public law challenge can be mounted. If he had considered that he had arguable grounds he could have challenged the lawfulness of the exercise of the discretionary power to make an authorisation on the usual public law grounds. Furthermore, if the applicant had sued for damages for trespass arising out of the stop and search incidents the onus to justify the exercise of these powers would have rested upon the police. In an action for trespass the applicant could complain about any alleged unlawful exercise of the power by the constable. If the constable was not genuinely exercising the power in discharge of the statutory purpose the applicant must succeed in damages. The latter could arise in a number of scenarios and would include for example a circumstance where the power was being exercised for an improper motive for example to harass someone and not to genuinely search for guns or explosives. If the stop and search power was used in an arbitrary way for no legitimate purpose that would not be a lawful exercise of the power. If there were in fact no basis justifying the exercise of the power, the onus resting on the police to justify its use in an individual case, the exercise of the power would be unlawful and the court would so hold and award damages for the tortious breach.

[37] In judicial review proceedings the duty of candour requires the respondent to put all its cards on the table to enable the court to decide whether any public law wrong has been committed. This would include the need to address any arguable claim of alleged improper exercise of the discretion to make an authorisation. In the context of civil proceedings for trespass the applicant would of course be assisted by

the processes inherent in such actions which would include Notices for Particulars, Interrogatories and Discovery as well as the examination and cross-examination of witnesses before a judge. The Supreme Court in *Roberts* [2015] UKSC 79 placed particular emphasis on the fact that section 6(1) of the Human Rights Act 1998 made it unlawful for any police officer to act in a manner which was incompatible with the Convention. The result of breaching this section would be legal liability and potential disciplinary action. As the Supreme Court noted at paragraph 43 of its judgment:

> "It is said that, without the need to have reasonable grounds for suspecting the person or vehicle stopped to be carrying a weapon, it is hard to judge the proportionality of the stop. However, that is to leave out of account all the other features, contained in a mixture of the Act itself, PACE and the Force Standard Operating Procedures, which guard against the risk that the officer will not, in fact, have good reasons for the decision. The result of breaching these will in many cases be to render the stop and search itself unlawful and to expose the officers concerned to disciplinary action."

[38] In relation to any argument that convention jurisprudence required prior control of authorisations the ECHR in *Colon v The Netherlands* [2012] 55 EHRR acknowledged that prior judicial control of what were there referred to as designations (here authorisations) was not an essential pre-requisite and that an aggregate of non-judicial remedies could replace judicial control. The court found that the designation did amount to an interference with Article 8 but concluded that the interference was in accordance with the law.

[39] Given the remedies and processes identified above and the fact that the applicant is challenging the stop and search power through this application for judicial review there is no basis for concluding that the remedies available are such that one could justifiably complain that there is no effective means of challenging the grant of an authorisation.

The authorisation regime lacks transparency

[40] The applicant complains that information is not made publicly available about the extent of the authorisations. There is an air of unreality about this complaint given that the various annual reports from the Independent Reviewers explain the authorisation process, the need thus far for their continuous renewal, the fact that they cover the whole of NI and why. Further, these annual reports record, analyse and cogently explain why complaints almost identical to those advanced by this applicant are, on examination, without merit. A similar complaint about lack of publicity was addressed and rejected by Lord Bingham in *Gillen* [2006] 2 AC where he stated:

> "[35] The act and the code do not require the fact or the details of any authorisation to be publicised in any way, even retrospectively. I doubt if they are to be regarded as "law" rather than as a procedure for bringing the law into potential effect. In any event, it would still defy a potentially valuable source of public protection to require notice of an authorisation or confirmation to be publicised prospectively. The efficacy of a measure such as this will be gravely weakened if potential offenders are alerted in advance. Anyone stopped and searched must be told, by the constable, all he needs to know. In exercising the power, a constable is not free to act arbitrarily, and will be open to civil suit if he does. It is true that he need have no suspicion before stopping and searching a member of the public. This cannot, realistically, be interpreted as a warrant to stop and search people who are obviously not terrorist suspects, which would be futile and time wasting."

To similar effect the court was also referred to paragraph 51 of the judgment of Lord Hope.

[41] The respondent contends that if the Convention required that the public were told the details of the extent and duration of authorisations, those who were intent on transporting or using munitions or explosives etc would be given a clear guide as to where and when to conduct their activities without risk of disruption or detection and that such cannot be required by the Convention.

[42] As I have earlier observed there is an air of unreality about this complaint not least because the various annual reports of the Independent Reviewer which are publicly available address the fact that prior authorisations have been in force on a continuous basis since the instigation of the impugned power and that they extend throughout Northern Ireland. The applicant who is believed by the police to be a dissident republican has indeed complained about the authorisations being in continuous force throughout Northern Ireland since the inception of the authorisation regime. Since this issue has been repeatedly returned to in each of the annual reports produced by the Independent Reviewer it is difficult to see how in fact the authorisation regime can be said to lack transparency. Accordingly, for the reasons stated above this complaint is not accepted.

Community background monitoring (Ground 3(b)(iv)-(v))

[43] Under this heading the applicant complains the Code of Practice imposes insufficient safeguards to ensure that the impugned powers are not exercised arbitrarily. It is submitted that the Code makes no express provision for monitoring

the use of the power on the basis of the perceived religious or political opinion of individuals subject to the exercise of the power and as a consequence there no practical or effective means of determining differential impact of the use of the power between religious or political groups nor is there any practical or effective means of determining whether individual officers have engaged in discriminatory conduct. In the alternative to that submission it is claimed that the failure to monitor the use of the power on the basis of the perceived religious or political opinion of individuals is in breach of paragraphs 5.9-5.11 of the Code of Practice.

[44] Again, this complaint is not new and has been addressed in a number of the annual reports from the Independent Reviewer. For example in his 6th Report at Annex D he states as follows:

> "**Avoiding Discrimination**
>
> 13. In paragraphs 5.6 to 5.11, a request was made that the Code expressly state that "stop, search and question powers may never be exercised on the basis of racial profiling". To strengthen the Code on this issue an additional section was added titled "Avoiding discrimination". The text of this new section is based upon the corresponding Code in Northern Ireland for the Terrorism Act 2000 (section 11 of the TACT Code).
>
> 14. The new section relates directly to concerns that stop and question and stop and search powers may have an adverse impact on communities with a particular religious affiliation. These concerns have been raised with me by various people this year. Some of those doing so have shared with me their correspondence with the PSNI about this.
>
> 15. Paragraph 5.6 of the Code says:
>
> > "Racial or religious profiling is the use of racial, ethnic, religious or other stereotypes, rather than individual behaviour or specific intelligence, as a basis for making operational or investigative decisions about who may be involved in criminal activity."
>
> 16. Paragraph 5.7 says:
>
> > "Officers should take care to avoid any form of racial or religious profiling when selecting people to search under section 24/schedule 3 powers.

> Profiling in this way may amount to an act of unlawful discrimination, as would discrimination on the grounds of any protected characteristics."

17. Paragraph 5.8 says:

> "To avoid the kinds of discrimination referred to… great care should be taken to ensure that the selection of people is not based solely on ethnic background, perceived religion or other protected characteristic. Profiling people from certain ethnicities or religious backgrounds may also lose the confidence of communities."

18. It is probably wise to include warning language of this kind, to avoid dangers of any direct or indirect discrimination. These are live issues in Northern Ireland, affecting the nationalist community in particular, but also, increasingly, recently arrived communities from European Union countries. If police training is effective, the possibilities of improper use by individual police officers will be minimised. The basis for action is clear: it should rest on individual behaviour or specific intelligence."

[45] I am satisfied that this aspect of complaint is also without substance.

[46] Indeed, the complaint under this heading is one particular of a group of particulars to support the general complaint that the legislative scheme (including the Code of Practice) does not contain adequate safeguards to prevent abuse. However, given the nature of the threat from dissident republicans it would come as no surprise to anyone in Northern Ireland that the impact and exercise of these powers is more likely to be felt by perceived Catholics and/or nationalists.

[47] However, the authorisation process, police training, the control and restriction on the use of the impugned powers by the Code of Practice, complaints procedures, disciplinary restraint on police officers including the requirement to act, inter alia, in accordance with the Code, the risk of civil action and/or judicial review together with the independent oversight by various bodies previously detailed in my view constitute effective safeguards against the risk of abuse. The system appears to be carefully designed to structurally ensure that the power is not exercised arbitrarily and it is kept constantly under review at least on an annual basis by the Independent Reviewer whose annual reports are publicly accessible.

[48] The applicant also complains under 3(b)(vi) that the Code imposes insufficient control on the conduct of individual officer's use of the power, in particular by not putting in place any mechanism whereby supervising officers can effectively supervise the use of the power by officers under their supervision. The applicant now also complains at paragraph 3(c)(ii) that the searches of the applicant were incompatible with Article 8 because it is said as a matter of fact the PSNI failed to develop a mechanism which enables supervising officers to undertake reliable examinations of the records of the use of stop and search powers according to the name of the officer and the name of the person searched. Although not in place at the time of the searches in issue, since February 2014 the PSNI have implemented a facility for supervising/senior officers to examine records by either the name of the individual stopped or the officer who conducted the search (see third affidavit of Keith Jackson).

[49] As previously pointed out the exercise of the stop and search powers is kept under ongoing review involving the annual review of the Independent Reviewer. Where problems or potential problems emerge it appears the search for solutions to address such problems can yield helpful changes in the operation of the scheme. But the identification of improvements through the process of ongoing review does not mean that the prior system must be condemned as being in breach of the rights enshrined in Article 8. As long as there are effective safeguards in place to prevent arbitrariness the 'quality of law' and 'in accordance with law' requirement of Article 8 will be met. The scheme does not breach Article 8 because a review and/or experience suggest improvement. Amongst the panoply of available safeguards is the effective ongoing review. The identification by these review processes of improvement and the willingness to identify and implement such is a measure of how effective such safeguards can be. Another safeguard is that if an individual believed, for example, that the stop and search powers were being used for an improper motive or were used in an arbitrary way or for no good reason or to harass or an action for damages would lie in which proof of justification for the use of the power would lie on the defendant to the claim.

Record Keeping/Basis of Search

[50] The applicant submits that paragraph 8.61 of the Code of Practice obliges police officers to identify a basis for a person being stopped pursuant to s24/Schedule 3 of the 2007 Act and that paragraph 8.75 obliges the police officers to record the basis for the use of the power. It is submitted that the PSNI, as a matter of policy and practice, refuses to do so except inasmuch as they record the fact that an authorisation is in place and that accordingly the PSNI and its officers are acting in breach of the requirements of the Code of Practice and in breach of the applicant's rights pursuant to Article 8 ECHR.

[51] The PSNI accept that they do not record the grounds for a stop and search but rely on the fact of the authorisation for the basis for it. The PSNI submits that while it is required to give a basis for the search they are not required to provide any

grounds. They assert that they are not required to provide any information about the basis for a search beyond the use of the phrase "Due to the current threat in the area and to protect public safety a stop and search authorisation has been granted".

[52] The respondent pointed out that the contention raised by the applicant was the subject of a number of complaints to the Police Ombudsman's office in relation to the PSNI's use of JSA. The Police Ombudsman made four recommendations and the Independent Reviewer of the JSA comments in his sixth report at paragraphs 44 and 36 and in his seventh report at paragraphs 11.3-11.6 on these Recommendations:

> "11.4 The PSNI do not record the grounds for the stop and search but rely on the fact of the authorisation as the basis for it (see Chapter 9 above). The Police Ombudsman found that this has led to numerous complaints by members of the public who think they are being harassed by the police. The Police Ombudsman thought that this omission could lead to potential abuse and considered that such a process was envisaged by paragraph 8.61 and 8.75 of the Code of Practice. A proper system of recording the rationale for the stop and search would assist officers in countering claims of harassment. This matter was raised in my predecessor's 6th Report at paragraph 336. He commented that it was important that the PSNI consider the Police Ombudsman's recommendation carefully. He recognised that implementing it might generate some work for the PSNI. He concluded that the drive for best practice "must be relentless".
>
> 11.5 The PSNI do not accept this recommendation – or more accurately, they take the view that the current practice is in accordance with the Police Ombudsman's recommendation. The PSNI draw a distinction between the basis for a search and the grounds for a search. **While the PSNI is required to give a basis for the search they are not required to provide any grounds reasonable or otherwise. Accordingly the Code of Practice does not state that the basis must be one of those listed in paragraph 8.61 of the Code. The basis for the stop and search is read out to each person and, as required by paragraph 8.75(v) of the Code of Practice, this is recorded electronically.** In response to the Police Ombudsman's recommendation, however, the basis for the use of the power of stop and search is now

included in the printed copy of the search record which is made available to the individual.

11.6 **The PSNI analysis on this point is sound. I comment elsewhere on the PSNI's reluctance to explain publicly how it uses these powers but I think, in this context, it would not be appropriate for a police officer to be required to articulate the reasons why a particular individual had been stopped and searched.** I think it is sufficient that the individual is told that due to a current threat in the area and to protect public safety a stop and search authorisation has been granted. This wording is included on the printed record available at a police station.The Police Ombudsman's recommendation does however highlight the need for greater transparency on the use of these powers. It would also be sensible for the standard form police record to state "Grounds (where appropriate)" to reflect the fact in some cases grounds need not be given." [respondent's emphasis]

[53] The respondent maintains that:

(i) The current practice is in accordance with both the Police Ombudsman's recommendation and the Code of Practice.

(ii) Whilst the PSNI is required to give a basis for the search they are not required to provide any grounds reasonable or otherwise.

(iii) The Code of Practice does not state that the basis must be one of those listed in paragraph 8.61 of the Code.

(iv) The "basis" for the stop and search is read out to each person and, as required by paragraph 8.75(v) of the Code of Practice, this is recorded electronically.

(v) The Independent Reviewer has examined this issue and has concluded that PSNI are in compliance with the provisions of the Code identified by the applicant.

[54] Thus, it is clear that the PSNI continues to proceed on the basis that they are not required to provide any grounds notwithstanding that the Police Ombudsman found that this has led to numerous complaints by members of the public who think they are being harassed by the police and that the Police Ombudsman also considered that paragraphs 8.61 and 8.76 of the Code required such recording.

[55] Paragraph 8.61 of the Code provides:

> "Where a person or vehicle is being searched without reasonable suspicion by an officer (but with 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 the 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." [applicant's emphasis]

[56] The applicant submits paragraph 8.61 clearly indicates what is meant in the Code by the basis for a search. It is directed particularly, inter alia, to a case where a person is being searched pursuant to an authorisation under paragraph 4A(1) of Schedule 3 to the JSA.

[57] Paragraph 8.75 of the Code provides:

> "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:
> …..
> (v) the **basis for** the *use* of the power, *including any necessary authorisation that has been given*;
> ….
> [My emphasis]

[58] In my judgment the distinction drawn by the PSNI between the basis for a search and the grounds for a search is misconceived and not in accordance with the Code of Practice. Reliance on the authorisation simpliciter as the "basis" for the search is inconsistent with the express requirements of the Code. The authorisation is the legal foundation for the constable's *power* to stop and search. However, the basis for the *use* of this power will vary from case to case. As paragraph 8.61 of the Code makes clear the basis could include but is not limited to:

- That something in the behaviour of the 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.

[59] I consider that paragraphs 8.61 and 8.75 of the Code plainly envisaged a process where the basis for the use/exercise of the power would be recorded. The mischief that this safeguard was intended to address and to mitigate was the risk of improper use of the power of stop and search by enabling greater transparency and accountability in respect of its exercise.

[60] Since in all cases an authorisation is the foundation for the existence of the constable's power to stop and search, simply relying on the fact of the authorisation for the basis of its use/exercise tells one very little, if anything, about the actual grounds for its use in a particular case. Since the power to stop and search, the Court was told, is not used on a suspicion-less basis and that there will always be a "basis" for the use of the power, the basis for the use/exercise of the powers "must always" be recorded.

[61] When, following consultation including with the PSNI, the Code was eventually promulgated it clearly envisaged a process where the grounds/basis for the stop and search would be recorded. As we have seen the PSNI does not record the grounds for the stop and search but relies on the fact of the authorisation as the basis. This practice is not in accordance with the Code. Indeed, if it had been intended that stating the fact of the authorisation as the basis for the search was sufficient in every case, paragraph 8.61 read together with paragraph 8.75 would not have been drafted in the terms in which they were. Indeed paragraph 8.75 requires in every case a record of "the basis for the use of the power, *including* any necessary authorisation that has been given.

[62] Although the failure to record the basis for the search is not consistent with the Code of Practice, that failure does not automatically render the exercise of the power in this case unlawful or in breach of Article 8. In the present case the affidavit evidence establishes that there was a basis for each of the impugned searches. This judicial review application was set up, by agreement, to address a specific set of factual circumstances relating to particular stops conducted upon the applicant between 13 May and 3 August 2013. In each of the cases identified by the applicant there was a "basis" for the stop and search conducted by PSNI. The respondent, very helpfully, detailed the individual incidents in their supplementary written submissions as follows:

(a) **25 May 2013** - The applicant was stopped and searched by Constable Hogg. He avers at paragraph 2 of his affidavit that "prior to deploying on duties that morning, I had received a confidential briefing regarding the continuing high threat to police officers from Dissident Republican Terrorist groups in the city." At paragraph 3 he avers that he identifed the applicant. He states:

> "This male is known to me through previous dealings as a police officer and I recognise him as being a person of interest to police as a result of a confidential briefing. I am unable to disclose the details of that briefing for national security reasons."

The Court has been provided with some further details on the briefings provided in respect of the applicant at paragraph 12 of the affidavit of Superintendent Yates where he states:

> "Steven Ramsey is a known Dissident Republican who currently associates with persons engaged in dissident terrorist activity. To that end I have ensured that all my operational staff are well briefed on the small number who would seek to do us harm."

(b) **10 June 2013** – The applicant was stopped by a uniformed mobile patrol at Rathlin Drive. Constable Miller avers at paragraph 3 of his affidavit that he recognised the applicant. He states "I have had cause to stop him on other occasions as a result of confidential briefings. Because of the briefing, I used the lights and siren on the police vehicle to stop the applicant's vehicle, with which he complied." The applicant was then advised that due to the current threat in the area and to protect public safety a stop and search authorisation is in place.

(c) **21 June 2013** – This search was also conducted by Constable Miller. At paragraph 6 of his affidavit he details that "as a result of confidential briefings I approached the applicant's vehicle and informed him that he and his vehicle were going to be the subject of a search."

(d) **26 June 2013** – The applicant was observed by Constable McKenna at Eden Terrace. At paragraph 2 of his affidavit he avers "As a result of confidential briefings the blue lights were deployed on our patrol car to stop the applicant who stopped his car on Eden Terrace." The applicant was informed that "due to the current threat in the area and to protect public safety a stop and search authorisation had been granted." This basis for the search was recorded in the officer's notebook.

(e) **17 July 2013** – The applicant was stopped in the grounds of Altnagelvin hospital by Constable Croskery. She noted the applicant's vehicle passing her patrol car on a number of occasions. At paragraph 4 of her affidavit she avers that:

> "I conducted a vehicle check using my police Blackberry and found that the car was registered to a male with suspected dissident republican links, Steven Ramsey."

Constable Croskery avers that she explained the reason for the stop to the applicant and advised him that due to the current threat in the area and to protect public safety a stop and search authorisation had been granted. She recorded the details.

(f) **26 July 2013** – The applicant was stopped while in his vehicle in the Ballymagroarty area. Constable Miller avers at paragraph 9 of his affidavit that he observed the applicant in the vehicle and "As a result of confidential briefings from Security Branch, the applicant's vehicle was stopped." Constable Miller did not record the three searches he conducted in his notebook but entered the details in the STOPS database using his Blackberry.

(g) **3 August 2013** – The applicant was stopped in Strabane by Constable Deeney. At paragraph 3 of his affidavit he states that:

> "As a result of a confidential briefing I stopped the vehicle…. I informed him that due to the ongoing threat in the area and to protect public safety an authorisation had been granted."

Conclusion

[63] Save for the acknowledgment above that the PSNI, in failing to record the basis for the use of the power, was acting in breach of the requirements of the Code of Practice the applicant's extant grounds of challenge are dismissed.