

Judicial Communications Office

26 February 2021

COURT DELIVERS JUDGMENT ON USE OF POLICE STOP AND SEARCH POWERS IN RESPECT OF CHILDREN

Summary of Judgment

The Court of Appeal¹ today found that the arrangements put in place for the exercise of stop and search powers under the Justice and Security Act 2007 in respect of children and young persons were in accordance with the law but that the PSNI had failed to implement the scheme. It noted, however, that the PSNI has now altered its position and for that reason it was not necessary to make a declaration that “quality of law” test had not been met.

Ailise Ni Mhurchu (“the appellant”) and her younger brother were passengers in their father’s car when it was stopped and searched by the police on 12 December 2017. She was aged 16 years old at the time. The officers stopped the car following an intelligence briefing they had received in respect of the appellant’s father. There was no challenge to the intelligence briefing information being an appropriate basis for the stop and search of the father and the vehicle. The appellant however claimed that the use of the powers to stop and search children without reasonable suspicion on foot of section 24 of and Schedule 3 to the Justice and Security (NI) Act 2007 (“the 2007 Act”) failed to meet the “quality of law” test required for interference with her Article 8 ECHR rights. She also claimed that the police (“the respondents”) acted contrary to section 6 of the Human Rights Act read with Articles 14 and 8 ECHR on the basis of a failure to ensure different treatment for children and that the respondents failed to meet their obligations under section 53(3) of the Justice (NI) Act 2002 to have the best interests of children as a primary consideration in the exercise of their functions in the youth justice system.

Legal background

Paragraphs [4] to [16] of the judgment set out the provisions of section 24 and Schedule 3 to the 2007 Act which confers the power to stop and search², the relevant decisions of the ECtHR and the NI Court of Appeal and the Code of Practice issued by the Secretary of State which came into operation on 13 May 2013.

Paragraphs [17] to [21] outline Policy Directive 13/06 which is the governing policy document issued by the PSNI dealing with its engagement with children and young people. One of the objectives of the policy is to treat children and young people with dignity, understanding and respect and listen to their views on key policing issues which affect them. The Policy Directive places considerable emphasis on the process of training. A review of training in respect of stop and search was carried out by the PSNI’s Human Rights Training Adviser in 2017. This concluded that the stop and search training programme provided sufficient guidance to enable officers to appropriately justify the lawful use of the powers where such encounters involved adults. Gaps, however, existed in relation to developing officers’ understanding and skills in relation to potential stop and search encounters

¹ The panel was the Lord Chief Justice, Lord Stephens and Lord Justice Maguire. The Lord Chief Justice delivered the judgment of the Court.

² These provisions are set out in Annex A to the judgment.

Judicial Communications Office

with children and young people. In light of this, training now specifically incorporates exercises in relation to the treatment of children. Service Policy SP1316 requires that officers must use Body Worn Video in stop and search encounters involving children, young people and vulnerable persons and a Community Impact Assessment must be completed for every search.

Paragraphs [22] to [37] outline the relevant reports of the Independent Reviewer of Terrorism into the operation of the 2007 Act where he has commented on the use of stop and search powers in cases involving children. In February 2020, the Court of Appeal delivered its judgment in Ramsey's (Steven) Application (No.2) [2020] NICA 14 explaining that the requirement to record the basis for the stop and search included the need to identify the trigger³. In his 12th Report in April 2020 the Independent Reviewer noted that the Chief Constable had recognised that if stop and search powers were used arbitrarily and excessively in respect of minors it could have an effect on confidence in and support for the PSNI. The Court noted that prior to the hearing of this appeal the PSNI indicated that it now accepted that there was a legal duty to record the trigger for the search and the Blackberry device used by PSNI officers has now been reprogrammed to allow for this. This information can be entered into a searchable database to allow the generation of a summary of the reasons for deciding to conduct a search of children.

Consideration

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

The complaint in this case was that the use of the powers was not in accordance with law. The Court said there was no dispute about the legal test but the issue was whether the law indicates with sufficient clarity the scope of any discretion conferred on the competent authorities and the manner of its exercise. It said that the level of precision required of domestic legislation which cannot in any case provide for every eventuality depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.

The sources of law in this case are the 2007 Act, the Code of Practice and Policy Directive PD 13/06 which has been incorporated within the Code of Practice. The Court considered that the Independent Reviewer is also part of the legal mechanism designed to protect against arbitrary use of the power. It said the publication of the Independent Reviewer's report provides in itself a basis for consideration of whether the power is being lawfully used. In addition to that function the making of recommendations by the Independent Reviewer which are designed to address any perception of arbitrary use require a considered response from the PSNI, an example being that after Ramsey (No 2) the Independent Reviewer and the PSNI recognised the legal duty to record the trigger for the search in order to protect against arbitrary use of the power and the steps outlined above that have now been taken.

³ Paragraphs 37 to 46 of the Ramsey (No.2) judgment are set out Annex B to the judgment.

Judicial Communications Office

The Court considered that the absence of that information prevented appropriate monitoring and supervision of the use of these powers in respect of children and young people. It said this was an area of considerable sensitivity and its importance was recognised in the Code (paragraphs 5.9 to 5.14). There was also well documented research evidence about the difficulties arising from encounters between police and children and young people and the Court said that monitoring and supervising to confirm the proportionate and necessary use of the powers was particularly important in relation to this cohort.

The Court commented that the detailed guidance as to the matters to take into consideration when interacting with young people within the Scottish Code of Practice on the Exercise by Constables of Powers of Stop and Search of the Person is particularly helpful to those officers engaged in utilising stop and search powers and said that consideration should be given to formally incorporating similar guidance to PSNI officers. It noted that to some extent this is already happening as a result of the provision of training flowing from the review in 2017. The Court did not accept that the absence of such guidance from the Code gives rise to any unlawfulness commenting that guidance cannot predict every possible scenario:

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

Dealing with the remaining points of appeal, the Court said that the case made on Article 14 within the ambit of Article 8 was based on the proposition that children and young people were treated like adults. It said that assertion is plainly wrong. Policy Directive PD 13/06 was specifically incorporated into the Code of Practice to recognise and apply the specific protections in relation to children and young people flowing from international conventions and domestic law. This is a case, therefore, where different groups have been treated differently. The Court did not accept, therefore that there was any breach of the principle in Thlimmenos v Greece (2001) 31 EHRR 15 at [44].

The final point of appeal related to section 53(3) of the Justice (Northern Ireland) Act 2002 which provides that the principal aim of the youth justice system is to protect the public by preventing offending by children. It states that all persons and bodies exercising functions in relation to the youth justice system must have regard to that principal aim in exercising their functions, with a view (in particular) to encouraging children to recognise the effects of crime and to take responsibility for their actions. It adds that all such persons and bodies must also –

- (a) have the best interests of children as a primary consideration; and
- (b) have regard to the welfare of children affected by the exercise of their functions (and to the general principle that any delay in dealing with children is likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development.

The Court said it was common case that this provision is specifically referred to in Policy Directive PD 13/06 and that the obligations set out in section 53(3) of the 2002 Act are delivered in guidance and practice. It said there was no particularity beyond the complaint in respect of the failure to

Judicial Communications Office

implement provisions similar to the Scottish Code in respect of this ground and that it did not accept that it was unlawful not to rehearse what was contained within that Code.

Conclusion

The Court considered that the arrangements put in place for the exercise of stop and search powers under the 2007 Act were in accordance with law but accepted that the PSNI failed to implement that scheme. It noted that the PSNI has now altered its position and said it did not consider, therefore, that any declaration is required. The remaining grounds of appeal were dismissed.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921

E-mail: Alison.Houston@courtsni.gov.uk