Neutral Citation No: [2021] NIQB 113 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC11656** *ICOS No:* *Delivered:* **09/12/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

_____

IN THE MATTER OF AN APPLICATION BY ANDREA HUGHES FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

A LAY MAGISTRATE
and
THE POLICE SERVICE OF NORTHERN IRELAND

_____

Representation

Applicant: Mr John Kearney QC and Mr Colm Fegan, of counsel (instructed by Emmet J Kelly Solicitors

First Respondent (Lay Magistrate): Mr Philip Henry, of counsel, instructed by the Departmental Solicitor's Office

Second Respondent (**Police Service**): Mr Joseph Kennedy, of counsel, instructed by the Crown Solicitor's Office

_____

Before: McCloskey LJ and McAlinden J

_____

McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] The two central questions raised in these judicial review proceedings are (i) whether the judicial officer concerned, a Lay Magistrate, in acceding to two inter-related applications by the police and issuing two search warrants as

requested, had the state of mind mandated by Article 10 PACE and (ii) whether the police applications were compliant with the requisite legal requirements. The applicant invites resolution of both questions in her favour and, further, contends that the searches executed by the police pursuant to the impugned warrants infringed her rights under Article 8 ECHR, contrary to section 6 of the Human Rights Act 1998.

[2] There are two preliminary issues of a procedural nature. First, having invited and considered the parties' submissions, the court was satisfied that, applying the *Amand* principle (*Amand v Home Secretary* [1943] AC 147), this is a criminal cause or matter, with the result that a Divisional Court comprising a bench of two judges was convened. Second, the court determined to adjudicate by the so-called "rolled up" mechanism.

The Judicial Review Challenge

[3] This application for leave to apply for judicial review is brought by Andrea Hughes ("the applicant"). The proposed respondents are the Police Service of Northern Ireland ("the Police Service") and a Lay Magistrate ("the Lay Magistrate"). The contours and focus of the applicant's challenge are succinctly formulated in the Order 53 Statement:

> "*The Applicant challenges the Respondents' decisions, acts and omissions on 15 February 2021. On 18 February 2021 in an ex parte hearing …… the* [Police Service] *applied pursuant to Article 10 of the Police and Criminal Evidence (NI) Order 1989 …. for two search warrants to search Blue Stone Psychiatric Unit, Craigavon Area Hospital, where the Applicant was a patient and to search the Applicant's home at …….. The said warrants were granted by the* [Lay Magistrate] *on 18 February 2021. The said warrants were drafted so as to permit police to search for and seize mobile phones and sim cards in connection with the alleged offence of perverting the course of justice.*"

[4] The grounds of challenge, which are couched in somewhat diffuse terms, resolve to two central complaints:

(i) <u>Non – compliance with Article 10 PACE</u>: the application by the Police Service to the Lay Magistrate for the issue of the impugned search warrants did not contain sufficient information compliant with the statutory criteria in order to establish that there were reasonable grounds for believing that an indictable offence had been committed and/or that the material sought did not consist of or include items subject to legal privilege and/or that there were reasonable grounds for believing that any of the conditions specified in Article 10(3) PACE applied.

(ii) Infringement of human rights: breach of the applicant's rights under Article 8 ECHR and Article 1 of The First Protocol, contrary to section 6 of the Human Rights Act 1998.

The applicant pursues declaratory and other alternative forms of discretionary public law relief. These proceedings were commenced on 17 May 2021. The court conducted hearings on 2 November and 1 December 2021.

Article 10 PACE

[5] This statutory provision lies at the heart of these proceedings:

> ***"Search warrants***
>
> *Power of justice of the peace to authorise entry and search of premises*
>
> *10. - (1) If on an application made by a constable a justice of the peace [now lay magistrate] is satisfied that there are reasonable grounds for believing-*
>
> *(a) that an indictable offence has been committed; and*
>
> *(b) that there is material on premises mentioned in paragraph (1A) which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and*
>
> *(c) that the material is likely to be relevant evidence; and*
>
> *(d) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and*
>
> ***(e) that any of the conditions specified in paragraph (3) applies in relation to each set of premises specified in the application,***
>
> *he may issue a warrant authorising a constable to enter and search the premises.*
>
> *(1A) The premises referred to in paragraph (1)(b) are –*
>
> *(a) one or more sets of premises specified in the application (in which case the application is for a "specific premises warrant"); or*

(b) any premises occupied or controlled by a person specified in the application, including such sets of premises as are so specified (in which case the application is for an "all premises warrant").

(2) A constable may seize and retain anything for which a search has been authorised under paragraph (1).

(3) The conditions mentioned in paragraph (1)(e) are-

(a) that it is not practicable to communicate with any person entitled to grant entry to the premises;

(b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence;

(c) that entry to the premises will not be granted unless a warrant is produced;

(d) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.

(4) In this Order "relevant evidence", in relation to an offence, means anything that would be admissible in evidence at a trial for the offence.

(5) The power to issue a warrant conferred by this Article is in addition to any such power otherwise conferred."
[Emphasis added]

The provisions of Article 10 highlighted are those which the applicant contends were not observed by the police officer and Lay Magistrate concerned. Article 17 PACE must also be considered:

*"**Search warrants - safeguards***

17. - (1) This Article and Article 18 have effect in relation to the issue to constables under any statutory provision, including a statutory provision passed or made after the making of this Order, of warrants to enter and search premises; and an entry on or search of premises under a warrant is unlawful unless the warrant complies with this Article and is executed in accordance with Article 18.

(2) Where a constable applies for any such warrant, it shall be his duty-

(a) to state-

(i) the ground on which he makes the application;

(ii) the statutory provision under which the warrant would be issued; and

(iii) if the application is for a warrant authorising entry and search on more than one occasion, the ground on which he applies for such a warrant, and whether he seeks a warrant authorising an unlimited number of entries, or (if not) the maximum number of entries desired;

(b) to specify the matters set out in paragraph (2A); and

(c) to identify, so far as is practicable, the articles or persons to be sought."

Factual Matrix

[6] By explanatory preface to the affidavit evidence, each of the impugned warrants was authorised by the Lay Magistrate in furtherance of a police investigation into the suspected commission by the applicant of the offence of perverting the course of justice by phantom phone calls. Both warrants permitted the police to search for mobile phones and sim cards. The first warrant was directed to the applicant's home. The second was directed to an identified hospital mental care unit where the applicant was accommodated at the material time.

[7] The substance of the applicant's challenge is illuminated by the following averments in her grounding affidavit:

"*From in or around January 2021 I had been dealing with the PSNI in relation to ongoing intimidation and threats that were directed towards me via social media accounts and platforms. I was also dealing with the PSNI in relation to ongoing issues and cases that involved my ex-partner who has a number of convictions relating to breaching non-molestation orders that were granted in my favour … I was truly shocked, horrified and embarrassed when the PSNI arrived at [*the hospital*]. I had previously voluntarily admitted myself to Blue Stone due to the deterioration in my mental health and the PSNI were aware of this …* [they] *did not tell me that my home was also being searched … my family, including my children, were present*

> *when the PSNI searched my home …. During their searches of both my hospital room and my home police seized mobile phones and sim cards ….*
>
> *I understand that the PSNI are alleging that I have perverted the course of justice by making false reports and that I have done so using mobile phones. Whilst I cannot specifically address the information that police have because same has not been fully disclosed, I completely deny such allegations ….*
>
> *Had the police approached me about these issues, they could have done so in conjunction with my solicitor and I would have co-operated with them, including in relation to entry to my home. I had a key to my home with me in hospital. Had police asked I would have provided them with this. I have always co-operated fully with police throughout my dealings with them …. On the day of the search for example I assisted police when they were in my hospital room by showing them where my items were and what I had and … when police contacted my family members they assisted police by going to my home and letting them into my home in the day of the search.*"

In further averments the applicant deposes that her solicitor was scheduled to make an application to the Magistrates' Court on 18 May 2021 for "*disclosure of all the information that they used for their warrant applications*."

Forms PACE 5A and 5B

[8] At this juncture it is necessary to understand the methodology whereby the police applied to the Lay Magistrate for the two warrants. In short, these applications entailed the prior completion of two pro-formae, Forms PACE 5A and PACE 5B. We shall examine the contents of these as completed in the present case *infra*. In a sentence, Form 5A is designed to be completed by the police officer concerned in a manner which ensures that all of the statutory requirements enshrined in Article 10 PACE are properly addressed. It is utilised in every case. Form PACE 5B, in contrast, is utilised only in cases where the police application for the search warrant is based wholly or partly on intelligence or other sensitive information.

[9] Notwithstanding the incorporation of the "PACE" acronym in their self-description, neither of Forms 5A or 5B is statutory in nature. Rather, each is of administrative derivation and status. The following information was provided in response to a specific request by the court. Fundamentally, the two forms are evidently the product of the corresponding search procedures in the jurisdiction of England and Wales. T he appropriate references here are the Criminal Procedural Rules 2020, as amended, and the Criminal Practice Direction 2015. Neither of these instruments applies to Northern Ireland. The English Criminal Procedural Rules

Committee, established under section 70 of the Courts Act 2003, is the responsible overseeing agency.

[10] Form 5B can be readily linked to the following provision in the English Criminal Procedural Rules Part 47:

> *"(4) Where the application includes information that the applicant thinks should not be supplied under rule 5.7 (Supply to a party of information or documents from records or case materials) to a person affected by a warrant, the applicant may – (a) set out that information in a separate document, marked accordingly; and (b) in that document, explain why the applicant thinks that that information ought not to be supplied to anyone other than the court."*

In summary, in both jurisdictions, the practice reflects a recognition that applications for the issue of search warrants might be based in whole or in part on information which it is not in the public interest to disclose other than to the judicial officer concerned. This, in principle, is unexceptional. It is appropriate to add, however, that as in every context PII claims for the protection/suppression of information can be challenged and the court is the ultimate arbiter of disclosure issues.

Applications for search warrants

[11] Next we turn to the mechanics of Article 10 PACE applications to the judicial officer concerned. Given the issues raised in the present case, the court considered it necessary to interrogate in some detail how applications by the police to Lay Magistrates for search warrants and the grant thereof are transacted in practice.

[12] At the beginning of the exercise, the constable applying must observe a procedural requirement of some importance. Paragraph 9 of Form PACE 5A requires the constable to formally declare that the application "*... discloses all the information that is material to what the court must decide, including anything that might reasonably be considered capable of undermining any of the grounds of the application*" and that "*the content of this application is true.*" This must be accompanied by the signature of the constable and the associated time and date. It is clear that the form is then presented to an officer of the rank of inspector or higher. This officer must then declare, in paragraph 10, that he has reviewed the application and authorises the constable concerned to make it. This officer must insert his name and rank, append his signature, insert the accompanying time and date and, finally, insert his contact number and station.

[13] At the stage when the aforementioned declaration and authorisation are completed, Form PACE 5A is in an uncompleted state. It remains thus until the judicial officer concerned completes the final two pages, in paragraph/section 11.

The intervening event is an appointment at which the applying constable and the judicial officer attend. There is no prior notice to the householder or premises owner and no public hearing in a court. On the contrary, everything is transacted in private, in an *ex parte* fashion. The police officer concerned – who by Article 10(1) PACE must be a constable of the Police Service – arranges to meet the judicial officer. This event typically unfolds at the judicial officer's home. There is normally no advance provision of documents or indeed any information to the judicial officer. Clearly the constable making the application must attend this encounter. On occasion the constable might be accompanied by another police officer.

[14] There is no audio or other recording of what transpires during this appointment. Nor does Form PACE 5A explicitly provide for a record of what is transacted to be made on the face of the document. In passing, there is ample space for this purpose. Furthermore, one would expect that a conscientious constable would make an appropriate record in his notebook. This court would exhort every Lay Magistrate to do likewise as a matter of elementary good practice.

[15] Section 11 of Form 5A contemplates that the constable will give sworn evidence to the judicial officer, either on oath or affirmation. The judicial officer must specify <u>which</u> in completing the form. The judicial officer must also complete one or both of the following:

> "*The applicant satisfied me about his or her entitlement to make the application …*
>
> *The applicant gave me additional information, the essence of which was: ……*"

This latter part of the form is clearly designed for the judicial officer to specifically record any material "*additional information*" provided by the constable under oath or affirmation. The final section of Form 5A is in these terms:

> "*I issued/refused a warrant(s) because: …*
>
> *….*
>
> *Signed: ……*
>
> *Name: ……..*
>
> *Judge/Lay Magistrate*
>
> *Date: …*
>
> *Time: ...*"

[16] Form 5A, quite clearly, is designed to ensure that the judicial officer concerned makes a careful record of the application for the search warrant, the adjudication of the application at the customary private appointment, the information provided by the applying police officer in this context and the reasons for the outcome. It is in the highest degree desirable that a comprehensive, coherent and legible record addressing all of these issues be made by the Lay Magistrate contemporaneously. Awareness of and adherence to this duty will serve to remind Lay Magistrates of their independent adjudicatory function. Transparency would favour making this record on the face of Form 5A, subject only to public interest considerations.

[17] Fundamentally, acceding to search warrant applications should never be a matter of course or routine. The adjudication of every such application involves the solemn discharge of an important judicial function in a context where important individual rights are at stake. Lay Magistrates must fearlessly interrogate applications presented to them in such a manner as the particular context dictates. Slavish, unquestioning acceptance of everything presented to them both in writing and orally by the applying police officer would entail dereliction of their solemn judicial duty. They should not hesitate, in any case where considered appropriate, to identify the shortcomings in the application and to refuse it accordingly. Where this occurs, the police will have the option of reconsidering their position and, if appropriate, reconfiguring and re-presenting the application. In cases where this occurs in practice, it would be desirable that the same Lay Magistrate consider the reconfigured application.

[18] There is one particular feature of Form 5A which, in the opinion of this court, is ripe for review and improvement. Doing the best that one can to view an Article 10 PACE application through the lens of the Lay Magistrate concerned, Section 11 conflates too many issues. Furthermore its layout has an unmistakeable orientation towards a positive outcome for the police. In addition, in its present configuration, Section 11 is not conducive to what the court has strongly recommended in [16] – [17] above. The following specific textual recommendations are made:

(i) The first tick box in Section 11 should be deleted.

(ii) The "*oath/affirmation*" subject should be assigned to a free standing section.

(iii) *Ditto* the "*… gave me additional information, the essence of which was ….*" passage.

(iv) A freestanding section incorporating "*The Applicant satisfied me about his or her entitlement to make the application*" passage is likewise required.

(v) A freestanding section for "*I issued the warrant for the following reasons …*" section is necessary.

(vi) *Ditto* a new freestanding section for "*I refuse the warrant requested for the following reasons...* "

(vii) And the addition of a new free standing clause "*I defer my final decision for the following reasons …"*

[19] This court would add that the two police officers concerned and the relevant Lay Magistrate must take great care to ensure that everything inserted in manuscript in the completed Form 5A is legible. These are solemn court proceedings involving potentially serious interferences with the rights of citizens. Nothing less than adherence to high professional standards in all respects will suffice.

The search warrant applications in the present case

[20] Turning to the present case, the two completed Forms 5A, the "*Complaint to Obtain Warrant to Enter and Search*", together with the completed Forms 5B, represent the police applications to the Lay Magistrate to issue the search warrants. These are the critical documents in these proceedings. The Forms 5A were completed by a person of unspecified identity and designation. The most that can be deduced from a perusal of the Forms as a whole is that they were compiled by a "*police officer*." The "signature" of the author is an unintelligible squiggle. This is not accompanied by the author's name in printed form. The date follows. However, the "*Time*" is not specified. Next the rank and name of the authorising inspector are specified. Here one finds the use of another indecipherable squiggle where the inspector's signature is required. While this part of the Form makes provision for the insertion by the authorising officer of "*Comments*", nothing follows. In particular there is no indication that the authorising inspector was aware of the existence of a completed Form PACE 5B or any intelligence. This is not acceptable.

[21] Paragraph 4(b) of each of the completed Forms 5A states that the premises to be searched are "*the home address of Ms Andrea Hughes*." This was correct as regards one of the identified addresses. However it was manifestly incorrect in the case of the application for the search warrant directed to the specified hospital unit: see [6] *supra*.

[22] In response to the question *"What are you investigating? Explain briefly…*" it is stated:

> "*Police enquiries carried out and information that would suggest that the occupier has made false reports to police in order to pervert the course of justice ….*"

Other material questions and answers follow:

> *"[Why do you believe that the offences under investigation have been committed?]*
> *As a result of research conducted and enquiries made.*
> *[What are you looking for?]*
> *Mobile phones. Sim cards.*
> *[Why do you believe that the material for which you want to search is likely to be relevant evidence?]*
> *The material mentioned … above if located will prove suspect Ms Andrea Hughes has perverted the course of justice. This material will be of substantial value as it can be linked to mobile phones used to make reports to police."*

[23] Paragraph 4[c] is in these terms**:**

> *"At least one of the following four access conditions must apply. Tick to indicate which:*
>
> *(i) It is not practicable to communicate with any person entitled to grant entry to the premises.*
>
> *(ii) It is practicable to communicate with such a person but it is not practicable to communicate with any person entitled to grant access to the evidence sought.*
>
> *(iii) Entry to the premises will not be granted unless a warrant is produced.*
>
> *(iv) The purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them."*

Each of these four options is accompanied by a blank box. The police officer concerned ticked the third and fourth boxes. The Form continues:

> *"Explain briefly why you believe that each condition you have ticked applies"*

In the blank space which follows, there is <u>nothing</u>.

PAP Correspondence

[24] In the present case, two completed Forms 5B accompanied the two partially completed Forms 5A. In the pre-proceedings fencing the Police Service legal adviser became involved, the upshot whereof was that while a copy of the completed Form 5B was not provided, its contents were communicated to the applicant's legal representatives in the following terms:

> "*Police hold information, dating from February 2021, which suggests that telephone number* [xxx] *was reported to have made calls and sent threatening texts to an Andrea Hughes on 1st January 2021. Both telephone numbers* [xxx] *and telephone number* [xxx] *are linked to the same IMEI number.*"

[NB: in the actual text the relevant telephone numbers are fully detailed.]

The communication from the Police Service legal adviser stated further:

> "*The 'gist' form that police have provided this office with …. was identical/verbatim to the information that was on the actual Form Part 5B that the Lay Magistrate* [received from] *police … the four lines on the gist form is* [sic] *exactly what the Lay Magistrate would have had … the identity of the source of the police information would not have been on the Form Part 5B …*
>
> *There were no notes from the Lay Magistrate on the warrant.*"

In the foregoing circumstances, the application which the applicant's solicitors had made to the Magistrates' Court to secure a copy of Part 5B was withdrawn. This court would commend the course taken by the Police Service legal adviser.

[25] In his affidavit the applicant's solicitor further discloses that PAP correspondence was then exchanged with each of the proposed respondents. This generated, firstly, a letter dated 22 June 2021 from the Crown Solicitor's Office, on behalf of the Police Service, containing the following material passages:

> "*... whilst the former partner* [of the Applicant] *was in custody and under arrest, there were further messages reported to have been received by the Applicant and efforts were made to locate the whereabouts of the phone in question …*
>
> *It is believed that the mobile phone with the relevant IMEI number is one that the Applicant owns or had access to at the relevant times …*

> *The Applicant is being investigated for making false complaints of a crime …*
>
> *The* [Police Service] *is investigating potentially false allegations which may constitute the indictable offence of perverting the course of justice …*
>
> *It was assessed that there was a requirement to obtain and examine mobile phones and sim cards owned by or that the Applicant has access to. The prospects of obtaining all the potentially relevant property voluntarily was* [sic] *assessed by Constable McComiskey and he felt that it was necessary in the circumstances to apply for a warrant …*
>
> *Constable McComiskey attended with the* [Lay Magistrate] *on 18 February 2021 to make the application for the warrants …*
>
> *Constable McComiskey was sworn in and presented the application …*
>
> *The warrants were necessary and … had the Applicant been made asked to* [sic] *voluntarily provide the items, in the absence of a warrant, then entry to the premises may have been denied or the purpose of the search could have been frustrated or seriously prejudiced where immediate entry not secured.*"

The fruits of the searches are described thus:

> "*Three mobile phones, including one from a locked cabinet, and three sim cards were seized from Blue Stone Unit. A further mobile phone, three sim cards and relevant articles were seized from the Applicant's home.*"

[26] The letter continues:

> "*The Applicant has provided a withdrawal of her complaints against the former partner. The statement sets out the Applicant's belief that the former partner was not responsible for the complained about conduct but that someone else was. The Applicant has declined to identify the individual ….*"

The heart of the Police Service response is encapsulated in the following passage:

> "*The* [Police Service] *had reasonable grounds for believing that an indictable offence had been committed and that there was material at both premises which were* [sic] *likely to be of*

> *substantial value to the investigation of the offence. Further, the material sought was likely to be relevant evidence and did not consist of or include items subject to legal privilege and the access conditions (under Article 10(3) of PACE) were satisfied.*"

[27] The PAP response letter on behalf of the Lay Magistrate emanates from the Departmental Solicitor's Office and is dated 25 June 2021. It contains the following material passages:

> "*A PSNI officer attended the* [Lay Magistrates'] *home and made the applications for both search warrants. The* [Lay Magistrate] *was satisfied the officer was a person with the requisite authority ….*
>
> *The officer was sworn in and presented their application, which was based on intelligence. The Applicant had made a complaint to police of receiving threatening messages. Police received information that those messages came from her home, rather than the phone of the accused. Therefore they wished to examine her phones and sim cards. Based on the intelligence provided, the* [Lay Magistrate] *granted the applications …*
>
> *It is suggested that there were not reasonable grounds to suspect that any of the Article 10(3) criteria were satisfied. Taking into account the circumstances of the case, it was possible* ***to infer*** *that the purpose of the search could be frustrated or prejudiced if a warrant was not granted and immediate entry could not voluntarily be gained.*"
>
> [Emphasis added.]

The Respondents' Affidavits

[28] While the procedural history of these proceedings was far from satisfactory, giving rise to *inter alia* an adjournment of the substantive listing and a resulting extensive series of further steps on the part of the two proposed respondents, it is unnecessary to dilate here on the details. Ultimately, though belatedly, the two proposed respondents provided the court with a high level of co-operation and this was acknowledged by the court at a later listing.

[29] One of the main products of what is noted in [26] above was the provision of two affidavits, one sworn by the police constable concerned and the other sworn by the Lay Magistrate. The affidavit of the police officer contains the following salient averment:

> "I believe that there were proper grounds for applying for

> the warrant but accept that the Search Warrant Application (Form 5A) for both searches did not include narrative entries setting out the basis for the entry conditions being met."

In other averments, the explanation elaborated by the deponent seems rather formulaic and is not altogether coherent. On balance, however, the court would be disinclined to reject this ex post facto account.

[30] In the affidavit of the Lay Magistrate it is appropriate to highlight the following averments:

> *1. "I do not have any specific memory of the applications for these warrants and I did not keep any records of the application process in accordance with instruction from JSB. Therefore, the only materials available about what information I was provided and my reasons for granting the warrants is contained in the PSNI Form 5A. There is also a PSNI Form 5B, which I have not seen since the search warrant applications were made in my home on 18 February 2021, which contains the intelligence relied upon by the PSNI at that time.*
>
> *2. The Form 5A does not record whether I was satisfied that one or both of the "access conditions" were made out (two were relied upon in section 4(c) of the form), it does not specify what information the PSNI relied upon in respect of these conditions, and it does not record my reasons for concluding that one or both were met.*
>
> *3. If sufficient information is not provided in the form, or associated records, I accept that it is difficult for the individual affected by a search warrant, in this case the Applicant, and any Court subsequently dealing with a challenge to the search warrant, to properly scrutinise the reasons why it was granted. I accept that in this case that gives rise to procedural unfairness.*
>
> *4. As I do not specifically recall the applications for these search warrants, I cannot, at this remove, speak to my reasons beyond the information contained on the Form 5A and 5B.*
>
> *5. I am able to say that I would not have granted the warrants unless I was satisfied at the time that the statutory criteria in the Police and Criminal Evidence (Northern Ireland) Order 1989 (as amended) were made out. I am also able to confirm from the Form 5A that I relied on intelligence information provided by the constable who applied for the warrants (the reference to "int supplied" is a reference to*

intelligence). However, I cannot expand on the detail for his reasons beyond that. "

This is followed by a series of averments in which the Lay Magistrate deposes to his recollection of the application to him for the warrants.

[31] The court considers it appropriate to draw attention to the final averment of the Lay Magistrate:

> *"Finally, I would like to thank the Divisional Court for providing the opportunity to me to set out my approach to these proceedings and for the kind words directed toward the service of LMs generally at the last hearing. I always strove to discharge my duties to the highest standards possible, but I recognise that there were some shortcomings in this particular application. Whilst I was required to retire from LM duties as a result of age, I remain an active member of the Northern Ireland Lay Magistrates' Association. Through this position I have been involved in a continual dialogue with the Northern Ireland Court Service and the JSBNI about issues concerning LMs. One the issues that is repeatedly raised is the need for further training to be provided as there has been no formal training for LM's since 2018. To this end, LMs in Belfast approached and received some training through the DSO and counsel who have experience in this area, which I understand from speaking with colleagues who attended was extremely helpful and a further training session has been arranged for 9th December 2021. I am going to encourage similar training for LMs who are not based in the Belfast area."*

This averment, in tandem with all that precedes it, is a paradigm example of the discharge of every litigant's duty to the court. Moreover, it conveys clearly to this court that the Lay Magistrate who issued the impugned search warrants in the present case is an exemplary servant of the public.

Guidance from the Decided Cases

[32] As noted by Gillen LJ in *Re O'Neill's Application* [2017] NIQB 37, at [17], there is a plethora of reported cases bearing on the main issue before this court. It will suffice in the present context to draw attention to what Lord Hoffmann stated in *Attorney General of Jamacia v Williams* [1998] AC 351 at 358, delivering the unanimous judgment of the House of Lords:

> "*The purpose of the requirement that a warrant be issued by a justice is to interpose the protection of a judicial decision between the citizen and the power of the state. If the legislature has decided in the public interest that in particular*

> *circumstances it is right to authorise a police man or other executive officer of the state to enter on a person's premises, search his belongings and seize his goods, the function of the justice is to satisfy himself that the prescribed circumstances exist.* ***This is a duty of high constitutional importance. The law relies on the independent scrutiny of the judiciary to protect the citizen*** *against the excesses which would inevitably flow from allowing an executive officer to decide for himself whether the conditions under which he is permitted to enter on private property have been met."*
>
> [emphasis added.]

From the decided cases emerges the clear theme that Article 10 PACE enshrines a draconian power not to be exercised casually or lightly. In *G v Commissioner of the Police for the Metropolis* [2011] EWHC Admin at [17] the English Divisional Court, considering the equivalent English statutory provision – section 8 PACE 1984 – stated:

> *"There is a large body of authority which establishes three important propositions: (1) the issue of a search warrant or a warrant for seizure is a very serious interference with the liberty of the subject. (2)* ***The officer applying for such a warrant must give full, complete and frank disclosure to the magistrate so as to enable the latter to base his decision on the fullest possible information.*** *(3) The court itself must give the most mature and careful consideration to all the facts of the case."*

[33] These principles are amplified in [17] of *Re O'Neill*:

> *"(i) All the material necessary to justify the grant of a warrant should be contained in the information provided on the application form which must identify which of the conditions specified in Article 10(3) is being relied on by the applicant.*
>
> *(ii) If the LM requires any further information in order to be satisfied that the issue of a warrant is justified, a note should be made of the additional information provided orally so that this exists as a proper record of the full basis on which the warrant has been granted.*
>
> *(iii) It is of the greatest importance that a judge granting a warrant must give reasons …."*

Elaborating on the third of these principles, another consistent theme of the jurisprudence is that the judicial officer concerned should ensure that reasons for their decisions are recorded in writing at the time. See for example *R (Glenn) v Revenue and Customs Commissions* [2011] EWHC 2998 (Admin) and *R (Tchengutz) v Director of Serious Fraud Office* [2012] EWHC 2154 (Admin) at [89]. This requirement will be less onerous in cases where the application for the warrant contains all of the material necessary to address the statutory requirements: see for example *R (Cronin) v Sheffield Magistrates' Court* [2002] EWHC 2568 (Admin) and *R (Newcastle United Football Club) v Commissioner for HM Revenue and Customs* [2017] EWHC 2402 (Admin).

[34] It is trite that by reason of Article 10(1)(e) PACE the search warrant application must specify which of the Article 10(3) conditions is said to apply. A failure in this respect may invalidate the warrant, as *O'Neill* (*supra*) and *Rednapp v Commissioner of Police for City of London* [2008] EWHC 1177 (Admin), a decision which resonates in the present case, make clear. In *Rednapp* none of the four Article 10(3) conditions had been deleted. This was condemned by the Divisional Court in scathing terms. The judgment is littered with the withering combinations of "*carelessly completed … wholly unacceptable … frankly inexplicable … uniform inaccuracy.*"

[35] In the decided cases there is a divergence of view on the test to be applied to the inclusion of misinformation in the search warrant application or the omission of material information. One line of authority favours the view that the search warrant will not be invalidated unless it can be demonstrated that the inclusion of material information omitted would have affected the judicial authority's decision to grant the warrant: see *R (AB and CD) v Huddersfield Magistrates' Court* [2014] EWHC 1089 (Admin), *Wood v North Avon Magistrates' Court* [2009] EWHC 3614 (Admin) at [35] and *Zinga* [2012] EWCA Crim 2357.

[36] There is, however, a competing line of authority to the effect that the test is whether the inclusion of the omitted information might have made a difference to the judicial authority's decision: see *R (Mills) v Sussex Police* [2015] 1 WLR 2199 at [41] and [46] and *R (Dulai) v Chelmsford Magistrates' Court* [2012] EWHC 1055 (Admin) at [45], where Burnton LJ formulated the following test:

> "*The question for this court in judicial review proceedings is whether the information that it is alleged should have been given to the magistrate might reasonably have led him to refuse to issue the warrant.*"

This was adopted with approval in *O'Neill* at [18]. As in *O'Neill*, this court prefers the *Dulai* line of authority.

[37] One can readily identify in the express requirements of Article 10 PACE, the format of Form PACE 5A and the decided cases considered above the operation of

one of the hallowed principles of the common law namely that in every *ex parte* application to a court the moving party is subject to the duty of the utmost good faith (*uberrima fides)*: see one of the foundational authorities, *R v The General Commissioners for Income Tax, ex parte De Polignac* [1917] 1 KB 486, which concerned an *ex parte* application for an injunction based upon a misleading affidavit. Successive three judge panels of the High Court and the Court of Appeal were unanimous in discharging the injunction, doing so in robust terms. The aforementioned duty was formulated by the judges in unqualified language. The twofold mischief was described by Lord Cozens-Hardy MR as "*… concealment of facts which ought not to have been concealed and … statements which were not in accordance with the facts*" (at 506).

[38] A more recent and comprehensive code of the government principles is found in the judgment of Ralph Gibson LJ in *Brink's Mat v Elcombe* [1988] 1 WLR 1350, at 1356/1357:

> *"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.*
>
> (1) *The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486, 514, per Scrutton L.J.*
>
> *(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v. Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at p. 504, citing Dalglish v. Jarvie (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289, 295.*
>
> *(3) The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.*
>
> *(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable*

effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in Columbia Picture Industries Inc. v. Robinson [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 92–93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in Bank Mellat v. Nikpour, at p. 91, citing Warrington L.J. in the Kensington Income Tax Commissioners' case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:" per Lord Denning M.R. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

> *'When the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" per Glidewell L.J. in Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc., ante, pp. 1343H–1344A.'"*

[39] While the cases cited above belong to the domain of private law, the principles which they enshrine apply fully to the realm of public law, to which the

present case belongs. The reason for this is the common law construct of the duty of candour owed to the court, which applies in both police applications for search warrants and every judicial review application. As stated emphatically in *R (Saha) v Secretary of State for the Home Department* [2017] UKUT 17 (IAC) (quoted in *Re Bryson's Application* [2019] NIQB 51 at [46]), the importance of every litigant's duty of candour to the court cannot be over emphasised. This is a duty of the most solemn kind. It is absolute, non-negotiable and non-delegable.

[40] There is no shortage of judicial guidance on how the respondent's duty of candour to the court in a case of the present kind should be discharged: see [24] of *O'Neill*:

> *"In the instant case, it would have been very simple for the respondent to have produced evidence that such scrutiny had taken place. In the first place, there could have been an affidavit from the LM indicating that she had specifically considered Article 10(3)(c) and was satisfied that the condition was met. Alternatively she could have averred that the she had drawn an obvious inference from the facts without needing the point to be addressed to her. Secondly, there could have been an affidavit from Mr Dunn that he had drawn this matter to the attention of the LM and recording what the LM had said. Thirdly, Mr Dunn could have made a note then or shortly afterwards of what had transpired at the hearing and exhibited this to an affidavit if he personally was not to swear an affidavit. Fourthly, someone who accompanied Mr Dunn to the hearing from the HMRC could have made a note if it was anticipated that Mr Dunn would be too busy to perform this task. None of these steps has been taken."*

The uncompromising terms of para [27] of *O'Neill* bear repetition in full:

> *"Parliamentary intent and the need for transparent compliance cannot be treated with the degree of casualness exhibited by the respondent in this instance if public confidence is to be preserved in a matter as solemn as the right to enter private property. This is neither a matter of mere oversight nor a considered decision that the inference was obvious as in Du Lai's case. Rather it is an instance where not even an elementary attempt has been made to comply with a fundamental proof of statutory obligation. We cannot be satisfied in these circumstances that a condition under article 10(3)(c) was either expressly or inferentially considered or found by the LM. It would appear no attempt was made either to address the issue of article 10(3)(c) or to give the LM any assistance on the matter. Notwithstanding the background facts of this case we have concluded that if addressed and assistance*

had been given on this vital proof, it might reasonably have led to the LM refusing to issue the warrant. We therefore quash the determination made by the LM."

The discretionary public law remedy which the court determined to award was an order quashing the grant of the search warrant and requiring the agency concerned, HMRC, to return to the applicant all property seized and any copies thereof still in its possession within a specified time limit: see [47].

Our Conclusions

[41] The effect of Article 10 PACE is that a judicial officer can lawfully accede to a search warrant application only if a particular state of mind is formed. The prescribed requirements for this state of mind are specific and exacting. The judicial officer must be satisfied that there are reasonable grounds for believing (i) four specified matters and (ii) one or more of four further specified matters belonging to a discrete menu: see [5] *supra*. The onus on the applying constable is to persuade the judicial officer that this state of mind in these prescribed terms should be formed. There is an ever constant onus on the applying constable, the authorising police inspector and the judicial officer, from the initial conception of the application to the completion of the process, to focus intensely on both the terms of Article 10 and the inter-related duties of candour and full and frank disclosure which they owe to the judicial officer.

[42] Next, it is necessary to emphasise that under the Article 10 PACE regime the person whose action gives rise to legal effects and consequences is the judicial officer. The conduct of the applying constable and the certifying inspector are preludes, essential prerequisites. Their importance must not be underestimated. However, the conduct of those two police officers does not have legal effects and consequences. It precedes an act – namely the Lay Magistrate's grant or refusal of the search warrant application – which does.

[43] We draw attention to this on account of evident confusion on the part of the legal representatives of all parties in these proceedings. There was a plain misconception in one aspect of the applicant's case, namely the challenge to the application of the police constable to the Lay Magistrate. In formulating the proceedings in this way, the applicant's legal representatives further identified the Police Service as the first respondent and the Lay Magistrate as the second respondent. This might be partially responsible for the next identifiable misconception, namely that of the respondent's legal representatives to the effect that the Police Service was the primary respondent. This too was fallacious.

[44] This misconception can be traced to the following passage in the letter dated 25 June 2021 from the Departmental Solicitor's Office, on behalf of the Lay Magistrate, to the applicant's solicitors:

> "*Our client will adopt the position set out in* ***Re Darley's Application*** *[1997] NI 384 at the hearing of this matter. The LM will assist the court in any way it can, but will leave the defence of the case to the PSNI.*"

The short riposte is that this is not a *Darley* type case. In the event, whether due to these misconceptions or otherwise, at the stage when the case was listed for hearing – following intensive judicial case management – both respondents presented themselves before the court, represented by separate counsel, without any affidavit evidence having been filed and adopting the stance that the Police Service was the primary respondent. This was erroneous. This was one of a lengthy series of issues raised by the court, the upshot whereof was an adjournment of the substantive listing from 2 November to 1 December 2021.

[45] In the event, each of the respondents, properly so, reconsidered their positions, resulting in an application to admit separate affidavits sworn by the Lay Magistrate and police officer concerned. The court permitted this course. By this stage of the proceedings the co-operation of both respondents with the court and the discharge of their respective duties of candour to the court were irreproachable. Furthermore, the Police Service complied fully with the court's direction to provide the sensitive Form 5B for consideration in chambers by the judicial panel. This satisfied us that there was no impropriety or deficiency in the completion of this pro-forma. This was unsurprising, given that the content of this document had already been provided by the Police Service legal adviser to the applicant's solicitors: see [23] above.

[46] The concerns and questions raised by the court upon the initial listing of the case for "rolled up" hearing were extensive. At this remove the court acknowledges the efforts which both respondents have made to respond to them. This has included the provision of documents, in particular Form 5A, in better copied and, hence, legible form.

[47] Shortcomings in and reservations about the formulation and presentation of the search warrant application to the Lay Magistrate and the making of the impugned decisions nonetheless persist. By a combination of the explicit and onerous statutory requirements and the overlying legal principles, the duties imposed on both agencies in the matter of every search warrant application under Article 10 PACE are onerous. They must be discharged to the full. The law does not permit of any exceptions to this overarching requirement. These duties must be discharged in a manner whereby a reviewing court can at a later stage satisfy itself simply by reading the relevant documents that all of the prescribed legal requirements have been observed. There should be no need to provide the multiple explanations and further materials which were required in this case. Furthermore, due and full observance of the applicable legal requirements will normally mean that affidavit evidence provided to the court by the two agencies concerned will not have to address gaps, queries or other shortcomings in the completion of Form

PACE 5A or 5B. Observance of the highest standards of professionalism is required. In this way the rule of law is fully respected and observed.

[48] The first ground of challenge is a pure, unvarnished legality challenge. The consideration that the jurisdiction of the High Court invoked is of the supervisory kind does not signify any material limitations in a case of this nature. This court conducts an audit of legality by reference to all of the evidence assembled and makes its decision accordingly. It is conceivable that in some cases the evidence assembled will raise issues of expertise or evaluative judgement on the part of police personnel. This might, in principle, call for a restrained approach on the part of this court. However, that is not this case.

[49] The multiple shortcomings in the police applications to the Lay Magistrate for the search warrants have been detailed particularly in [20] – [23] above. They are not peripheral, trivial or technical. Rather they are matters of gravity and substance. Had the court proceeded to final adjudication at the first of the two stages noted above it is highly likely that an order quashing the impugned search warrants would have been made. However, the matrix ultimately before the court, at the second and final stage, with the advent of the respondents' affidavits and a plethora of further materials, differed significantly from its predecessor. By this stage the case for judicial intervention in the form of a quashing order was less clear, albeit a compelling case for a declaratory order might well have been established. In the event, the court was not required to adjudicate as a draft order to which all parties subscribed materialised. Having considered this, the court was satisfied that it should, in the exercise of its discretion, make an order substantially in the terms proposed: see [51] *infra*.

Impermissible Satellite Litigation

[50] The Crown Solicitor's PAP response letter noted contains the following passage:

> "*The Applicant is engaging in an impermissible collateral challenge and the proposed Respondent believes that this is improper and a misuse of the judicial review mechanism …. (see* ***R v DPP, ex parte Kebilenee*** *[2000] 2 AC 326 and* ***Re McVeigh's Application*** *[2014] NIQB 57). …"*

There is no extant prosecution of the applicant. In passing, the further evidence provided to the court indicates that (a) on the day following the search the applicant withdrew her complaint and (b) she has not been arrested or interviewed by police subsequently. Thus, in stark contrast with *Kebelinee* and *Re Bryson* [2019] NIQB 51, intervention by this court of supervisory superintendence will not trespass upon proceedings in any other court.

Conclusion

[51] The court, by its final order, grants the following remedies:

(i) An Order of *certiorari* quashing the impugned search warrants.

(ii) A declaration that the entries, searches and seizures carried out by police officers pursuant to the warrants were unlawful.

(iii) An order of mandamus requiring that the Police Service, within 21 days from the date of this Order:

i. shall destroy any and all materials, information, data, and work product that has been extracted and/or created and/or generated as a result of the unlawful seizure and examination and/or analysis of the applicant's property; and

ii. shall return to the applicant all property, materials and possessions seized under the authority of the said warrants unless before the expiry of that 21 day period, an application is made to the Crown Court pursuant to section 59 of the Criminal Justice and Police Act 2001 ('the 2001 Act'), in which case the Crown Court will determine all matters touching upon the said items.

(iv) Payment of the applicant's legal costs and outlays by both Respondents, in equal measure.

Adjudication of the applicant's Article 8 ECHR ground, which has effectively though not formally been conceded, has been rendered otiose.

A Footnote

[52] The Police Service and the body of Lay Magistrates and those who advise and support them will doubtless be aware that in recent times there has been a substantial number of cases of the present *genre*. While most of these are recorded in this judgment, others include *Re Fine Point Films and Others Application* [2020] NIQB 55, *Re Donaghy and Others* [2017] NIQB 123 and *Re McVeigh's Application (No 2)* [2017] NIQB 61/[2020] NI 84. All have exposed legal flaws in the process. The indication that updated training of the body of Northern Ireland Lay Magistrates is imminent is to be welcomed. This court does not underestimate the difficulties and complexities of discharging the functions of this statutory judicial office. The Police Service will doubtless respond to this judgment in like manner.