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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**16/05/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY AS1 (A MINOR ACTING BY HER MOTHER AND NEXT FRIEND) FOR JUDICIAL REVIEW

AND IN THE MATTER OF ACTIONS OF THE POLICE SERVICE OF NORTHERN IRELAND IN RELATING TO VIDEO TAPING THE APPLICANT IN HER HOME ON 5 AUGUST 2016

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KEEGAN J

I have anonymised this application as it involves a minor. Nothing should be published which would identify the minor or her family on the basis that her interests need to be protected.

Introduction

[1] This is an application for judicial review of a decision to video tape the applicant in her home during an authorised search. The application is dated 14 December 2016. The applicant is a 9 year old child ("the child" also referred to as ("Child 1"). The case is brought by her mother as next friend. The applicant's elder brother was also in the home at the relevant time and he is referred to as "Child 2" in this judgment. The respondent is the Police Service of Northern Ireland ("PSNI"). Leave was granted by McCloskey J on 12 December 2017 to apply for various forms of declaratory relief, mandamus and damages. The relief sought is pleaded as follows:

> "(a) A declaration that the policy or practice whereby the respondent utilises video tape during entry and search of a home is unlawful, ultra vires and of no force or effect.

(b) A declaration that the policy or practice whereby the respondent retains footage of the entry and search of a home is unlawful, ultra vires and of no force or effect.

(c) A declaration that the use of videotape during the entry and search of a home and the retention of such footage thereafter requires explicit legislative authority.

(d) A declaration that the decision of the respondent to utilise videotape within the applicant's home on the 31 August 2016 was unlawful.

(e) A declaration that the decision of the respondent to retain the videotape footage obtained during the entry and search of the applicant's home on 3 August 2016 was unlawful.

(f) An order or mandamus requiring that the respondent dispose of the videotape footage obtained during the entry search of the applicant's home on 3 August 2016.

(g) Damages."

[2] The grant of leave was restricted to certain grounds set out in an amended Order 53 Statement dated 2 March 2018 namely:

(a) The policy or practice of the respondent to utilise video tape during entry and search of the home is contrary to section 6 of the Human Rights Act 1998 read together with Article 8 ECHR as there is no legal basis for such interference with the right to respect for private life.

(c) The decision of the respondent to utilise video tape during the entry and search of the applicant's home on 3 August 2016 was contrary to section 6 of the Human Rights Act 1998 read together with Article 8 of the ECHR as there was no legal basis for such interference with the applicant's right to respect for private life.

(f) The policy or practice of the respondent to utilise video tape during entry in a search of a home is contrary to directly effective European law – namely Article 1(1) of Directive 95/46/EC read together with Article 78(2) and 24 of the Charter of Fundamental Rights of the European Union (CFR) as there is no legal basis for such interference.

(h) By utilising video tape during the entry and search of the applicant's home on 3 August 2016 the respondent acted contrary to directly effective European law – namely Article 1(1) of Directive 95/46/EC read together with Article 7(82) and 24 of the Charter of Fundamental Rights of the European Union (CFR) as there was no legal basis for such interference.

(j) The decision of the respondent to retain video tape footage of the entry and search of the applicant's home was contrary to directly effective European law – namely Article 1(1) of Directive 95/46/EC read together with Article 7(82) and 24 of the Charter of Fundamental Rights of the European Union (CFR) as there was no legal basis for such interference.

[3] Upon questioning counsel confirmed that the Court was only being asked to adjudicate on the wider policy issues regarding the use of video recording in these circumstances by the PSNI. Counsel helpfully framed the question for determination as follows:

> "The issue for determination by the Court is whether the policy or practice of using video recording and retaining video footage obtained during a search of a home is contrary to section 6 of the Human Rights Act 1998 and Article 8 ECHR and/or contrary to European Union law namely the right to privacy in the Charter and Directive 95/46/EC. The challenge centres on the legality of the policy rather than the proportionality of the specific search."

[4] Mr McGleenan QC appeared with Mr Kennedy BL on behalf of the respondent. Mr Lavery QC appeared with Mr Bassett BL on behalf of the applicant. I am grateful to counsel for their comprehensive oral and written submissions.

The applicant's evidence

[5] The applicant's evidence is comprised in a grounding affidavit sworn by her mother and two affidavits filed by the instructing solicitor. The grounding affidavit deals with the facts of this case, namely that the applicant is a child who is now 9 years of age. Her brother is currently 16 and he suffers from a range of mental health issues for which he receives medication. It was initially suggested that he would be an applicant however the case was ultimately only brought on behalf of one child.

[6] The grounding affidavit then refers to the fact that the child's mother and partner were arrested on 3 August 2016 at her home in connection to the murder of Michael McGibbon on 19 April 2016 in North Belfast. The affidavit avers that the police entered the house and video-taped the family. It states that the basis for the search of the house was explained to the family at the time. However, the affidavit

states that it is the applicant's recollection that no explanation was given as to why it was necessary to continue videoing the family after the entry.

[7] The affidavit of the child's mother describes the scene as follows:

> "The entry of police into the house was a shock. It caused distress to the children to have strangers in their home video-taping them as they got out of bed. [Child 1] was very frightened at the time and [Child 2] reacted badly to their video-taping of him. The use of the video tape in the house has, in my opinion, had a detrimental effect on the children. The raid was very upsetting and the use of video by the police officers made this much worse."

The affidavit confirms that this adult was questioned by the police on 3 August 2016 and released unconditionally. The applicant's mother also avers that she has been told by police that they intend to retain the footage.

[8] The first affidavit filed by the applicant's solicitor, Mr Michael Brentnall, is dated 15 December 2016. In that he describes that on 1 December 2016 he viewed the footage of the police entering the premises at Antrim Road Police Station. He describes the recording of the entry at 8.48am and the subsequent search which ends at 9.26am. He notes that the applicant was taken out of the house at 9.08am. During the 20 minutes when the applicant was present, the solicitor notes that some images are captured of her whilst she is in her mother's arms. The solicitor also avers to the fact that the father and the mother were informed that they are to be arrested. He records the fact that Child 2 reacted badly to his mother's arrest and there was an altercation between him and police which was recorded.

[9] The second affidavit by Mr Brentnall deals with the issue of delay. Firstly, he points out some issues with legal aid. He then refers to a difficulty in engaging the applicant's mother. He states that legal aid was eventually granted on 15 November 2016 and notification was provided on 18 November 2016. He states that the applicant's mother was out of the jurisdiction between 21 November and 28 November. He explains that there were then issues with Child 2 being taken on a respite holiday. The affidavit states that during the months of November and December there were a number of instances of Child 2 having difficulties with his mental health. The solicitor then states that he had to view the video footage. He states at paragraph 22 that the reason for the difficulty in meeting the applicant was she was caring for her son who had issues and was engaging with mental health and social services. The respondent did not make any oral submissions on this point however reference was made to a previous written argument. In all of the circumstances I am not minded to dismiss this case on the basis of delay and I am prepared to allow an extension of time.

[10] A further affidavit was provided by Mr Brentnall dated 3 May 2018. This was filed to deal with some queries raised by the Court. In the affidavit the solicitor states that "the principal purpose of the application for judicial review was to challenge the practice or policy of the PSNI in using video cameras in a home". The solicitor also exhibits correspondence from the Police Ombudsman of Northern Ireland. The letter in relation to this applicant is dated 12 January 2017 and in it the Ombudsman states that there is insufficient evidence to support the allegations that were made as "this office is satisfied that the filming was appropriate for evidence gathering purposes".

The evidence on behalf of the respondent

[11] The evidence on behalf of the respondent is comprised in two affidavits, the first from a police search advisor. This affidavit sets out the role of the police search advisor and then refers to the background of this case as follows:

> "The circumstances of the background to this incident are that on 15 April 2016 police received a report that a male had been shot 3 times in the leg in the Ardoyne area of Belfast. One of the rounds severed an artery and the man died a short time later. The male had, the previous night, been threatened at his home by unidentified males who claimed to be the 'RA'. In the days following the attack there were claims of responsibility – one by the "New IRA" and the other claiming that the shooting was carried out by Republicans."

[12] Paragraph 6 of the affidavit states that on 2 August 2016 the deponent was tasked as police search advisor in relation to the search of the property. The search was conducted under section 24(3) of the Justice and Security Act 2007 and Schedule 5 of the Terrorism Act 2000 as part of the respondent's duties to investigate crime. The search was authorised by a Detective Inspector who had to have been satisfied that there was a legal basis for the search, that the search was proportionate and that it was necessary because no less intrusive means could be employed. The affidavit states that during the planning phase of all searches consideration is given to the prospect of children being present even if that is not reflected in the available intelligence.

[13] The deponent further avers that his role is to ensure that the appropriate resources are deployed to effectively and safely carry out this task. He explains that the welfare of the occupants including children is considered but so too is the welfare of police officers. He refers to the aim of this intervention as follows:

> "The intention was that EGT, including the use of video camera would negate any malicious complaint and would provide impartial non-edited evidence as to the

conduct of the police officers and the male occupant during the search. The approach to the house on entry is a factor in this. On this occasion:

- Entry to the property was at a reasonable time, i.e. not early morning.

- There was no rapid entry.

- Entry teams will secure the property and once this is done the police presence in the house will be scaled back. Normal practice when searching a house where children are present is to encourage the parents to make arrangements at an early stage for any child present to go to a friend or relative's house for the duration of the search – in this case I believe that this occurred for the younger children."

[14] The affidavit also refers to a number of factors as follows which were taken into account and these are recited at paragraph 7 of the affidavit as follows:

"(a) Local community interest in the investigation.

(b) The potential for other third parties to arrive at the property during the search – my experience suggested that a group of dissident republican supporters could, upon hearing that a search was taking place, make their way to the address to protest against the search – in fact, I received information after the search had started that a gather up of supporters had been making their way to the property. The presence of the police with EGT capability no doubt, in my view prevented this.

(c) The fact, known by me, that the male occupant had a history of aggression towards the police.

(d) The fact, relayed to me in my briefing, that the male occupant has a history of posting messages on social media in relation to alleged conduct of police officers towards his children during searches and that this was likely to occur again as a result of the search due to be undertaken."

[15] The deponent then avers to his belief that the PSNI is lawfully able to capture images of investigative matters (including in private dwellings) on the basis of common law powers which are exercisable in conjunction with conducting investigations – in this case lawful search under Section 24 of the Justice and Security Act 2007 and Schedule 5 of the Terrorism Act 2000. The deponent also makes the following averment;

> "In this case the intention was to prevent and detect any offences and to record part of this in case of subsequent allegations being made – so that there would be a viewable record of what occurred."

[16] Continuing, the deponent states that any images captured would be held securely in accordance with PSNI guidance. Reference is made to the current national and PSNI guidance on training which authorises the use of Body Worn Video ("BWV") and Evidence Gathering Teams ("EGT") during the house searches. The affidavit states that "the entry and exit phase are normally captured along with any other exceptional event". Finally, reference is made to the provisions of the Data Protection Act 1998 ("DPA"). The deponent avers that the recording was part of a police investigation and part of the evidence gathering process. The affidavit states that the personal information which would have been, and was captured, was felt to be necessary and proportionate and in the circumstances there were no less intrusive means to do so.

[17] A second affidavit was sworn by another member of the PSNI. This person was tasked to operate the hand held video camera to assist in the search. This affidavit refers to a briefing by police in relation to this policy. The deponent avers that in circumstances like this the primary purpose is for the protection of police officers and that when recording:

> "I would have no reason to actually record minors outside of them frustrating the search or if police were informing occupants (which could include minors) of their rights.
>
> In my view, where the children were being addressed by PSNI or where they were interacting with police then it was necessary to record this as part of my duties and where they were captured otherwise this was unavoidable – for instance where one of the children was being carried by the mother and I recorded her interacting with PSNI officers."

[18] This deponent suggests that footage recorded by the Evidence Gathering Team has two outcomes. First, where offences are captured footage is mastered into a disc and exhibited. Second, if there are no offences or other requirement for

footage to be retained it is then deleted from the SD card – the digital storage medium where the images are recorded. The affidavit states that in this case, due to potential offences within the house and potential complaints to the Ombudsman, the footage was mastered and given Exhibit No SA1 and is still retained due to ongoing court proceedings. The deponent avers that there is no requirement to retain the footage outside of the ongoing legal proceedings. So pending these it could be destroyed. However, this deponent understands that there is a possibility of the minors bringing a personal injury claim and so there may be a requirement to retain the footage for some time yet. The affidavit concludes by stating that the footage is currently stored securely by the deponent and only he has access.

Pre action correspondence

[19] There was an exchange of correspondence which is instructive in a number of respects. The first Pre-Action Protocol ("PAP") response is dated 8 September 2016. In it the PSNI states that:

> "All decisions in this matter were taken in accordance with the law and in accordance with applicable police policy. The relevant operating procedures for the recording of images in private dwellings make specific reference to the need to take special account of the rights of children. In addition PSNI Policy Directive PD 13/06 Policing with Children and Young People incorporates the provisions of the UN Convention on the Rights of the Child into police action in all spheres. Article 3 of the Convention requires that the best interests of the child be the primary consideration in all decisions in relation to them by police."
>
> In the present case there was no intention to record images of children. Children were present in the house and one of them became aggressive towards police. During the course of effecting the entry to the premises, some images of children were recorded, in accordance with the object of the recording, which was to protect the rights and interests of all persons involved in the search.
>
> The recordings of images which included the proposed applicants was purely incidental and was in no manner the object of the decision to record."

[20] A further request was made for explanation as to the grounding policy. The reply is by e-mail of 27 September and refers as follows:

> "PSNI considers that PD 13/06 as previously referred to and PD 01/15 Information Management Policy provides a sufficiently clear and foreseeable legal basis for the recording of the searches. PD 01/15 sets out clear and accessible rules for the processing of recordings.
>
> It is neither necessary nor feasible for PSNI to have bespoke policies regulating each and every one of the myriad activities police may necessarily be involved in. Authorisation for the recording of searches is required in each case and was obtained in this case."

Arguments made by the parties

[21] Mr Lavery QC filed comprehensive written arguments augmented by oral submissions during which he made the following points:

(i) Mr Lavery accepted the lawfulness of the search. His argument focussed on the fact the videoing of the child applicant was unlawful as it occurred in the privacy within the home.

(ii) Mr Lavery argued that this intervention was not in accordance with law.

(iii) Mr Lavery argued that it was not justified or proportionate.

(iv) Mr Lavery contended that there were no proper guidelines in relation to this issue and as such that this course of action lacked regulatory oversight and control.

(v) Mr Lavery also argued that this approach offended Article 8 of the ECHR and the provisions of the EU Charter.

(vi) Mr Lavery stated that this case fell within the provisions of the Data Protection Act and that the police actions were not within the exemptions provided for and as such breached those provisions.

[22] Mr McGleenan QC on behalf of the respondent made a number of replying arguments which may be summarised as follows:

(i) Helpfully Mr McGleenan conceded that Article 8 was engaged and that there had been interference.

(ii) Mr McGleenan argued that the intervention in this case was in accordance with law. He based this argument upon the two statutory authorisations for the search and then he relied on section 32 of the Police (Northern Ireland) Act and common law provisions in relation to the actions taken.

(iii) Mr McGleenan argued that the policy objectives have been met and he made the case that there is oversight in relation to this type of intervention. He referred to the Code of Practice which was enacted following the decision of Fox & Others [2013] NICA 19.

(iv) Mr McGleenan referred to the value of video recording and drew an analogy with BWV in the domestic violence context. He pointed to the utility of this type of intervention particularly for the prevention of disorder and to deal with any allegations of police misconduct in the context of this case.

(v) Mr McGleenan referred to the Data Protection Act and made the case that there had been no breach given the exemptions within the Act and also that retention in this case was clearly for police purposes.

(vi) Mr McGleenan also referred to the fact that in this case complaints had been made to the Ombudsman which were not attached to the affidavits but which he understood were ultimately unsuccessful. He also made an argument that there was an alternative remedy.

Statutory context

[23] The statutory basis for the search is contained in Schedule 5 to the Terrorism Act 2000. Section 24 of the Justice and Security (Northern Ireland) Act 2007 also applies and reads:

> "24. Search for munitions and transmitters
>
> Schedule 3 (which confers power to search for munitions and transmitters) shall have effect:
>
> Schedule 3 reads as follows:
>
> 2(1) An officer may enter and search any premises for the purposes of ascertaining:
>
> (a) whether there are any munitions unlawfully on the premises; or
>
> (b) whether there is any wireless apparatus on the premises.
>
> 2(2) An officer may not enter a dwelling under this paragraph unless he is an authorised officer and he reasonably suspects that the dwelling-

(a) unlawfully contains munitions or

(b) contains wireless apparatus

2(3) A constable exercising the power under sub paragraph 1 may if necessary be accompanied by other persons.

3(1) If the officer carrying out a search of premises under paragraph 2 reasonably believes that it is necessary in order to carry out the search or to prevent it from being frustrated, he may-

(a) require a person who is on the premises when the search begins, or who enters during the search, to remain on the premises;

(b) require a person mentioned in paragraph a to remain in a specified part of the premises;

(c) require a person mentioned in paragraph a to refrain from entering a specified part of the premises;

(d) require a person mentioned in paragraph a to go from one specified part of the premises to another;

(e) require a person who is not a resident of the premises to refrain from entering them."

- The Police (Northern Ireland) Act 2000 reads as follows:

"32(1) It shall be the general duty of police officers-

(a) to protect life and property;
(b) to preserve order;
(c) to prevent the commission of offences;
(d) where an offence has been committed to take measures to bring the offender to justice."

- Article 8 of the European Convention on Human Rights ("ECHR") provides:

"**Article 8 – Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or … for the prevention of disorder or crime, … or for the protection of the rights and freedoms of others."

This is one of the protected Convention rights under the Human Rights Act 1998.

Policy Context

[24] I was referred to the following policy and related documents:

(i) PD/01/15-Information Management policy.

(ii) PD/13/16-Policing with Children and Young People.

(iii) Code of Practice for the exercise of powers in the Justice and Security (Northern Ireland) Act 2007, May 2013.

(iv) Police Service of Northern Ireland, Body Worn Video (BWV) Privacy Impact Assessment August 2016.

(v) Independent Reviewers Report on the Justice and Security Act, 7th, 8th and 9th.

Consideration

[25] The applicant objects to video images being recorded by police after entry to her home. The issue is whether the actions of the police represent an abuse of power in the exercise of their duties in a private home. Having looking carefully at the evidence the following salient facts emerge:

(i) This was a lawful search, properly authorised under legislation designed to investigate terrorist offences. The search was to look for weapons and recording equipment, the backdrop being an investigation into a murder.

(ii) This search was early in the morning, in a private home, where police were aware children would be present.

(iii) The decision to record was based on a number of factors including to maintain order, to obtain an objective record, and to avoid unwarranted allegations against police.

(iv) The recording was overt, the images have not been broadcast and they are currently retained by police given that civil proceedings may be brought by the family.

(v) The capture of images of the child was incidental.

[26] It is in the context of these particular facts that I must adjudicate upon this applicant's claims that the taking of video footage and its use and retention breaches Article 8 of the ECHR, EU law and the Data Protection Act. I have been greatly assisted by counsel's streamlining of the legal considerations at play. It was agreed that Article 8 is engaged in this case. It was also accepted that there has been an interference with Article 8 which met a certain level of seriousness. There was no dispute between the parties that there is a reasonable expectation of privacy in this case and that this extended to the child.

[27] A search of this nature is clearly in accordance with law by virtue of the powers contained within Schedule 5 to the Terrorism Act 2000 and/or section 24 of and Schedule 3 to the Justice and Security (Northern Ireland) Act 2007. These legislative provisions are specifically designed to assist in the detection and prevention of terrorism. That context must frame this case. However, the taking of the video is not specifically authorised within this process. This was an ancillary matter and the purpose of it is set out in the affidavit evidence. In particular, in this case the video recording was utilised to gather impartial evidence, to protect the interests of the police and individuals affected and to prevent disorder and further offences.

[28] In my view there is a lawful basis for the exercise of this power found in section 32 of the Police (Northern Ireland) Act 2000 and common law. In cases such as Wood v Commissioner for the Metropolis [2009] EWCA Civ 414 and Murray v UK [1994] 19 EHRR 139 the common law has provided a sufficient basis for the taking of images. These principles are reiterated in R (Catt) v Commissioner of the Police for the Metropolis [2015] UKSC 9 where at paragraph 7 Lord Sumption said:

> "At common law the police have the power to obtain and store information for policing purposes ie broadly speaking for the maintenance of public order and the prevention and detection of crime. These powers do not authorise intrusive methods of obtaining information such as entry upon private property or acts (other than arrest under common law powers) which would constitute an assault. But they were amply sufficient to authorise the obtaining and storage of the kind of public information in question on these appeals."

[29] The intervention must also be necessary and proportionate. In this case there was no real argument about proportionality given the facts. The only live issue

which was pressed by counsel was whether the policy basis for interventions of this nature satisfied the "quality of law" requirement. This legal principle is driven by the fact that legal interventions should be foreseeable and should not be arbitrary. The applicant argued that in relation to privacy the European Court of Human Rights has imposed a particularly exacting standard of what is in accordance with law. I was referred to numerous cases starting with Malone v United Kingdom. However, none of these cases are truly on point as they largely involve the world of surveillance. It is clear that the Strasbourg case law establishes that covert and secret surveillance by the State constitutes a particular threat to democracy and freedom. Such surveillance requires strict justification in the interests of national security or for the prevention of crime. See Gillan v UK [2010] 50 EHRR 45. The European cases led to a legislative strengthening of protections in the United Kingdom culminating in the Regulation of Investigatory Powers Act 2000.

[30] The type of intervention at play in this case is of a different species as it is overt. This is not a secret measure. In my view it must follow that the same strictures do not apply in terms of quality of law. However, such actions may still constitute an interference with Article 8 rights and so the quality of law requirement does not dissipate entirely. In Gillan the court stated, in the context of stop and search powers:

> "Domestic law must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of democratic society enshrined in the Convention, for a legal discretion granted to the Executive to be expressed in terms of an unfettered power. Consequently the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. The level of precision required with 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."

[31] In Catt at paragraph 11 the following assessment is made by Lord Sumption:

> "The requirement of Article 8(2) that any interference with a person's right to respect for private life should be in accordance with the law is a pre-condition of any attempt to justify it. Its purpose is not limited to requiring an ascertainable legal basis for the interference as a matter of domestic law. It also ensures that the law

> is not so wide or indefinite as to permit interference with the right on an arbitrary or abusive basis.
>
> For this purpose, the rules need not be statutory, provided that they operate within a framework of law and that there are effective means of enforcing them. Their application, including the manner in which any discretion will be exercised should be reasonably predictable, if necessary with the assistance of expert advice. But except perhaps in the simplest cases this does not mean that the law has to codify the answers to every possible issue which may arise. It is enough that it lays down principles which are capable of being predictably applied to any situation."

[32] In that vein I turn to the existing policy in this area. Following the decision in Fox & Others a detailed code was enacted for stop and search - the Code of Practice for the exercise of powers in the Justice and Security (Northern Ireland) Act 2007 ("the Code"). This Code was made in accordance with section 34(1)(a) of the Justice and Security (Northern Ireland) Act 2007 and it refers to:

- Section 21 – Stop and Search
- Section 23 – Entry
- Section 24 Schedule 3 – Search for munitions and wireless apparatus
- Section 26 – Premises and vehicle

[33] The respondent did not draw the Code in aid as a basis for the recording. That is understandable as the Code does not deal with video recording. It seems to me that this is because the power being exercised is ancillary to the statutory provisions. The Justice and Security Act also requires a record of any search. It was argued that the use of video creates the best record. I am attracted to that line of argument however I do not go so far as to say that the video record is the same as the written record that must be taken. That is because video recording interferes with personal autonomy and space and so Article 8 is engaged.

[34] In fact the PSNI refers to two policy documents in the pre-action correspondence. One is a generic policy dealing with children as the subjects of policing. This document properly expresses all of the domestic and international principles which apply when children are involved in any intervention. In particular, reference is made to the UN Convention on the Rights of the Child and the best interests of the child. The other code relates to management of material and data protection. Again this document properly refers to the police response in such a scenario. These documents provide a broad framework for policing with children and also management of data. I accept that they do not deal with the use of a video in a private home.

[35] However, I was referred to another code namely that to regulate the use of Body Worn Video ("BWV"). This is dated August 2016. I was told that this document has been circulated and is publicly available since February 2018. The BWV is a project in Northern Ireland which is relatively new. The Executive Summary states that in common with other UK police services, and in line with recommendations from a number of sources including the Policing College, Senior Police Officer Associations and the Home Office, PSNI initiated a project to implement the use of it across the service in line with national guidelines. It states that:

> "Various studies have shown benefits can be achieved through the prudent use of this technology within modern policing."

The efficacy of such a technique is set out in the documentation I have been referred to. This accords with the PSNI averment that, "it is to everyone's benefit" to have an objective record in tense situations such as stop and search.

[36] There is extensive reference in the BWV documentation to Article 8 and it is specifically framed in terms of an assessment of the issue of privacy. There is reference to the European Convention on Human Rights. There is reference to the Data Protection Act in some detail. Appendix K refers to Evidence Gathering Teams and it refers to the relevant law in relation to this in the context of public order events. The Executive Summary gives expression to the overall aim as follows:

> "Recognising that this will have an impact upon the privacy of individuals ranging from victims, witnesses and suspects through to officers and the general public PSNI has initiated a privacy impact assessment. The PIA document has been created to examine the risks and document the mitigation processes, procedures and controls that will ensure a proportionate and pragmatic use of this technology for the greater good of the Northern Ireland community. The approach taken has been to consider the impact upon individuals' privacy using the Data Protection Act (DPA principles) as a framework against which the controls may be mapped. PSNI is the Data Controller for this data as defined by the DPA."

[37] The reports of the independent reviewer are all broadly in support of the use of body worn video as an appropriate evidence gathering technique. The point made by the respondent is that this has value beyond terrorist cases and is particularly important in domestic violence cases which may involve the videoing of scenes within the home. I agree with that assessment.

[38] I can well understand how this policy is drawn in aid. In my view it provides a comprehensive framework for this type of intervention. It is also a reflection of the police utilising modern techniques. These are not alien to society at large as video recording of day to day events is a social norm. However this method must be used appropriately. The Code refers to a situation where a breach of Article 8 may occur. In particular it embeds a "privacy impact assessment" at the heart of the policy structure. It also refers to incidental capture and whilst it does not specifically mention children it refers to "vulnerable individuals". I note that this policy is subject to ongoing consultation and that children's organisations are engaged.

[39] Drawing all of the above strands together my conclusion regarding the Article 8 challenge is as follows. Firstly I am persuaded that proper consideration was given to all of the issues by virtue of the respondent's affidavit evidence. I do not consider that the type of overt recording at issue in this case requires legislative authority. I consider that the common law offers sufficient protections. In my view the BWV policy document meets the quality of law test and it can be applied to this type of video recording. I accept that at the date of the interference the policy applied may not have met the quality of law test. However, the situation has been rectified as the current policy is compatible, it is public, it deals with privacy and is subject to ongoing consultation. It complements the other policy documents which refer to children's rights and data management to provide a comprehensive code. As such I do not consider that the policy itself breaches Article 8. Whether there is a breach of Article 8 in a specific case will depend on the particular circumstances of the case.

[40] The Article 8 consideration focusses upon whether processing of personal data should occur. The next issue to be addressed is the application of the Data Protection Act 1998 ("DPA") which focusses upon the proportionality of how personal data is used and retained. This legislation implemented the EU Directive 95/46/EU. The activities of the PSNI in preventing and detecting crime and in the apprehension or prosecution of offenders are exempted under section 29 of the DPA. This exemption applies to the first data protection principle (except to the extent to which it requires compliance with the conditions in Schedules 2 and 3) Schedule 2 which refers, inter alia, to circumstances where processing is necessary for the administration of justice and in connection with any legal proceedings.

[41] Section 35 DPA permits the disclosure of personal data which would otherwise be impermissible where such disclosure is necessary for or in connection with legal proceedings, including prospective legal proceedings. The respondent refers to the fact that the applicant may make a complaint to the Police Ombudsman for Northern Ireland ("PONI") and/or institute private law proceedings seeking compensation and so disclosure may be made in those circumstances. That did in fact happen as there was a PONI complaint. There is also a prospect in this case of civil proceedings being brought by the applicant and her family.

[42] The statutory scheme provides safeguards in relation to the gathering and storage of personal details by virtue of section 10 to the DPA. There is also provision for complaints to the Information Commissioner ("IC"), under Section 40-45 as well as Court remedies set out at Section 7-15. The utility of a complaint to the IC was explained in the Supreme Court in Catt.

[43] Paragraph 13 also states:

> "There are discretionary elements in the statutory scheme as there must inevitably be, given the great variety of circumstances that may give rise to allegations that personal data had been improperly processed but their ambit is limited. In the first place, the Code of Practice governing police information is an administrative document whose contents are determined by police organisations subject to the approval of the Home Secretary. It leaves room for discretionary judgment by the police within specified limits, notably in the area of the duration of retention. But both the code and the guidance issued under it are subordinate instruments which are subject to the Data Protection principles. Neither the Information Commissioner nor the courts are bound or indeed entitled to apply them in a manner inconsistent with those principles. Secondly, the Commissioner has discretion as to whether or not to take action. He need not, for example, necessarily issue an enforcement notice in a trivial case or one in which a contravention has caused no appreciable damage or distress. But he is bound to enforce the act, and his performance (or non-performance) of his functions is subject to judicial review in the ordinary way."

[44] In light of the above I consider that the information has been retained for a proper purpose and that the statutory scheme provides appropriate accompanying procedures. My conclusion is reached on the basis of the statutory exemption and also by virtue of the reasons given for retention and the fact that any issues can be taken up with the IC.

[45] The CFR arguments were not developed during the hearing and given my conclusions which are set out above I do not consider that anything is added by this ground of challenge. For the avoidance of any doubt I am also of the view that the current policy and practice comprised in the privacy impact assessment document and the information management policy is in accordance with EU law. This documentation will no doubt be updated to take into account the General Data Protection Regulation when it comes into force on 25 May 2018.

Conclusion

[46] Accordingly, I consider that the current policy or procedure of using video recording and retaining video footage obtained during a search of the home complies with Article 8 of the ECHR and EU law. My conclusion is reached on the basis of the current policy structure which lays down principles which are capable of being predictably applied to situations. These documents deal with when the intervention should be used and the use and retention of images. The policy foundation for this type of intervention is public facing and subject to ongoing consultation. This should form the basis of any future interventions of this nature. I do not consider that any relief is required. I will hear counsel in relation to any other issues and on the question of costs.