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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

2015 24256/01

IN THE MATTER OF AN APPLICATION BY BM1 FOR JUDICIAL REVIEW

AND

IN THE MATTER OF DECISIONS OF THE POLICE SERVICE OF NORTHERN IRELAND

BM1

Applicant;

-v-

THE PSNI

Respondent.

_____

COLTON J

Background

[1] The applicant is a member of a group known as "Precious Life". In common with other members of this group she holds "pro-life" (Anti-Abortion) views. On diverse dates and times throughout 2014 she participated in a protest styled as a "prayer vigil", on Great Victoria Street, Belfast approximate to the locus of the Marie Stopes Clinic. The Marie Stopes Clinic opened in Belfast in October 2012. It provides advice on sexual and reproductive health including information and advice on abortion.

[2] It is clear from the affidavit evidence that the protest proved controversial with interactions between those involved in the protest and those working in the clinic. As a result of those interactions considerable police resources have been devoted to policing the protest and ensuring the preservation of public order at the location. In the course of the protest the police received complaints and counter-complaints from staff and users of the clinic and from those involved in the protest.

In summary these involved allegations of intimidating and threating behaviour, assaults and conduct which could be classed or characterised as harassment.

[3] It would be trite to say that abortion is an issue which provokes strong and sincerely held views in this jurisdiction.

[4] The absolute opposition of those such as the applicant and members of Precious Life to abortion motivated them to organise and participate in the protest outside the clinic. Those who established the Marie Stopes Clinic were motivated by their conviction that there was a need to provide advice on sexual and reproductive health including information and advice on abortion to women in Northern Ireland.

[5] In this context it is perhaps not unsurprising that the "Prayer Vigil" organised by Precious Life resulted in heated interactions between those working and visiting the clinic and those gathered outside. The applicant says that the presence of the protestors at the clinic resulted in a hostile response from those working and visiting the clinic. This was reflected in the numerous complaints and counter-complaints made by the respective parties to the PSNI arising from the vigil.

[6] In the course of the hearing the applicant presented a scenario of a clash between two groups of people holding strong views on an issue of great controversy. In those circumstances it was argued that there was a particular obligation on the PSNI to act with scrupulous fairness between what might be described as "the opposing parties".

[7] I make it clear that the applicant and members of Precious Life are of course entitled to engage in peaceful public protest. The applicant has never been convicted of any criminal offence as a result of her participation in the vigil throughout 2014 and she denies that she has ever acted unlawfully. However it must be recognised that those working at or visiting the Marie Stopes Clinic were doing so perfectly legally. They were entitled to go to their place of work and/or seek advice in peace, without interference and without being intimidated or harassed.

[8] In my view there was an onus on anyone involved in a public protest outside the clinic to ensure that there was no infringement with this entitlement. Equally in the event of a threat to this entitlement, those working and visiting the clinic were entitled to the protection of the PSNI.

[9] During the course of the vigil police received a number of complaints about the applicant and others involved in the vigil from those who work in/for the Marie Stopes Clinic.

[10] Arising from these complaints the PSNI issued six Police Information Notices ("PINs") in respect of the applicant in relation to five complaints (the sixth PIN – was actually a duplicate for a previously issued PIN). These PINs were issued

between 14 March 2014 and 4 February 2015 (the latter being a reissue of a PIN issued on 17 October 2014). The PINs related to incidents between 31 January 2014 and 10 October 2014.

[11] The PINs issued in respect of the applicant were stored separately on the PSNI electronic NICHE database.

[12] In respect of the retention of each of the PINs they were initially "deactivated" over a period of time and they were subsequently "deleted".

[13] The applicant in this judicial review challenges the decision by the PSNI to issue and retain the PINs in question. I am obliged to all the counsel in this case for their helpful and able written and oral submissions. Ms Fiona Doherty QC led Mr Seamus Lannon for the applicant. Dr Tony McGlennan QC led Mr Paul McLaughlin for the respondent.

PIN Notices – The legal framework

[14] At common law the police have the power to obtain and store information for policing purposes, i.e. broadly speaking for the maintenance of public order and the prevention and detection of crime.

[15] Under Section 32(1) of the Police (Northern Ireland) Act 2000:

> "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."

[16] Article 3 of the Protection from Harassment (Northern Ireland) Order 1997 provides as follows:

> "3-(1) A person shall not pursue a course of conduct—
>
> (a) Which amounts to harassment of another; and
> (b) Which he knows or ought to know amounts to harassment of the other.

> (2) For the purposes of this Article, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other."

[17] Pursuant to Article 2 "harassing a person" includes alarming the person or causing him distress. It also provides that a "course of conduct" must involve two or more incidents of the relevant "conduct". Article 4 provides that harassment is a criminal offence.

[18] A PIN is a non-statutory notice issued by police as part of its function to prevent and detect crime, in connection with the offence of harassment.

[19] At the relevant time the issuing of PINs in this context was governed by PSNI **Service Procedure SP 1 2012.**

[20] The document is described as the "Police Response to Stalking and Harassment." It is a publicly accessible document. The policy reflects the statutory obligations of the police under the Protection of Harassment Order.

[21] The aims of the service procedure are identified as:

(i) To protect the lives and preserve the safety of both adults and children who are at risk of harassment;

(ii) To ensure a consolidated service wide approach to recording and investigating all reports or suspicions of harassment;

(iii) To facilitate effective action against offenders.

[22] In the introduction the procedure points out that "harassment incorporates a wide range of behaviour that often has a devastating effect on victims causing a negative reaction in terms of distress".

[23] The procedure expressly takes cognisance of the Article 8 obligations of police officers.

[24] Paragraph 4 includes the following:

> "(5) Any interference by the police with a person's rights under Article 8 of the ECHR must be in accordance with the law, in pursuance of a legitimate aim (e.g. the prevention and detection of crime and/or the protection

> of the rights of others) and necessary in a democratic society (often referred to as proportionality). For an action to be necessary in a democratic society it must -
>
> (i) correspond to a pressing social need; and
> (ii) be proportionate to the aim it seeks to achieve.
>
> (6) Police action in response to stalking and harassment will often involve an interference with Article 8 rights. So long as this interference is carried out properly, this is perfectly lawful. Action to safeguard the rights of one person may well involve interference with the rights of another. …"

[25] The procedure includes a number of appendices. The key ones in the context of this case are; Appendix C (Reports of Harassment), D (Identifying, Assessing and Managing Risk), E (Risk Indicators Associated with Stalking and Harassment), F (Investigative Strategies in Harassment Cases) and G (Police Information Notices). These appendices provide guidance to officers from the initial response through the investigation and risk assessment stages and responding to the alleged perpetrator with the use of police information notices (PIN).

[26] Appendix A sets out some examples of harassment which include:

> "Frequent, unwanted contact, e.g. appearing at the home or working place of the victim, …"

[27] The appendix goes on to define a "**Course of Conduct**" in the following way:

> "(a) The order seeks to deal with conduct which has an element of persistence. A course of conduct must `involve conduct on at least two occasions' and `conduct' includes speech. A course of conduct can be disclosed to the police through one report only. The person who pursues the course of conduct ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment. This conduct can comprise words and/or actions. Each individual incident towards a course of conduct does not necessarily have to cause harassment, it is sufficient that only the most recent incident of a course of conduct causes harassment."

[28] The definition further provides:

> "(d) A single course of conduct may apply to more than one person. It is not always necessary to have a separate charge of harassment in respect of each complainant where a course of conduct comprises incidents involving more than one victim. It would be appropriate to include more than one complainant in a prosecution where the complainants were members of a `close knit definable group' and the conduct complained of was clearly aimed at all of them on each occasion, even though only one of them might have been present on each such occasion. It may be possible to apply this principle to harassment of a family living in the same accommodation or workers at the same place of work."

[29] Appendix B, paragraph 12 deals with "**Political Protest and Public Order**" in respect of which it states:

> "(1) Officers involved in planning and policing political protest and other public order events should consider that lawful protest, including lawful picketing, does not infringe the human rights or liberty of any individual. Such activity should not be directed at any individual in circumstances that would amount to harassment.
>
> (2) Organisations such as companies, Government departments or religious institutions may also be subject to harassment. This could be in furtherance of a political or other aim such as animal rights. In some cases this activity will include the harassment of individuals who work for, or who are otherwise associated with, the organisation and this document would be relevant to such investigations. …"

[30] Appendices C, D, E and F provide detailed and appropriate guidance to police officers on this issue.

[31] However the key appendix is Appendix G which I set out in full:

> "POLICE INFORMATION NOTICES
>
> 1. An alleged perpetrator does not need to be informed by the police that their behaviour may constitute a criminal offence before the

Order can be applied. A course of conduct can be disclosed to the police through one report only.

2. The terminology of 'warnings' and cautions' should be avoided in the context of police action in relation to harassment. Such terminology may be misinterpreted by victims, alleged perpetrators and others as constituting a form of legal action. There are some circumstances in which it can be useful for the police to inform an alleged perpetrator verbally and/or in writing that their alleged actions may constitute an offence under the Order (described here as a Police Information Notice). The Police Information Notice (PIN) is available on the intranet as well as within this document, however, for operational use, it is available as a carbonated form for completion — one copy to be retained by the police, whilst (sic) another copy for the alleged perpetrator.

3. Any decision to issue a PIN should be authorised by a supervising officer. This will generally not be appropriate when an investigation has established evidence of a course of conduct under the Order. Where the victim is unwilling to support a prosecution or the PPS has decided not to continue with the prosecution, the PPS should be consulted about any further action which could be considered. Early intervention by using a PIN may prevent behaviour escalating into harassment and could be relevant evidence in future criminal or civil proceedings to show that an individual knew that their conduct could amount to harassment under the Order.

4. Before a PIN is given to an alleged perpetrator, this process should be explained to the victim, a copy of the notice given to them, their views sought and recorded. When the victim does not wish the alleged offender to be issued with a PIN the reasons must be noted in their statement or the officer's notebook. The officer should document the decision of his supervisor giving the reasons to follow the victim's wishes or not.

5. The PIN should be given personally with no suggestion that this implies guilt on the part of the alleged perpetrator or that this marks an end of the matter (this could render evidence of conduct prior to the notice inadmissible in any subsequent prosecution). The officer should offer it to the recipient to sign indicating their receipt and understanding. Where the recipient refuses to accept or sign the notice, this should be recorded by the officer in their notebook and countersigned by a colleague present at the time of the record. In exceptional circumstances consideration should be given to using a personal delivery service or recorded delivery to issue a PIN. Where

a PIN is to be served on a young person police must inform Social Services in order that the young person's situation can be assessed and relevant support mechanisms put in place.

6. It may be necessary to caution an alleged perpetrator as per Article 3 of the Criminal Evidence (NI) Order 1988 and take necessary action if they make any relevant comments such as disclosing an offence, etc.

7. In some cases there may be counter-allegations relating to the victim by the alleged perpetrator. Also, the nature of a particular allegation may prompt early suspicions that it is false or misleading. A person making a complaint may be doing so as a means to cause harassment to the alleged perpetrator, or to confuse or negate any allegations against themselves. The grounds for suspicions should be recorded but unless there is sufficient evidence to support these, the allegation of harassment should be fully investigated. In most cases, early concerns about the integrity of an allegation can only be confirmed or refuted by means of a review of the evidence later in the investigation. All the circumstances surrounding the allegation(s) should be investigated. Where possible, the evidence of any independent witnesses should be assessed to determine whether it supports critical timings and alibis put forward by the alleged perpetrator. For further information on dealing with counter-allegations, particularly in domestic abuse cases, see Policy Directive 09/08 Police Response to Domestic Incidents.

8. The investigating officer should scan the PIN and save onto NICHE. A copy of the PIN should be forwarded as an email attachment including details of the victim to zpvi selected from the global address list. ZPVI will be responsible for placing flags against the victim and alleged perpetrator. The flags will not be time-bound.

9. The original documents should be stored in accordance with the records' management policy."

[32] In accordance with this procedure each of the PINs in this case advised the applicant that a complaint had been received about her behaviour. The PIN identifies the complainant and summarises the behaviour in question. It goes on to state:

> "The police have received an allegation of harassment against you. Harassment is any behaviour, on at least two occasions, which causes alarm or distress to someone else. At this stage the police are not

> commenting on the truth of this allegation. Instead this letter is being sent to you in the spirit of crime prevention and to make you aware that **if** the kind of behaviour described were to continue then you would be liable to arrest and prosecution. You should also be aware that if further such behaviour resulted in prosecution then the behaviour complained of above could be referred to, or relied upon, in any subsequent proceedings.
>
> **This letter is neither a court order nor a criminal record,** but will be kept by the police for the purposes of any future investigations and retained in accordance with national guidelines on the Management of Police Information."

[33] Dr McGleenan submits that the form of warning fulfils two related purposes:

(i) Deterrent. The notice may result in the recipient modifying his/her behaviour and/or avoiding future contact with the complainant, thus preventing the possibility of a crime occurring.

(ii) Evidential. If the behaviour continues, the fact that the notice has been served can assist in proving that the recipient "knew or ought to know" that the behaviour amounted to harassment. In any prosecution for harassment, it will still be a necessary proof that the underlying events occurred and that they amounted to harassment.

[34] Dr McGleenan argues it is important that the notice itself does not amount to any form of adjudication about whether the underlying incident took place. It simply advises the recipient that a complaint has been received and alerts them to both the identity of the complainant and the nature of the unwanted behaviour.

[35] There can be little doubt that the use of PINs by the PSNI in principle is lawful. Commenting on the purpose of PINs Lord Sumption, in the case of **R (on the application of Catt) v Association of Chief Police Officers & Anor; R (on the application of T) v Metropolitan Police Commissioner** [2015] 2 All ER 727, commented as follows:

> "**[42]** The purpose of the Prevention of Harassment letter is plain enough from its terms. Under the Act, harassment requires a `course of conduct', not just a single incident. The Prevention of Harassment letter is intended to warn the recipient that some conduct on his or her part may, if repeated, constitute an offence. It also

> seeks to prevent the recipient from denying that he or she knew that it might amount to harassment. It therefore serves a legitimate policing function of preventing crime and, if a repetition occurs, it may also assist in bringing the accused to justice. …"

Background circumstances giving rise to the issue of the PINs

[36] The circumstances surrounding each of the PINs may be summarised as follows:

PIN 1 – dated 14 March 2014

(i) This relates to a complaint by Dawn Purvis about an incident on 31 January 2014. She was employed as the Director of the Marie Stopes Clinic. On 7 February 2014 she made a statement of complaint to the PSNI which included the following allegation:

> "On Friday 31 January 2014 at 12:55 hours just coming after lunchtime, I was leaving the building. As I stepped out of the lift on the ground floor to walk towards the main entrance door, the protestor that I know as (the applicant's sister) was standing in front of the entrance staring out at me. She did not look away. She did not take her eyes off me as I walked towards the entrance and I found this quite frightening and intimidating, so much so that I did not want to exit and paused to talk to the concierge. When I turned around she was still standing, staring at me. I needed to be somewhere so I needed to leave. When I came out the door I said to her 'you know it's quite intimidating having someone standing in front of you staring in at you when you are leaving your place of work. It's not very nice'.
>
> At that point the protestor I know as (BM1) started to shout at me 'don't you speak to us Dawn Purvis, that's intimidation and I'll phone the police on you'. I walked away. I found the shouting of (BM1) and the behaviour of (the applicant's sister) intimidating and menacing to the point where I dreaded coming back into the building. I am concerned about my personal safety. This whole situation is quite distressing and I find it extremely stressful when a Thursday and Friday approaches."

On 8 February 2014 the PSNI secured CCTV footage relating to this incident. In response to this complaint, the PSNI decided to issue PIN notices against

both the applicant and another person. This PIN was authorised by Sergeant Philip Graham. The PIN was served by prior arrangement with the applicant's solicitor at his offices on 14 March 2014 – it is alleged that two prior appointments were not kept. A statement was taken from the applicant on 14 March 2014.

In that statement she says that on the relevant date she was standing with her mother on the pavement outside the clinic quietly praying. She goes on to say that:

> "At approximately 13:00 hours a female I know to be Dawn Purvis, the Director of Marie Stopes NI, emerged from the building. She walked right up to my mother and said aggressively into her face words to the effect `you're intimidating standing in front of the door there'. I replied by saying `don't speak to us Dawn. You're harassing us and if you do it again I will ring the police'. Or words to that effect."

She goes on to say that she was very upset by the incident and makes the case that she in fact has been harassed by Dawn Purvis who has no reason to engage or approach her or speak to her at all.

This PIN was deactivated from the police database on 14 August 2014 and deleted on 11 February 2016.

PINs 2, 3 (17 October 2014) and PIN 6 (4 February 2015)

(ii) PINs 2 and 3 relate to complaints by two staff members (Jane Robinson and Claire Bailey) about incidents on 10 October 2014 and 18 September 2014. The PSNI recorded statements of complaint on 10 October 2014. Ms Robinson is a volunteer escort who works at the clinic. She escorts clients from the clinic at their request when their appointment time is finished. In her statement she describes how she and her colleague Claire Bailey were escorting a client and a male companion from the premises at approximately 13:50 hours. She says in her statement that:

> "As I opened the front door of the building to exit on to Great Victoria Street, I stepped out and immediately a female protestor stood in our way blocking our way to the footpath. This female immediately started trying to hand leaflets to the clients and say things along the lines of 'her baby has a heartbeat, these women don't care about you'. We

> all then walked around this female protestor and turned left and began walking along Great Victoria Street. This female walked along with us, she was walking alongside Claire and close behind me. She was continually in her personal space. However she did not physically touch me at any point. She continually tried to hand leaflets to the client. The female followed us for about 10 to 15 metres. The whole incident lasted less than a minute. As a result of this behaviour I feel harassed and intimidated. I believe the comment about these women not caring is directed towards me and this is unwanted attention."

This incident was recorded on a body camera and the female has been identified as the applicant.

This account is supported by Claire Bailey, who in describing the applicant's conduct, says:

> "She was very forceful in trying to put a leaflet into the client's hands. She blocked our way by standing directly in front of us. I asked her to stop harassing us and told her everything was being recorded. She refused to move and we had to walk around her. As we walked down the street towards Amelia Street she came right up behind me and was shouting over my shoulder, 'these women don't care about you, we are just trying to help'. I felt very intimidated and due to her aggressive behaviour I was concerned for my safety. I had a walkie talkie which I held up to my left shoulder and told her everything was being recorded and told her to stop harassing us. At this point she walked back towards the clinic."

Ms Bailey also made a complaint about similar conduct of the applicant on 18 September 2014 when she was escorting a client from the building. On that occasion it was alleged that the applicant attempted to block the client by standing directly in front of her preventing her from walking down the street.

Police later carried out investigations with local businesses in Great Victoria Street and obtained CCTV footage, relating to 10 October 2014.

These complaints were reported to a Sergeant Cromie, who agreed that PIN notices should be served on the applicant in respect of each complaint.

PINs 2 and 3 were served on 17 October 2014. They were deactivated on 12 August 2015 and deleted on 11 February 2016.

PIN 6 is the same as PIN 2. It was served on the applicant on 4 February 2015 as police were concerned that it may not have actually been served on 17 October 2014. Like PIN 2, it was deactivated on 12 August 2015 and deleted on 11 February 2016.

The applicant had previously attended the police on 18 September 2014 along with her solicitor and alleged that she had been assaulted that day by two people acting as "client escorts" in the Marie Stokes Clinic. She identified one of these people to be Kelly O'Dowd. The second person was later identified as Claire Bailey.

The police reported both the applicant's complaint relating to the events on 18 September 2014, and the complaints of Claire Bailey and Jane Robinson concerning the applicant on 10 October 2014 for prosecution. There was a direction of no prosecution in relation to all allegations.

PIN 4 – 28 November 2014

(iii) This relates to a complaint by Janine Fretwell about another incident on 10 October 2014. A statement of complaint was recorded on 7 November 2014. She is a member of staff at Marie Stopes Clinic and she describes how she decided to go with a friend to Tesco's to get something to eat for her evening meal. She describes how as she left the building she noticed 3 or 4 protestors standing to the left of the clinic. She goes on to say:

> "My friend and I went to walk around the protestors again not wanting to engage with them. As I walked to the right of the protestors they started to cross my path forcing my friend and I to walk towards a phone box. From previous experience and working in these premises at 14-18 Great Victoria Street I know one of the protestors to be called (BM1) who was wearing a cream coat started saying, 'I was going to kill my baby'. This statement from 'BM1' I believe was targeted at my friend as protestors would not have seen my friend before. However, I also took offence and felt harassed. I was not able to maintain my intended path and kept to moving to the right. We then had to stop walking and turn left quickly to get into Tesco's. (BM1) kept saying this sentence in a clear and audible voice. At this time the footpath was crowded with other members of the public who were

> now staring at my friend and I. I felt very intimidated and harassed by this and embarrassed for my friend, who had only come to Belfast to visit me while she was also on some other business. BM1's behaviour only stopped when my friend and I entered Tesco's. BM1 was then joined by two other protestors, one called N and another male protestor called M. All three remained outside the door of Tesco's. … We felt intimidated to leave Tesco's and remained nearly like trapped in Tesco's for approximately 5 minutes. We then decided to leave Tesco's and walk to the right."

She then refers to the conduct of another protestor, not the applicant.

The PSNI obtained CCTV footage from the adjoining Tesco store and the building. In light of this information and the CCTV footage, a decision was taken to serve a PIN on the applicant.

The PIN was served by Constable McIlvenny on 28 November 2014. He recorded that the applicant refused to accept service and denied the allegation that she had harassed Janine Fretwell. She contended that she had not spoken with her at all but that her comments were directed towards another lady in her presence. It was reviewed on 24 March 2015 and deactivated on 3 April 2015. It was later deleted on 11 February 2016.

PIN 5 – 24 October 2014

(iv) This relates to a complaint by two members of staff (Kellie O'Dowd and Claire Bailey) about an incident on 17 October 2014. On that date, police received a call from a member of staff at the clinic alleging that at approximately 17.50 hours that evening, two members of staff had been escorting a client from the building when the applicant made a lunge for them and followed them along the street shouting words to the effect that the clinic was illegal and if the client had taken tablets she would be contacted by police and could be punished with life imprisonment. Formal statements of complaint were made on 24 October 2014. It appears these statements were mislaid and Ms O'Dowd was asked to make a subsequent statement on 29 January 2015.

Ms O'Dowd is a volunteer at the clinic and works as a "client escort". She describes how on 17 October 2014 she was working alongside Claire Bailey and says that:

> "At approximately 5.55 pm I was working alongside client escort Claire Bailey. We were assisting a client and

her mother exit the building. I had the 'walkie talkie' device and Claire had the 'Go-Pro' camera. As soon as we exited the building, a protestor I know to be BM1 immediately approached us in order to give us leaflets. Claire advised her to stop harassing us and we continued walking up Great Victoria Street in the direction of the bus station. BM1 was saying things like 'they're operating an illegal abortion clinic up there, if you have taken anything, the PSNI will be involved, it is punishable by a life sentence and "abortion is murder"'. Whilst assisting the client and her mother I turned round to check her mother was okay and saw a male I now know to be X following us. He had a camcorder, handheld device and was holding it up pointing it in our direction. I perceived him to be recording me which made me feel intimidated and harassed. It made me feel more concerned for the client and her mother at their privacy being invaded. It upset me that both BM1 and X by their behaviour, were drawing unwanted attention from the public towards us. They followed us as far as the Northern Ireland Housing Executive with X filming throughout. The incident lasted for approximately 3-4 minutes and I had a clear view of X and BM1. Despite being asked not to follow us, BM1 and X continued which left me feeling harassed and distressed. I felt really concerned for the client and her mother because they shouldn't have to run the gauntlet of their behaviour outside the clinic. I believe in everybody's right to protest, but that was not a protest. In my view this was clear harassment. I previously provided a statement in relation to this incident on Friday 24 October 2014. However I have been asked by police to provide a further statement as they have been unable to locate the original statement."

A PIN relating to this matter was served on the applicant on 24 October 2014.

In the interim on 17 October 2014 the applicant had attended a police station with her solicitor and made a complaint that she had been assaulted by Kelly Dowd and Claire Bailey that day.

In the statement she alleged that about at 5.15 pm on 17 October she observed Claire and Kelly exit the front doors of the building with two other females. She says that she stepped forward to offer information to the two females

they were escorting who she believed were clients of Marie Stopes. As she did so:

> "Either Claire or Kelly, I am not sure which, pushed me into the other. This occurred in and around the footpath outside Subway. I stumbled back, carried on my attempts to speak to the two females that I believe are Marie Stopes NI clients. I walked on a bit further, but after seeing that one of the females appeared distressed, I walked back to my position beside the door."

She then describes an incident about 30 minutes later when again Claire and Kelly leave the building with two more females who the applicant believed were clients of Marie Stopes. She says:

> "I again went to offer information to the females when Claire Bailey took hold of my left upper arm and pushed me back whilst maintaining a grip on my upper left arm and said loudly 'you're harassing me. You are being filmed'."

She goes on to say that:

> "Although not physically injured by the actions of Claire and Kelly, they have made me physically ill and afraid."

No PIN was issued on foot of the applicant's complaint, however it did form part of a report to the PPS. In relation to the complaints against the applicant the PSNI reviewed CCTV evidence and decided to interview the applicant under caution in the presence of her sister on 4 February 2015 during which she denied the allegations of harassment. She admitted to some of the comments but denied others and stated that she was interested only in speaking to the client. She denied harassing the complainants. All of the incidents were then reported to the PPS for prosecution. On 29 July 2015, the PPS directed that there should be no prosecution in relation to any of these allegations.

This PIN was deactivated on 19 March 2015 and deleted from the police database on 11 February 2016.

Retention of PINs

[37] What was done with the PINs in terms of retention is set out in a number of affidavits from ACC Hamilton.

[38] In a related case of **LM** ACC Hamilton described how the police manage the recording of PINS:

> "(13) Once a Command and Control Log has been generated in relation to a complaint, an entry will be opened on the police NICHE database for the relevant occurrence. As described above, this enables police to record electronically every action taken in relation to that occurrence. In addition to the Occurrence Log a separate page on NICHE enables the storage of electronic copies of relevant reports and/or documents. This is known as a `Reports Tab'. … NICHE also contains a separate page linked to each occurrence which is referred to as `Warning Tab'. Within this page, police store information related to any formal action taken by it on foot of the occurrence. It consists of a written summary of the relevant action (referred to as a `Warning Flag') together with associated documents. …
>
> (14) Service of a PIN is considered to be a formal police action and it is recorded as a flag on the warning page …
>
> (15) Once a record is entered within the warning flag section of NICHE, it is considered to be `active'. In this case following the decision of Chief Inspector Magee to delete this record, this was given effect by `deactivating' the warning flag. In practical terms this meant that the text of the warning flag was `greyed out' by changing the colour of the font. While it remained visible to readers, this is understood by all users of NICHE that the flag is no longer active or needed for policing purposes. At that point it is understood by users of NICHE simply to be an historical record of police action. The PIN document itself was not deleted and an electronic copy remained available to be viewed. In addition to the `deactivation' of the PIN, text was added to the entry to make it clear that it had been deleted on the instructions of Chief Inspector Magee …
>
> (16) The result of these measures was that the authorised personnel who accessed this occurrence entry in NICHE would see that there was a warning flag

attached to the occurrence. They would be able to read the occurrence log and also see an inactive entry describing the conduct alleged … the fact a PIN had been issued and a copy of the PIN. It would be apparent that the PIN was no longer required for policing purposes and the person would see their chief inspector to say that the police no longer required this information. …

(18) Following this review, a decision has now been taken to delete the entire warning flag relating to the PIN. As a result, neither the PIN itself, nor the warning flag will be visible. The entire 'warning page' relating to this occurrence will be blank. In addition, a further entry has been made on the Occurrence Log explaining the rationale for the decision. It reads as follows:

> 'The police information notice in respect of LM is no longer needed for retention on police systems, in accordance with police purposes, for the purpose of proving a course of conduct or in relation to an on-going investigation. I authorise deletion of same'."

[39] In relation to the PINs which are the subject matter of this application ACC Hamilton averred that:

"… That at a meeting on 25 January 2016 all of the PIN notices issued to the applicant were reviewed. It was decided the notices were no longer required for policing purposes and that the notices should be deleted with the deactivated flags removed from NICHE. I am advised that this took place on 11 February 2016.

Police continue to hold all of the other documentation relating to each of these incidents which is described and exhibited to this affidavit. They also hold all the associated documents generated in the course of preparing for the prosecution. These include witness statements from other police officers who had continuity involvement or who provided witness evidence. These documents are also electronically on the NICHE database and may be accessed in the future. PSNI do not consider it appropriate or necessary to delete these records. For the same reasons described in my affidavit in the case of

> LM, PSNI, consider these documents are an essential part of the record of police actions taken on foot of each of these complaints. Retention of them is therefore necessary for that purpose."

The reasons described in the case of **LM** are as follows:

> "In the course of the review, consideration was also given to whether or not to delete any of the records such as the Command and Control Log and Occurrence Log, which refer to the fact that a PIN was issued. It was decided not to do so. It is considered that these records provide an accurate and important historical record of actions taken by police in response to the complaint made by PM. While it is clear that the applicant contests the accuracy of the complaint, it is considered essential to the efficient operation of policing services that accurate records are retained of both the complaints made to police and the actions which it takes in response to them. Many complaints made to police transpire not to be accurate or do not result in formal police action. Nevertheless, it is essential that police are able to make and retain accurate records of historical events and actions by individual officers. Police may be subject to later complaints about his actions or they may become important to internal police administration or possibly future investigations. This information is retained on a secure computer which is not accessible to the general public. However, they are not private records, so far as they are retained by police subject to its obligations under the Data Protection Act 1998. Individuals may therefore make a data subject request to PSNI in relation to information held about them. Insofar as it is inaccurate or retention is otherwise in breach of data protection principles, the subject may make a complaint to the Information Commissioner. It is the view of the PSNI to issue a complaint would have been a more appropriate form of recourse in this case, rather than judicial review proceedings."

The other documents to which ACC Hamilton refers are the Command Control Log, Occurrence Log and Statements.

I have referred earlier in the judgment to the dates upon which the PINs were 'deactivated'.

The applicant's challenge

[40] The applicant challenges the decision by the police to issue and serve the PINs on the following grounds:

(a) Breach of the common law right to procedural fairness.

(b) Failure by the PSNI to follow its own policy in relation to the issuing of PINs.

(c) Breach of her Article 8 rights – in both the issuing and retention of PINs on the PSNI database.

The arguments

[41] The essential argument on behalf of the applicant is that as a matter of law before any of these PINs were issued the applicant should have been given an opportunity to respond to the complaints made against her. She says this arises both as a matter of her common law right to procedural fairness and from the PSNI's own policy.

[42] The latter argument is based on the contents of paragraph 7 of Appendix G. Ms Doherty in particular refers to the sentence:

> "The grounds for suspicion should be recorded but unless there is sufficient evidence to support these, the allegation of harassment should be fully investigated."

[43] She says that a basic requirement of a full investigation must at the very least involve interviewing the applicant and providing her with an opportunity to put her version of events. She says the PSNI has failed to follow its own procedure, which in itself is a vitiating flaw which should lead the court to conclude that the PINs should never have been issued.

[44] I am not persuaded by this argument.

[45] As will be seen from the entirety of Appendix G, paragraphs 1 to 5 deal with the procedure for the issuing of PINs.

[46] Specifically paragraph 4 provides that before a PIN is given to an alleged perpetrator, this process should be explained to the victim, a copy of the notice given

to them, their views sought and recorded. It makes no mention of seeking the views of the alleged perpetrator. Similarly paragraph 5 makes provision for the service of a PIN on an alleged perpetrator. It requires personal service and an explanation that it does not imply guilt.

[47] Paragraph 7 provides guidance to police in cases where there is reason for suspicion about the veracity of the allegation of harassment where there are counter allegations. It seems to the court that paragraph 7 requires that there be a full investigation of an allegation of harassment unless there is sufficient evidence to support grounds for suspicion that the allegations are in some way false or misleading. The paragraph accurately points out that "in most cases, early concerns about the integrity of an allegation can only be confirmed or refuted by means of a review of the evidence later in the investigation". I do not consider that the requirements of paragraph 7 to "fully investigate" an allegation of harassment relate to the pre-PIN phase of the investigation. In any event it is clear that there was a full investigation of the entirety of the allegations and counter-allegations arising from this process. A report for prosecution summarising the background to the PINs including the applicant's counter-allegations was submitted for prosecution. In addition two PINs were served on members of staff employed by the clinic arising from complaints made against them. Clearly there was a "review of the evidence later in the investigation" as envisaged by paragraph 7.

[48] Irrespective of the contents of the procedure the applicant argues that there has been procedural unfairness in the issuing of the PINs which stems from overlapping grounds of challenge. The first is that the PSNI did not carry out any or adequate investigation into the underlying circumstances and/or any complaint/allegation made, secondly that she was not provided with any or adequate opportunity to make any submissions or representations prior to the issue or service of the notice and thirdly there was no opportunity to appeal or review the PINs.

[49] In my view the contents of the statements of the complainants, together with the other evidential material obtained in the form of body camera material and CCTV material were sufficient to justify a consideration of the issue of PINs.

[50] The fundamental issue on procedural unfairness is whether or not before issuing them the PSNI should have provided the applicant with an opportunity to respond to the complaints. In this regard the applicant relies on the well-established common law right to a hearing – this was succinctly described in Gordon Anthony's publication – Judicial Review in Northern Ireland paragraph 730 as follows:

> "The common law right to a hearing is centuries old and historically sought to ensure that individuals who will be affected by a decision are able to make

> informed representations to the decision-maker in advance of the decision being taken."

[51] In support of this submission Ms Doherty refers me to decisions on the right to 'know and respond' such as **Re Henry's Application** [2004] NIQB 11, **Re Drummonds Application** [2006] NIQB 81 and **Re JR57** [2013] NIQB 33."

[52] In particular, Ms Doherty places emphasis on the judgment of Horner J in **Re Swann** [2014] NIQB 81.

[53] In that case the court was considering the issuing of two Harbourer's Warning Notices ('HWN'). In his judgment Horner J explains the nature of HWNs in the following way:

> "These HWNs, also known in some areas of the United Kingdom as Child Abduction Warning Notices, are used by police forces throughout the United Kingdom. Detective Superintendent Skelton, who swore an affidavit on behalf of the Police, said:
>
> > 'Essentially the purpose of the Harbourer's Warning Notice is an administrative process to act as a formalised record of a warning to the subject that a person enjoying parental responsibility for a child has forbidden the child from contact with the subject and that for the subject to knowingly and without lawful authority or reasonable excuse take or keep the child away from its parents or to induce, assist or incite the child to run or stay away from the parent may render the subject liable to arrest for child abduction'."

[54] The procedure for issuing and serving HWNs was also set out in a Police Service Procedure – SP27/2010.

[55] The applicant in **Swann** was a learning disability deputy manager with Belfast Health and Social Care Trust. He was not spoken to or interviewed by the police before the service of the two HWNs.

[56] Horner J found that, on the facts of the case, the police acted unfairly by failing to carry out any investigation, save one that appears to have been superficial

and incomplete, before they served the HWNs and in particular by failing to give the applicant an opportunity to put his version of events. He concluded that the police were in breach of the applicant's Article 8(1) rights and that what they did was not in accordance with law and/or was not proportionate.

[57] The key passages of his judgment are set out in paragraphs [37] and [38]:

> "[37] In circumstances where the applicant was served with HWNs in respect of which he never had the opportunity to put his own version of events, he had every right to feel that he had been unfairly dealt with by the Police. I do not accept that it is an answer to the charge of unfairness that the applicant could have given his version of events when he was served with each HWN. Never mind the numbing effect the service of such Notices would have on the mind of any recipient, the central fact is that the applicant could not know the full circumstances which had led to the service of the Notices without being told by the Police and therefore would have been unable to shape the nature of his response. In **R (Osborn) v Parole Board [**2013] UKSC 61, [2014] NI 154 the Supreme Court looked at the issue of procedural unfairness in the common law. Lord Reed giving the judgment of the Supreme Court said at paragraph 67:
>
> > 'There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested.'
>
> He also pointed out that two other important values were engaged. The first was the avoidance of the sense of injustice which the person who is the subject of the decision might otherwise feel. The second is the Rule of Law.
>
> Lord Reed said at paragraph 71:
>
> > 'Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of

> decision-makers and the law which should govern their actions: see e.g. Fuller, *The Morality of Law*, revised Ed (1969), 81 and Bingham, The Rule of Law, (2010), Ch 6.'

[38] However, in this case para 8(2)(a) of the Service Procedure required an investigation before any HWN was served. The applicant says that Constable Parker, who served the first HWN, told him that no investigation had been carried out by the police. Detective Sergeant McKernin on behalf of Constable Parker in an affidavit denies that Constable Parker said any such thing, although Constable Parker has not sworn an affidavit. Judicial reviews are particularly ill suited to determining disputes such as this. However, the court is satisfied that any investigation by the police was cursory and superficial. There are two reasons for reaching this conclusion:

(i) Neither A nor DC were interviewed. Of all the girls, A was in the applicant's company the most and had the most to say about his behaviour.

(ii) The applicant was not interviewed.

It seems that the police may, instead of proceeding on the basis of hard fact, have proceeded on the basis of unmerited assumptions. Of course, not every investigation will require an interview. In some cases there may be exceptional reasons why the police must serve an HWN immediately and there may be insufficient time to investigate fully. The police may be unable because of pressure of time to obtain the subject's explanation for what had happened. As I have made clear, unfairness is contextual. In this case the police had ample time and opportunity to obtain the applicant's version of events and the versions of others with critical information before serving either of the HWNs. They chose not to listen to the applicant or to A and her family for reasons which are still not clear to the Court. If the police decided only to carry out a superficial investigation and/or not to

> interview the subject because they believed they were administering the 'written equivalent of an informal word in the applicant's ear', they were seriously mistaken. Service of an HWN provides the police imprimatur that the subject is a harbourer or a suspect following a request or direction from the parents of a child under 16 years of age. Investigation in the context of SP27/2010 can only mean such investigation as is reasonable in all the circumstances. This did not take place on the evidence before this Court. There is no system of review or appeal to allow the applicant to challenge the decision to serve HWNs."

[58] Ms Doherty says that the principles applied by Horner J in **Swann** support the applicant's case. In particular the basic requirements of procedural fairness would have required an opportunity for the applicant to respond in advance of each of the PINs being issued and also provide her with an opportunity to challenge, appeal or review the PIN after it had been issued. The failure of the PSNI to do so in this case, she argues, constituted a breach of the applicant's common law right to procedural fairness. She submits that it is significant that after the decision in **Swann** (although she points out that this was after the commencement of these proceedings) the PSNI issued interim guidelines on PINs to all officers. Those guidelines include the following provisions which did not form part of the procedure in relation to the impugned PINs:

- The decision to issue a PIN is to be taken by a duty sergeant. The sergeant's decision may be subject to an appeal by the accused party.

- During the investigation of the complaint and in the interests of fairness police must speak to the accused party to verify information, and gain their views to assist in the decision-making process as to whether a PIN is an appropriate course of action. This is an opportunity for the accused party to present their own version of events and ensure that police action is appropriate in the circumstances.

- The accused party should be advised that they have 14 days from date of service of the PIN to appeal the decision to serve the notice. The appeal should be in writing for the attention of the local neighbourhood inspector.

- The serving officer should scan the PIN and save it onto NICHE … PVI will set a six month timescale from the date on which the PIN was issued. Fourteen days prior to this expiration period, PVI will inform the serving officer that the six month review is required by the appropriate inspector as outlined in Section 5 'review of a PIN'.

- Section (2) sets out the procedure for appeal following the service of a PIN.

- Section (5) sets out the procedure for review of a PIN.

- Section (6) indicates that factors that would govern the retention of documentation and information will be based on further risk to the complainant and the seriousness of the possible offence.

[59] The fact that these changes were introduced does not mean that the existing procedure was unlawful. They do, however, provide evidence of what could have been done to strengthen the protection provided to those who receive PIN notices.

[60] Dr McGleenan argues that the PSNI are not subject to any obligation at common law to afford a person an opportunity to respond to an allegation of harassment, prior to deciding to issue a PIN notice.

[61] He submits that the answer to this issue was provided unequivocally by a combination of the Court of Appeal in England and Wales and the Supreme Court decisions in the combined cases of **R (Catt)** and **R (T)*;*** [2013] EWCA 192 and [2015] 2 All ER 727.

[62] The case of **Catt** concerned a challenge to the retention by police of information about Mr Catt's activities as part of a political protest group called "SMASH EDO". The group was concerned with the activities of a company which manufactured weapons and weapon components in the UK. Some of the members of the group had been known to use violence. The information had been gathered by means of police observation and protest meetings which Mr Catt had attended.

[63] The case of **T** is more directly relevant to these proceedings. It concerned a challenge to the decision to issue a PIN and thereafter to retain it on police databases. The PIN was issued after police received a complaint from Mr S that Mrs T (his neighbour) had called him a "faggot". The police had attempted to speak with her, but the door was never answered. It then put a PIN notice through her letterbox approximately 10 weeks later. She challenged the decision to issue the PIN and also the decision to retain it. The grounds upon which she relied to challenge the PIN are essentially the same as those relied upon in this case.

[64] By the time the **T** case reached the Court of Appeal, police had decided to delete the PIN. The court acknowledged that Mrs T had therefore achieved the benefit sought. However the court heard the appeal which centred principally upon the issue of retention of the PIN notices on the police database. The Court of Appeal considered the claim under Article 8. As part of the proportionality assessment, it considered the impact of the failure to obtain Mrs T's side of the story and dealt with the issue in the following way:

> "[60] … Mr Bowen QC submitted that the failure of the police to speak to Mrs T before serving her with a warning letter was unfair and rendered the whole procedure disproportionate. We do not accept that. The letter did not involve a formal determination of any kind, it was not like a formal caution which requires an admission of guilt and might well have to be disclosed to third parties (e.g. in response to a request for an Enhanced Criminal Record Certificate). Nor did it initiate proceedings of any kind. It simply informed Mrs T that an allegation had been made against her and warned her of the possible consequences of behaving the way it described. In those circumstances although it would have been better if the police had asked Mrs T for her comments before sending the letter, we do not think that the failure to do so undermines the lawfulness of their action nor their lawfulness of including in the CRIS report a record of what had been done. However the retention of the information is a different matter …" (My underlining)

[65] In paragraph [61] the Court of Appeal goes on to explain that they differed from the first instance judge who held that it was lawful for the respondents to have retained the information on its database for a period of 2½ years after the event. It took the view that the retention of the information for this period of time was unnecessary, disproportionate and unjustifiable. However in paragraph [62] of the judgment Moore-Bick LJ goes on to say:

> "[62] As in the case of Mr Catt, it appears to have been accepted below that it made little difference whether the court looked at the question through the prism of the Data Protection Act or that of Article 8 (see the judgment below at paragraph [57]). In any event, in the light of the conclusion to which we have come on the application of article 8 it is not necessary or desirable to add to the length of this judgment by a detailed consideration of the provisions of the Act. Nor is there any need to discuss the submission that by failing to take reasonable steps to obtain Ms T's side of the story before serving the letter on her the police failed to observe common law requirements of fairness and so acted unlawfully. It might be thought, however, that in common fairness a person against

> whom an allegation of this kind is made should be invited to give his or her side of the story before the police decide whether action of any kind is appropriate."

[66] The police appealed to the Supreme Court, which overturned the finding that the period of retention amounted to a breach of Article 8. Mrs T attempted to cross-appeal the finding on the decision to issue the PIN. The Supreme Court refused permission to cross-appeal on this issue.

[67] The leading judgment in the Supreme Court was delivered by Lord Sumption.

[68] In the course of his judgment he observed in relation to PINs that:

> "The service of such notices appear to be a common practice by police forces across the country, although they are not all in this form."

[69] At paragraph 40 of the judgment he comments that:

> "**[40]** Ms T's complaint was originally directed mainly at the issue of the notice. She was outraged, because she regarded it as an accusation which treated Mr S's allegation as true, when her side of the story had not been heard. This was the main point made by her solicitors when, on 3 December 2010, they wrote to the Metropolitan Police in accordance with the pre-action protocol for judicial review. But they added that they had `also advised' that the retention of the information was a violation of Ms T's Article 8 rights. They called for the withdrawal of the notice and the removal of any reference to in police records. Proceedings were begun on that basis on 23 December 2010. Before us, however, Ms T was unsuccessful in her application for permission to cross-appeal on the question whether the letter was lawfully issued, and had founded her case only on the retention of the information on police records. That point has, however, lost much of its practical substance, since January 2013, when the Metropolitan Police wrote to her solicitors notifying them that, having re-examined the materials in the course of preparing for the appeal, they had decided to delete the matter in any event."

Thus in the case of **T** the Court of Appeal in England and Wales did not think that the failure to seek her comments before sending the PIN letter undermined the lawfulness of the police action or the lawfulness of including it in the police database. Clearly the Supreme Court took no issue with this view, refusing leave to **T** to appeal on this point, and focussed on the question of the retention of the letter on the relevant police records.

[70] In light of the conclusion of the Supreme Court it is difficult to see how the challenge based upon procedural fairness can be sustained. It is of course correct to say that the Court of Appeal did say in relation to the PIN that "it would have been better if the police had asked Ms T for her comments before sending the letter".

[71] In similar vein the Court of Appeal did indicate "in common fairness" a person in **T's** should have been invited to give her side of the story.

[72] Notwithstanding these comments the judgment expressly stated that:

> "We do not think that the failure to do so undermines the lawfulness of their action or the lawfulness of including in the CRIS report a record of what had been done."

[73] This seems to have been accepted by the Supreme Court by reason of their failure to grant permission to Ms T to cross-appeal.

[74] The strongest authority in favour of the applicant's submission is the judgment of Horner J in **Re Swann** to which I have referred earlier in this judgment. However as that judgment makes clear what constitutes unfairness is contextual.

[75] Obviously Horner J was considering a different scheme and one can understand the added emotional impact of the service of a HWN, which is expressly stated to be a "warning" particularly in the context of an applicant employed by a Care Trust working with vulnerable adults.

[76] The decision of Horner J was not based solely on a refusal to seek the applicant's version of events. He was highly critical of the investigation carried out by the police which he described as "cursory and superficial". In particular the police failed to interview two persons who were best placed to comment on the allegations being made about the alleged behaviour of Mr Swann.

[77] In terms of the appropriateness of the issuing of the PINs it seems to me that this was precisely the type of dispute in which consideration should be given to their use as a means of policing the ongoing interaction between the complainants. In these circumstances the two purposes of deterrence and potential evidence in criminal proceedings were clearly in play.

[78] A common feature of the cases considered in the **Catt** and **T** judgments is that each case fell to be considered on its own particular facts. What fairness requires is contextual. It is therefore essential to consider the factual context of this case. The PINs about which the applicant complains were issued in the context of an ongoing public protest. The protest presented a significant policing challenge to the PSNI. During the course of those protests members of the PSNI were in contact with both the applicant and other protestors as well as those associated with the clinic, each of whom were making claim and counterclaim. The police were dealing with an ongoing operation and not a single complaint as was the case in **T**.

[79] In respect of each complaint members of the PSNI took statements of complaint and also sought CCTV by way of supporting evidence. After the decision was made to issue each of the PINs arrangements were made for service and this included service at the applicant's solicitors' office. The first PIN was actually served on the applicant in her solicitor's office on 14 March 2014. In my view it is significant, although by no means determinative, that there was no legal challenge to the issue of this PIN until 3 March 2015 when the applicant's solicitors challenged all of the PINs issued by the police up to and including the one on 4 February 2015.

[80] I consider that there was a lawful basis for the issuing of the PINs on the material available to the police in the form of official statements of complaint and CCTV evidence (there is a useful summary of the CCTV evidence in the police report for prosecution). As matters transpired, the consistent response of the applicant to the receipt of the PINs which could be categorised as one of denial and counterclaim suggests that little would have been gained from speaking to the applicant in advance of issuing the PINs. She had little difficulty in shaping the nature of her response.

[81] It is also clear that the police acted impartially in the matter. PINs were also issued on the basis of complaints made by the applicant. In addition the PSNI prepared a comprehensive report setting out <u>all complaints</u> with relevant statements and CCTV evidence for prosecution.

[82] It is also important to consider the form and the content of the PINs that were actually issued. The notice sets out the details of the alleged conduct and summarises the complaint that has been made. I have set out the format of the notice in paragraph [32] above.

[83] In my view the format used lacks what was described as the "unnecessary menacing and accusatorial" character of the letter considered in the **<u>T</u>** case. It clearly refers to the conduct as an "allegation". It explains what harassment is and makes it clear that the police are not commenting on the truth of the allegation. Furthermore the notice goes on to explain the purpose of the PIN and underlines the fact that the letter is not a court order or a criminal record. It makes no use of the word

"warning" unlike the reference to the "First Instance Harassment Warning" which was in the **T** letter.

[84] It must however be acknowledged that the issuing of a PIN is a formal police action. It is not something which can be issued routinely when a complaint is made. The issuing of the notice involves some evaluative exercise by the police. It is essential therefore that when such a notice is challenged the court should scrutinise the evidential basis for the issuing of the PIN and the justification put forward by the police.

[85] In the course of her submissions Ms Doherty subjected each of the PINs issued against the applicant to a forensic examination. In essence her submissions were that their issue was arbitrary and careless. I do have a concern that the decision to issue PINs 4 and 5 may not have been authorised by a "supervising officer" in accordance with police procedure. It appears that the decision to issue these may have been taken by constables, but it is also clear that they were reviewed by Sergeant Graham.

[86] Overall in the context of what was an ongoing investigation in relation to potential harassment it seems to me that the issue of the PINs on both the applicant and on persons associated with the clinic was an appropriate and proportionate way of dealing with the dispute. There was an evidential basis for the decision to issue each of the PINs and their use was in accordance with the purpose of the Procedure of the Police which established their use.

[87] It may well be the case that it would be better if the police were to speak to someone such as the applicant before issuing a PIN but in the circumstances of this case I do not consider that the failure to do so renders the PINs unlawful. I would agree with the approach taken by the Court of Appeal in England and Wales and by the Supreme Court in the case of **T**. In my view the facts of this case can be distinguished from the scenario in **Swann**. I have therefore concluded that the issue and service of the PINS in this case were lawful.

Article 8

[88] The applicant argues that both the issue and the retention of the PINs constituted a breach of her Article 8 rights and was therefore a breach of Section 6 of the Human Rights Act 1998.

[89] The original Order 53 Statement based the complaint about the retaining of the records on an allegation that the respondent failed to comply with paragraph 5 of Schedule 1 of the Data Protection Act 1998. On 3 October 2016 the applicant served an amended Order 53 Statement arguing that the issue and service of the PINs was incompatible with the applicant's Article 8 ECHR rights.

[90] In the course of the hearing the applicant sought to amend the statement to argue that the retention of the PINs and all reference to them was incompatible with the applicant's Article 8 ECHR rights.

[91] Having heard argument from the parties I granted leave to the applicant for this proposed amendment.

[92] At the hearing Ms Doherty argued that the decision to issue and serve the PINs alone engaged the applicant's Article 8 rights. I do not consider this argument is supported by the authorities or that it is in accordance with the law.

[93] I am satisfied that by retaining the PINs on its database the respondent has interfered with the applicant's Article 8 rights. That the applicant's Article 8 rights are engaged in these circumstances is clear from the judgment of Lord Sumption in the **Catt** and **T** cases. Having considered this issue he came to the unequivocal conclusion at paragraph 6 that:

> "But it is clear that the State's systematic collection and storage in retrievable form even of public information about an individual is an interference with private life."

[94] It is also clear from the authorities that it is the retention of the information that constitutes the interference with the applicant's private life.

[95] This was so even if the conduct which led to the issuing of the PIN took place in public and even if there was no intrusive or covert activity on behalf of the State that led to the creation of the PIN, as is the case here.

[96] The case of **R (L) v Commissioner of Police of the Metropolis** [2010] 1 AC 410 to which the Court of Appeal referred in **Catt** and **T** considered the issue of the disclosure of confidential information on a request for an Enhanced Criminal Record Certificate. The leading judgment of Lord Hope looked at the issue of disclosure of convictions, cautions, allegations of criminal behaviour for which there was insufficient evidence to prosecute and information which could not be described as criminal behaviour at all.

[97] It is clear from his consideration of these matters that it was the storage of the information and its potential disclosure which engaged the applicant's Article 8 rights.

[98] In looking at the question of Article 8 in the **T** case the Court of Appeal said as follows:

> "(55) It is difficult to accept that the action of the police in giving Ms T a warning letter of this kind was sufficient

> of itself to amount to an interference with a right to respect for her private life. Although the receipt of the letter no doubt caused her a degree of annoyance and distress, its effect was not of a serious nature and in any event it was, and could have remained, essentially a private matter between her and the police. However, although the complainant was not given a copy of the letter, she was told by the police that they were going to visit Ms T later that week to give her her harassment warning letter. To that limited extent, therefore, it entered the public domain. However, in our view the letter cannot be viewed in isolation from the CRIS report and the retention on police files of both a copy of the letter itself and the information described in the allegation and the steps taken in response to it. That was the approach of the court in *Wood* to the taking and retention of the claimant's photograph in that case and we think it applies equally to the present case.
>
> (56) … We think that the letter and CRIS report contained information of a personal kind, the systematic processing and retention of which will involve an unlawful interference with a right to respect for private life unless it can be justified. Moreover, even if the information is properly to be regarded as public in nature, it is of a kind which the subject can reasonable expect to be forgotten about over the course of time and so enter the sphere of private life … see **L**, per Lord Hope, para [27]. In our view, therefore, the judge was right to hold that Article 8 was engaged."

[99] In my view in considering the Article 8 issue the court should look at the police conduct as a whole. In truth I think it would be somewhat artificial to separate the issuing and serving of the PIN from the fact that the PIN was retained on the police database. I have come to the firm conclusion that it is the retention of the PINs and not the mere issuing and serving of the PINs that engages the applicant's Article 8 rights. The Supreme Court took a similar approach. In considering whether Article 8 was engaged it looked at the question of what constitutes "private life", and whether there was a reasonable expectation of privacy in the relevant respect. In considering the **Catt** case it concluded that:

> "In this context mere observation cannot, save perhaps in extreme circumstances, engage Article 8, but the systematic retention of information may do" (my underlining – see paragraph (4)).

In paragraph 6 of the judgment Lord Sumption says:

> "But it is clear that the State's systematic collection and storage in retrievable form even of public information about an individual is an interference with private life."

[100] It was the retention of the relevant information that persuaded Mr Justice Horner in the **Swann** case that the applicant's Article 8 rights were engaged – see paragraph [49] of his judgment.

[101] That being so, the first issue is whether or not the retention of the data in the PSNI information system is in accordance with law. This issue was reviewed by Sumption J in the Supreme Court judgment and he came to the firm conclusion that the retention of PINs on police files is in accordance with law. He referred to the fact that at common law the police have the power to obtain and store information for policing purposes, i.e. broadly speaking for the maintenance of public order and the prevention and detection of crime. Whilst these powers do not authorise intrusive methods of obtaining information he was of the view that they were "amply sufficient to authorise the obtaining and storage of the kind of public information in question on these appeals."

[102] He went on to point out that the exercise of these powers is subject to an intensive regime of statutory and administrative regulation. The principal element of this regime is the **Data Protection Act 1998** which was passed to give effect to European Parliament and **Council Directive 95/46/EC**, "… A harmonisation measure designed to produce a common European Framework of Regulation ensuring a `high level of protection' satisfying (among other standards) Article 8 of the Convention;" he points out that any person who thinks that the police may hold personal information about him or her may call for access to it under Section 7 of the 1998 Act (subject only to the exception in Section 29). Armed with this information any person who objects to its retention or use can bring the matter before the Information Commissioner.

[103] There has been no evidence of any disclosure to third parties in this case. Any potential disclosure is limited to policing purposes, and is subject to an internal proportionality review, and review by the Information Commissioner and the courts. The applicant has expressed a concern about the possible disclosure of the PINs or the underlying allegations in the event that she requires an Enhanced Criminal Record Certificate under Part V of the Police Act 1997 at some point in the future. This issue was considered in the case of **L**, to which I have already referred. The Supreme Court confirmed that the act could be given an effect which is compatible with the Article 8 rights of persons affected by potential disclosure. ACC Hamilton has confirmed in the LM case that:

> "In the event that a request for a certificate is received, the PSNI will always conduct a search on NICHE to ascertain the information which it holds in relation to that individual. Such a check will make known to the officer in question the fact that this complaint was received and that a PIN was issued. The risk of any possible disclosure of this information will be dependent upon the extent to which the underlying allegations may be relevant to the position applied for and also the extent to which disclosure would interfere with the applicant's right to a private life."

The procedure allows for submissions from the applicant if a decision to disclose was taken.

[104] As in the **Catt** and **T** cases the real question is whether the interference with the respondent's Article 8 rights was proportionate to the objective of maintaining public order and preventing or detecting crime. At paragraph 33 of the judgment Lord Sumption said:

> "**[33]** Although the jurisprudence of the European Court of Human Rights is exacting in treating the systematic storage of personal data as engaged in Article 8 and requiring justification, it is consistently recognised that (subject always to proportionality) public safety and the prevention and detection of crime will justify it provided that sufficient safeguards exist to ensure that personal information is not retained for longer than is required for the purpose of maintaining public order and preventing or detecting crime, and that disclosure to third parties is properly restricted."

[105] In looking specifically at the service of PINs at paragraph 39 he says:

> "Moreover, different police forces retain the original hard copy of the Harassment Letter for different periods, in some cases as short as 8 months. The current practice of the Metropolitan Police is to retain a copy of the Harassment Letter on their electronic records for at least 7 years, and the corresponding CRIS for 12 years. The issue of the letter is not tantamount to a criminal conviction, like a caution, but it would in theory be disclosable to a potential employer in response to a request for an Enhanced Criminal Record Certificate

under Section 113B of the Police Act 1997, if the relevant chief officer considered the allegation was sufficiently relevant."

[106] The key passages of the judgment in relation to the retention issue are at 42 onwards:

> **"[42]** The purpose of the Prevention of Harassment Letter is plain enough from its terms. Under the Act, harassment requires a `course of conduct', not just a single incident. The Prevention of Harassment Letter is intended to warn the recipient that some conduct on his or her part may, if repeated, constitute an offence. It also seeks to prevent the recipient from denying that he or she knew that it might amount to harassment. It therefore serves a legitimate policing function preventing crime and, if a repetition occurs, it may also assist in bringing the accused to justice. It is however impossible to conceive how, in the circumstances of this case, that purpose could justify the retention of the letter on police records for as long as 7 years or of the corresponding CRIS for 12. It seems obvious that within a few months the incident on 20 July 2010 would have become too remote to form part of the same `course of conduct' as any further acts of harassment directed against Mr S. It is not suggested that the material has any relevance to the investigation or prevention of possible offences by others.
>
> **[43]** It may well be that longer periods, even much longer periods of retention, would have been justified in a more serious case arising under the **Protection from Harassment Act 1977**, for example in the case of stalking (Section 2A) or putting people in fear of violence (Sections 4 and 4A). These kinds of offences are often characterised by the development of abusive behaviour over a long period of time. This is especially true of domestic violence, a difficult and sensitive area in which the protection of persons at risk may require sensitive monitoring over a considerable period. However, this is a long way away from that kind of case. It arises, if the allegation is true, from a relatively trivial act of rudeness between neighbours who did not get on. The real problem is that the period of retention seems to be a standard period which applies regardless of the nature of the incident and regardless of any continuing value that

> the material may have for policing purposes. It was only because of these proceedings that the retention of the material was reviewed and the decision made in January 2013 to delete it. This is in my view difficult to reconcile with the Data Protection principles in the Act. Nonetheless I do not think that Ms T's Article 8 rights have been violated, because although the Metropolitan Police envisages the retention of material for 7 or 12 years, it was in fact retained for only 2½ years before the decision to delete it was made. The latter period can be justified by reference to the need to relate the incident of 20 July 2010 to future incidents, bearing in mind that sometime may elapse after a repetition before a complaint is made to the police."

[107] If the retention of the PIN in relation to Ms T (for 2½ years) did not constitute an interference with her Article 8 rights then on no account could this be said of the applicant. In my view the policing need for the retention of the records given the ongoing nature of the complaints and counter-complaints by the applicant clearly justified the retention of the PINs for a period of time. The question is whether or not the period of time in this particular case was justified. In this case all of the PINs were deleted on 11 February 2016, having been "deactivated" in March 2015, April 2015 and August 2015. Having regard to the principles set out in the **T** judgment I cannot see how the period of retention in this case could be deemed to be in breach of the applicant's Article 8 rights.

[108] I have some concerns about the extent to which the police have published an easily accessible administrative code in relation to the retention of this type of data.

[109] In the course of the hearing I was referred to the "Information Management Policy" issued by the PSNI on 9 December 2015. This document is publicly available and cancelled the previous policy - /3/2010 which was not produced in the course of the hearing. The management policy does not deal specifically with periods of time for the retention of this type of material or for its review but does refer to the legal requirement for effective management of all PSNI records with specific reference to the Data Protection Act 1998.

[110] Appendix G of the procedure document dealing with PINs indicates that documents should be stored "in accordance with the Records' Management Policy".

[111] In any event it is clear that in this case the respondent did review the retention of the material by first deactivating the various PINs and subsequently deleting them. Thus it is clear that the policy was sufficiently flexible to ensure that the PINs were not retained for an excessive period of time. In any event I note that

the interim guidance now provides for automatic reviews of PINs after 6 months from the date on which the PIN was issued.

[112] In the **T** case the Metropolitan Police had a policy of retention of material for 7-12 years. The fact that the material in question was only retained for 2½ years before the decision to delete it was made, was sufficient for the Supreme Court to come to the conclusion that there had not been a breach of the applicant's Article 8 rights. On this issue Lord Manse said at paragraph 76 as follows:

> "In my view the Court of Appeal erred in granting that declaration. By the time Ms T's claim before Eady J the police had made it clear their policy was not inflexible, as later events have confirmed. I am not persuaded that the policy, with that flexibility, was unlawful. The Protection of Harassment Act covers a wide spectrum of offensive behaviour which may occur in a variety of circumstances. It has been useful particularly, but not exclusively, in the context of domestic abuse and problems with neighbours. The response of the police to complaints about abusive conduct may well be affected by knowing whether similar earlier complaints have been made against the same person, either by the same or by other complainants. In those circumstances I do not consider it to be unlawful for the police to adopt a standard practice of retaining a record of such complaints for several years, but with a readiness to be flexible in the application of the practice."

[113] I accept that there was a valid reason for the retention of the PINs in this case. As already pointed out they served the potential purposes of deterrence and retention of evidential material. The fact that a PIN had been issued and the alleged conduct on which it was based can be extremely useful to inform future police decision making in relation to the complainant, recipient or known associates. Both the applicant and members of staff in the clinic were the subject of a report to the PPS. Retention of some of the PINs was therefore important for evidential purposes. The applicant formed part of a group which was engaging in protests outside the clinic over a prolonged period of time. The protest had given rise to numerous complaints by a range of individuals against a range of protestors. Monitoring the protest required a considerable amount of police time. Retention of as much information as possible was therefore important and helped informed decision making about the protest and the retention of information in this case.

[114] In terms of guidelines for the period of time during which PINs can be retained it has to be acknowledged that the range of circumstances in which a PIN may be issued and retained is so varied that it would be difficult to prepare

guidelines on the duration of retention and the precise content of the information which should or should not be retained. In terms of the reviewing of the retention of such materials, apart from the discretion exercised by the PSNI the respondent relies on the provisions of the Data Protection Act 1998. Clearly the police hold information subject to the requirements of that Act including the Data Protection principles. These include a requirement that the data is processed "fairly and lawfully" and held only for a "relevant purpose". Once obtained it cannot be processed in a manner incompatible with these purposes. The data cannot be retained for longer than is necessary. Access to the police database is limited to the authorised police officers and members of staff, who are subject to disciplinary and/or criminal sanction in the event of unauthorised access or use of the information retained on an NICHE. Importantly the respondent argues that the applicant was aware of the existence of the PINs and that they had been retained by the police on its database. It was open to the applicant and anyone in her position to make a complaint to the Information Commissioner at any time to argue that the continued retention of any of the PINs was unlawful contrary to the first data protection principle.

[115] In this regard the respondent says that the availability of an alternative remedy should defeat the judicial review application in this case. It is argued that disputes of this nature should be resolved by the Information Commissioner rather than by way of judicial review.

[116] This issue was addressed expressly by the Supreme Court in the **Catt** and **T** cases. The court held that where a case concerned a "straightforward dispute over retention" it should be dealt with by way of a complaint to the Information Commissioner. The court said:

> "**[14]** However, any person who thinks that the police may hold personal information about him may call for access to it under Section 7 of the Data Protection Act subject (in the present kind of case) only to the exception in Section 29. Armed with the information any person who objects to its retention or use can bring the matter before the Information Commissioner …
>
> **[45]** … What remained was a straightforward dispute about retention which could have been more appropriately resolved by applying to the Information Commissioner. As it is the parties have gone through three levels of judicial decision, at a cost out of all proportion to the questions at stake …"

[117] I recognise that this judicial review sought to challenge the lawfulness of the decision to issue PINs, in respect of which the Information Commissioner has no

power to intervene. The decision to delete the PINs was made after the issue of these proceedings. However, in terms of the issue of retention it seems to me that there is an adequate alternative remedy in the form of the powers granted to the Information Commissioner under the 1998 Act.

[118] This application focused on the retention of the PINs which were deleted on 11 February 2016. As is clear from the affidavit of ACC Hamilton (see paragraph [39] above) the PSNI has retained the "other documentation" associated with all the complaints arising from the incidents throughout 2014 which were prepared for a report for prosecution. I accept that the retention of this material is lawful and subject to proper regulation and control.

[119] For the reasons set out in this judgment judicial review is refused.