Neutral Citation No. [2012] NIQB 49

Ref: **TRE8556**

Delivered: **9/7/2012**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MARVIN CANNING FOR JUDICIAL REVIEW

-and-

IN THE MATTER OF AN APPLICATION BY BERNARD FOX & CHRISTINE McNULTY FOR JUDICIAL REVIEW

Canning's (Marvin) Application and Fox (Bernard) and McNulty's (Christine) Application [2012] NIQB 49

TREACY J

Introduction

[1] By these applications for judicial review the applicants seek declarations that the powers to stop and question pursuant to s21 and the power to stop and search pursuant to s24 and para 4(1) of Schedule 3 of the Justice and Security (NI) Act 2007 ("the JSA") are incompatible with Arts5 and 8 of the ECHR.

Background

[2] The applicant Canning is a 54 year old man who alleges he has been stopped and questioned under s21 and stopped and searched under s24 of JSA on a number of occasions and of having previously been stopped and searched frequently pursuant to authorisations under s44 of the Terrorism Act 2000. The applicant has been stopped pursuant to s21 JSA alone on only one occasion and on another four occasions when the power was used in combination with other statutory powers. T/Chief Inspector Jackson has averred that the applicant is a dissident republican and there exists reliable and credible intelligence to support

reasonable suspicion that he has been involved in terrorist activity. This is denied by the applicant who has no previous convictions.

[3] On 10 March 2011, the applicants Fox and McNulty were travelling together in a car when they were signalled to stop by uniformed officers of the Police Service of Northern Ireland ("PSNI") near Camlough, Co Armagh. Both the applicants and the car they were travelling in were searched by the PSNI. Both applicants remained at the scene until the searches were complete.

[4] The searches were carried out by the PSNI in the purported exercise of their powers under s24 of the JSA.

[5] The evidence given by the applicants indicates they were detained by the PSNI for approximately one hour. The evidence of the two police officers involved indicates the time from stopping the applicants until completion of the search was approximately twenty-five minutes.

[6] Print outs obtained from police records recording the duration of the search of Ms McNulty and the subsequent search of Mr Fox indicate the applicants were detained for approximately fifty-five minutes.

Application for Judicial Review

[7] The primary ground advanced by all of the applicants is that the principles enunciated by the European Court of Human Rights ("ECHR") in Gillan & Quinton v UK [2010] 50 EHRR 45 concerning s44 of the Terrorism Act 2000 apply with equal force to s21 and para 4(1) of Schedule 3 of the JSA.

[8] The applicants contend that the powers under s21 and s24 of the JSA confer an extremely wide discretion, without reasonable suspicion, on police officers to interfere with the privacy of individuals and they are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. It is argued, therefore, that these powers are not "in accordance with the law" and they violate Art8 ECHR. It is further contended that the powers are incompatible with Art5.

Preliminary Cause or Matter

[9] Mr MacDonald QC, on behalf of Canning, submitted that the case was a criminal cause or matter. Ms Quinlivan QC, on behalf of Fox & McNulty, in agreement with Mr McGleenan for the respondent, submitted that it was not a criminal cause or matter. Applying the principles set out by the Divisional Court in JR27 [2010] NIQB 12I consider that Ms Quinlivan and Mr McGleenan are correct.

Legal Framework

[10] S21 of the JSA sets out the power of a constable to stop and question a person:

> "(1) A member of Her Majesty's forces on duty or a constable may stop a person for so long as is necessary to question him to ascertain his identity and movements.
>
> (2) A member of Her Majesty's forces on duty may stop a person for so long as is necessary to question him to ascertain–
>
> (a) what he knows about a recent explosion or another recent incident endangering life;
>
> (b) what he knows about a person killed or injured in a recent explosion or incident.
>
> (3) A person commits an offence if he–
>
> (a) fails to stop when required to do so under this section,
>
> (b) refuses to answer a question addressed to him under this section, or
>
> (c) fails to answer to the best of his knowledge and ability a question addressed to him under this section.
>
> (4) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.
>
> (5) A power to stop a person under this section includes a power to stop a vehicle (other than an aircraft which is airborne)".

By way of background the power to stop and question was formerly contained in Part VII, s89 of the Terrorism Act 2000.

[11] S24 of the JSA provides:

> "Search for munitions and transmitters
> Schedule 3 (which confers power to search for munitions and transmitters) shall have effect".

[12] The relevant portions of Schedule 3 (Munitions and transmitters: search and seizure) of the JSA provide:

> "Entering premises
> 2(1) An officer may enter and search any premises for the purpose of ascertaining—
>
> (a) whether there are any munitions unlawfully on the premises, or
>
> (b) whether there is any wireless apparatus on the premises.
>
> …
>
> (3) A constable exercising the power under sub-para (1) may, if necessary, be accompanied by other persons.
> …
>
> Stopping and searching persons
>
> 4(1) An officer may—
>
> (a) stop a person in a public place, and
>
> (b) search him for the purpose of ascertaining whether he has munitions unlawfully with him or wireless apparatus with him.
>
> …
>
> Seizure
>
> 5(1) This para applies where an officer is empowered by virtue of this Schedule or section 25 or 26 to search premises or a person.
>
> (2) The officer may—
>
> (a) seize any munitions found in the course of the search (unless it appears to him that the munitions are being, have been and will be used only lawfully), and
>
> (b) retain and, if necessary, destroy them.

(3) The officer may—

(a) seize any wireless apparatus found in the course of the search (unless it appears to him that the apparatus is being, has been and will be used only lawfully), and

(b) retain it.

Records

6(1) Where an officer carries out a search of premises under this Schedule he shall, unless it is not reasonably practicable, make a written record of the search.

(2) The record shall specify—

(a) the address of the premises searched,

(b) the date and time of the search,

(c) any damage caused in the course of the search, and

(d) anything seized in the course of the search.

(3) The record shall also include the name (if known) of any person appearing to the officer to be the occupier of the premises searched; but—

(a) a person may not be detained in order to discover his name, and

(b) if the officer does not know the name of a person appearing to him to be the occupier of the premises searched, he shall include in the record a note describing him.

(4) The record shall identify the officer—

(a) in the case of a constable, by reference to his police number, and

(b) in the case of a member of Her Majesty's forces, by reference to his service number, rank and regiment.

7(1) Where an officer makes a record of a search in accordance with para 6, he shall supply a copy to any person appearing to him to be the occupier of the premises searched.

(2) The copy shall be supplied immediately or as soon as is reasonably practicable.

Offences

8(1) A person commits an offence if he—

(a) knowingly fails to comply with a requirement imposed under para 3, or

(b) wilfully obstructs, or seeks to frustrate, a search of premises under this Schedule.

(2) A person guilty of an offence under this para shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

9(1) A person commits an offence if he fails to stop when required to do so under para 4.

(2) A person guilty of an offence under this para shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale."

[13] S42 of the JSA provides that in s21 to s38 (and Schedules 3 and 4) "premises" includes "any place and, in particular, includes – (a) a vehicle…".

[14] The provision challenged in Gillan & Quinton was s44 of the Terrorism Act 2000. S44 authorised police officers to conduct a stop and search where an appropriate authorisation was in place:

"44. Authorisations

(1) An authorisation under this subsection authorises any constable in uniform to stop a vehicle in an area or at a place specified in the authorisation and to search—

(a) the vehicle;
(b) the driver of the vehicle;
(c) a passenger in the vehicle;
(d) anything in or on the vehicle or carried by the driver or a passenger.

(2) An authorisation under this subsection authorises any constable in uniform to stop a pedestrian in an area or at a place specified in the authorisation and to search—

(a) the pedestrian;

(b) anything carried by him.

(3) An authorisation under subsection (1) or (2) may be given only if the person giving it considers it expedient for the prevention of acts of terrorism.

(4) An authorisation may be given—

(a) where the specified area or place is the whole or part of a police area outside Northern Ireland other than one mentioned in para (b) or (c), by a police officer for the area who is of at least the rank of assistant chief constable;

(b) where the specified area or place is the whole or part of the metropolitan police district, by a police officer for the district who is of at least the rank of commander of the metropolitan police;

(c) where the specified area or place is the whole or part of the City of London, by a police officer for the City who is of at least the rank of commander in the City of London police force;

(d) where the specified area or place is the whole or part of Northern Ireland, by a member of the Royal Ulster Constabulary who is of at least the rank of assistant chief constable"

[15] S45 of the Terrorism Act 2000 provides that the power conferred by an authorisation under s44 may be exercised

> "...only for the purpose of searching for articles of a kind which could be used in connection with terrorism" and "whether or not the constable has grounds for suspecting the presence of articles of that kind".

[16] S46 provides that an authorisation under s44 was required to be confirmed by the Secretary of State "*before the end of the period of 48 hours beginning with the time when it is given*" and that the duration of an authorisation could not exceed the period of 28 days beginning with the day on which the authorisation was given.

> **"**Legal context – Convention rights
>
> 1. Art5 ECHR provides:
>
> 1. Everyone has the right to liberty and security of person.
>
> No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> …
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this

article shall have an enforceable right to compensation."

[17] In respect of freedom of movement, Art2 of the Fourth Protocol of the ECHR which has not been ratified by the UK, provides:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of 'ordre public', for the prevention of crime, for the protection of rights and freedoms of others.
>
> 4. The rights set forth in para 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society".

[18] Art 8 provides:

> "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 the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Legal context – victim status

[19] In order to bring an ECHR challenge an applicant must demonstrate he is a victim within the meaning of s7 of the Human Rights Act 1998:

> "7(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may -
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act.
>
> …
>
> (7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act".

[20] Art34 ECHR provides:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation… of the rights set forth in the Convention or the protocols thereto…"

Relevant affidavit evidence

Affidavit of Marvin Canning dated 6 April 2011

[21] This applicant makes a number of averments in respect of the occasions on which he states he was stopped by the police:

> "2. Over a long period of time, about 3 years ago, I have been subject to a great many stops by the police. First under section 44 of the Terrorism Act 2000 and then in more recent months under section 21 of the Justice and Security (Northern Ireland) Act 2007.
>
> …

4…. I undertake to provide a supplemental affidavit exhibiting all stop and search records in their entirety.

…

11. These stops are completely unnecessary and unwarranted. They cause me a great deal of embarrassment by virtue of the fact that they always occur in public areas and are carried out in full view of members of the public. ...The frequency with which I have been stopped, searched and questioned makes this all the more embarrassing.

…

15. I do recall two specific incidents when these powers were used…

16. On one occasion, in July 2010 I was returning from a wedding when the taxi I was in was stopped by the police. I believe this was stopped under the Section 21 and/or section 24 of the Justice and Security Act… I have made a statement of complaint to the Police Ombudsman for Northern Ireland in relation to this incident and it is under investigation.

…

20. I also recall another occasion when I attended Strand Road Police Station with my son…in relation to an allegation of vehicle taking from 4th September 2008.

...

22. At the time I was stopped by two police officers outside Strand Road Police Station pursuant to Section 21. These police officers pulled up in a police car while I was talking to my solicitor on the phone.

…

24. I also recall one further occasion when I was stopped in and around the 2nd February 2011…".

Affidavit of Marvin Canning dated 21 July 2011

[22] In para 9 of this affidavit, the applicant offers some specific details in respect of instances where he alleges that he was stopped and searched pursuant to s24 of the JSA. He details ten specific incidents in the period from 18 April 2011 to 14 June 2011 and exhibits the documents relating to these incidents.

[23] In paras 23-26 of the affidavit the applicant disputes the assertion in T/Chief Inspector Jackson's affidavit dated 25 May 2011 that he is a dissident republican terrorist.

[24] At paras 31 and 34 the applicant makes averments as to the reason why he is being stopped by the police:

> "31. I also reject the idea that section 21 will not be used in the circumstances where my identity is known. This does not make any sense because the only reason I am being stopped is <u>because of who I am</u> and because of the police perception of my political beliefs.
>
> …
>
> 34. I am being victimised because of who I am rather than anything I have done".

[25] In respect of the one occasion on which police records indicate a s21 stop and question was conducted, the applicant avers he cannot recall that specific incident:

> "36. I note from the replying affidavits that the PSNI confirm that I have been stopped on only one occasion under section 21 which was on the 7 March 2011. Unfortunately due to the frequency of these stops I am unable to recall this specific incident and I am unable to provide any further details due to the passage of time".

Affidavit of T/Chief Inspector Jackson dated 25 May 2011

[26] Para 8 of this affidavit provides that the applicant has been subject to stop and search powers on approximately 50 occasions and discusses why s21 was rarely employed in respect of same:

> "8. The Applicant has been subject to stop and search powers on approximately 50 occasions but the section

> impugned by the Applicant of stop and question has rarely been employed. There is an obvious reason for this. Section 21 is used where police require to ascertain the identity of an individual. The Applicant is a dissident republican and there exists reliable and credible intelligence to support reasonable suspicion that the applicant has been involved in terrorist activity. This intelligence covers the relevant times during which he was stopped by police. His identity is known to police in G district. There would, therefore, rarely be a need to stop the Applicant in order to ascertain his identity. Section 21 can also be used to make inquiries about a person's movements. Thus, it is possible that a section 21 power will be used to stop and question a person whose identity is known in order to ascertain details about their movements".

Affidavit of T/Chief Inspector Jackson dated 29 September 2011

[27] This affidavit refers to the affidavit of the same date as sworn by T/Chief Inspector Jackson which was made in respect of related proceedings brought by Bernard Fox and Christine McNulty. Para7 of that affidavit provides there must always be a reason for a stop under s24 of the JSA:

> "…These fluctuations [in statistics] reflect the fact that, in Northern Ireland, the power to stop and search pursuant to section 24 is not exercised on a purely random basis. The use of the power is frequently intelligence-driven. There must always be a reason for a stop under Section 24. I refer to an Aide Memoire – 'Stop/Search/Question Justice and Security (NI) Act 2007 and Terrorism Act 2000' produced to assist police officers in the use of stop, search and question powers…".

[28] T/Chief Inspector Jackson averred at para8 that the context in which the power is exercised in Northern Ireland is also significant. Paras9–12 describe current terrorist related activity in Northern Ireland; threats to security by dissident republicans which continue to be high; the threat posed to serving police officers has been classified as "severe"; and a number of potentially lethal attacks are specifically mentioned.

[29] Para13 reflects on the s24 power in the JSA as being a vital tool to reduce the level of threat from terrorism:

> "The use of a stop and search power which does not require "reasonable suspicion" is a vital tool in the efforts by the PSNI to reduce the level of threat to police personnel and the public from dissident republican terrorism. While intelligence is available on such activity it is rarely sufficiently specific to provide officers with a "reasonable suspicion" for conducting a stop and search. Even in cases where intelligence indicates a likely terrorist attack, the precise date and location of the activity may not be known".

[30] At para14, reference is made to the examination of the s24 powers by the Independent Reviewer of JSA powers in light of the cessation of reliance on s44 of the Terrorism Act 2000 after the ***Gillan & Quinton*** ruling. In this regard, paras174 and 175 of the Third Report by the Independent Reviewer (2009 – 2010) as included in para49 below were quoted.

[31] At para15 of the affidavit, reference is made to conclusions of the Independent Reviewer regarding the continued use of the s24 JSA power as included in paras278–280 of the Third Report by the Independent Reviewer (2009 – 2010) (set out in para50 below).

[32] At para16 it is averred that the use of the s24 stop and search powers is subject to a number of procedural safeguards within the PSNI Corporate Governance Structures being:

(i) the Terrorism and Security Powers User Group scrutinises the use of such powers on a quarterly basis;

(ii) the Terrorism and Security Powers User Group reports to the Security and Serious Harm Programme Board; and

(iii) as and when is necessary issues can be elevated to the Service Executive Board of the PSNI.

[33] Para17 provides that the use of such powers is also subject to external scrutiny mechanisms:

(i) The PSNI are subject to the oversight of the Northern Ireland Policing Board.

(ii) At local level, accountability structures require senior officers to attend meetings of the District Policing Partnerships where specific concerns about police actions can be raised.

(iii) A person aggrieved by the use of a particular stop and search power can raise the issue with the Police Ombudsman for Northern Ireland who will conduct an entirely independent review if appropriate.

[34] Para18 of the affidavit describes the reasons why the PSNI use the stop and search powers:

> "…It may be as a result of a specific briefing about an individual or intelligence about a specific threat within a geographic area in a given time frame. The intent is that the power is not used on either a purely random or blanket basis but rather on the basis of threat. It is unlikely that an individual will be the subject of a section 24 stop and search unless there is an intelligence-led basis for the use of the power in the prevailing circumstances. Officers frequently exercise powers under Section 21 of JSA to stop and question about identity and movements, the answers to which may reduce the likelihood of recourse to the use of the Section 24 power".

[35] At para 19 of the affidavit T/Chief Inspector Jackson states the use of the s 21 and s 24 JSA powers is directed to the discharge of the PSNI obligations under Art2 to ensure that reasonable operational steps are taken to avert a real and immediate risk to life.

[36] Para 20 refers to an additional safeguard regarding the use of s 24 of the JSA, being the internal authorisation regime which was under development. It is averred:

> "…This will provide for the requirement of an authorisation to be in place to permit the use of the section 24 stop and search power. The authorisation will be by a Chief Officer…who will have received a detailed account of the intelligence which has given rise to the reasonable suspicion that the safety of any person might be endangered by the unlawful use of munitions or wireless apparatus. The authorisation will also include legal advice from the Respondent's Human Rights Legal Advisor as to the compliance with the authorisation with the law. The authorisation will only be signed when the Chief Officer is satisfied that the authority is both necessary and proportionate…".

[37] At para 22 it is stated the s 24 JSA power can be exercised without reasonable suspicion that the applicants were unlawfully in possession of munitions or wireless apparatus but proceeds to explain the stop in the present case was not a random stop:

> "The Applicant contends that Articles 5 and 8 of the Convention have been breached because the stop on 10th March 2011 was exercised without reasonable suspicion that the Applicants were unlawfully in possession of munitions or wireless apparatus. The section 24 power can be exercised without any such suspicion. However, in this case the uniformed officers stopped this vehicle as it was alerted on the ANPR system as of interest…The stop in this case was not a random stop. It was based on information held by PSNI about the vehicle being driven by one of the Applicants".

[38] At para 23 it is averred the applicants were detained at the locus of the stop for a period of approximately fifteen minutes.

[39] In para 24, regarding the applicants' complaint the PSNI did not provide assurances they would not be subject to further s 24 JSA stops and searches, it is averred:

> "…Such assurances would be incompatible with the general duties and obligations upon the Chief Constable to investigate and prevent crime".

Affidavit of T/Chief Inspector Jackson dated 10 October 2011

[40] Para2 of this affidavit provides confirmation that the internal authorisation scheme referred to in para 20 of T/Chief Inspector Jackson's affidavit dated 29 September 2011 was now in place and effective as of 6 October 2011.

Third Report by the Independent Reviewer period 2009 – 2010

[41] This report was published in November 2010 and includes an analysis of the use of the s24 JSA regime in light of the ruling of the ECHR in Gillan & Quinton**.**

[42] The Independent Reviewer noted the context in which his report was prepared:

> "27. The Government's national security strategy published in October 2010 says at para 1.7: 'At home there remains a serious and persistent threat from residual terrorist groups linked to Northern Ireland'."

[43] Under "Part 4: The Security Background" reference is made to the security threat from residual terrorist groups:

> "63. There has been a serious deterioration in the security situation in the past year.
>
> …
>
> 65…. The formal assessment of the threat by the Security Service has remained at "Severe" the second highest in the tiered level of threats, throughout the period under review…".

[44] The Independent Reviewer examined the impact of the ruling of the ECHR in Gillan & Quinton on counter-terrorism powers available in Northern Ireland:

> "108. It is not altogether easy to apply the Court's reasoning as set out above to the current circumstances of a very serious security threat in Northern Ireland. I would expect that the police would use an element of judgment and common sense before concluding that "many articles commonly carried by people in the streets" might have a connection with terrorism. Furthermore, the current context of daily security threats and incidents in Northern Ireland is very different from the circumstances obtaining in connection with a demonstration in East London on 9 September 2003, the date of the stop and search in question."

[45] At para110 the Independent Reviewer examined the possible use of other powers as compensation for reduced use of s44 of the Terrorism Act 2000. He noted that the use of powers for purposes for which they were not intended was inappropriate. At para 111 he stated:

> "An example of an inappropriate use of the powers would be where the police stop under section 21 someone already known to them and question him about his identity. I have received some reports that this has occurred. It cannot be justified and should not happen. In such cases the Police Ombudsman provides an avenue for investigating a complaint. Where however the known person was stopped to question him about his movements the issue is not so straightforward. If the basis of the questioning

> related to recent incidents or known threats it would indeed be justified, but in a case where there was no such linkage the questioning would be very hard to justify..."

[46] At para 120, the Independent Reviewer addressed a criticism with respect to the small number of arrests arising from the use of search powers. He outlined the nature of the operational problems facing police in light of the security situation and stated at para122:

> "The police response has to be correspondingly flexible. There is little value in untargeted activity, which can be wasteful of precious resources and may cause resentment, unless it is judged necessary for deterrence against a specific threat. I have seen no evidence this year of inappropriate police conduct, but have not seen individual complaints made to the Police Ombudsman. The small number of formal outcomes does not mean that the police activity was unnecessary, unjustified or wrong. An equal *(sic)* valid measure is the extent of harmful activity which has been disrupted, attacks prevented and lives saved…"

[47] The Independent Reviewer expressly examined the s21 JSA power. At para145 of his report for 2009, he noted the PSNI had adopted a practice of combining a s44 stop under the Terrorism Act 2000 with one under s21 of the JSA. He noted that this was "perfectly reasonable, and indeed the correct and proportionate use of the power."

[48] At paras174 and 175 the Independent Reviewer addressed the comparative use of s44 of the Terrorism Act 2000 and the s24 power under the JSA. Having outlined the relevant statistics he noted:

> "174. In summary, this shows a substantial shift from section 44 to section 24 in the police strategies for stop and search. In other words, there has been some displacement effect from the change in relation to section 44. But it is not as great as might have been expected. There has not been a full scale shift from one power to the other. The overall use of stop and search and stop and question under all three powers fell from 16,965 to 9,324 between the third and fourth quarters. In my judgment, that fall reflects rigour on the part of the police in using only those powers which could be justified by the circumstances,

> furthermore at a time of disturbances associated with the parades and a spate of under-car bomb devices.
>
> 175. Some will find a 22% increase in stop and search and stop and question a welcome reassurance that the police are responding effectively to the challenges posed by residual terrorist groups. Others will see in it alarming confirmation of all their worst fears about an increase in the use of intrusive powers, out of all proportion to need. Such views are invariably subjective: I make no judgment on them".

[49] At paras 278-280 the Independent Reviewer expressed his view on the continued use of the s24 powers under the JSA:

> "278. In this complex and sensitive situation it remains of paramount importance that stop and question and stop and search operations are carried out only when absolutely necessary and in full recognition of their potential to alienate individual members of the public and groups whose support for the police is essential if normal policing is to develop. Wherever possible, less intrusive strategies should be used. But where these powers are necessary, they should be used.
>
> 279. My own judgment is that the overall increased use of these powers is justified in response to the scale of the challenge from the residual groups, and in particular the risk to life from firearms and explosives (whether judged according to obligations under Article 2 of the European Convention on Human Rights or against more pragmatic criteria).
>
> 280. I make that judgment against the clear assumption that every stop and search or stop and question must be capable of justification on its merits. These must relate both to the context of the security threat, which in Northern Ireland is not in doubt, and to the individual circumstances, vehicles, weapons and explosives".

Fourteenth Report of the Joint Committee on Human Rights - Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion - Human Rights Joint Committee (printed 7 June 2011)

[50] In this report the Joint Committee on Human Rights considered the question of whether a stop and search power without suspicion was necessarily incompatible with Art8. The Joint Committee concluded it did not consider that such a power is inherently incompatible with Art8 because of its inherent arbitrariness:

> "52. The EHRC itself, however, does not appear to share this view that a power to stop and search without reasonable suspicion is inherently incompatible with Article 8 and other Convention rights. In its submission, it "recognises that there may be very exceptional circumstances in which it is necessary for there to be a power to stop and search without reasonable suspicion [...] for instance to prevent a real and immediate act of terrorism or to search for perpetrators or weapons following a serious incident." The question for the EHRC, rather, is whether the restrictions on the scope of the power are sufficiently tightly defined and the safeguards against its misuse robust enough to ensure that the power is only used in those very exceptional circumstances when it is absolutely necessary.
>
> 53. The NIHRC, the IPCC, JUSTICE and Liberty all appear to take a similar position to the EHRC, accepting in principle that a power to stop and search without reasonable suspicion may be necessary in exceptional circumstances and focusing on the definition of the power in the Order and the adequacy of the safeguards provided in order to make sure that it is exercised compatibly with Convention rights.
>
> 54. We do not consider that a power to stop and search without reasonable suspicion is inherently incompatible with Article 8 ECHR, as well as Articles 5, 10, 11 and 14, because of its inherent arbitrariness. Although we see considerable force in the argument that the lack of a requirement of reasonable suspicion gives rise to a serious risk that the power will be exercised in breach of those rights, because there is an irreducible element of arbitrariness in the exercise of the power, in our view it is not clear from the *Gillan* judgment that the European Court of Human Rights goes this far. In particular, if the Court in that case had considered that the lack of a requirement of reasonable suspicion was of itself fatal to the

> compatibility of the power, it would not have been necessary to conduct the detailed analysis of the practical effectiveness of the limitations on the scope of the power and the adequacy of the safeguards against its misuse".

Report on the operation in 2010 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 by David Anderson QC (published July 2011)

[51] The Independent Reviewer of the powers in the Terrorism Act 2000 was in agreement with the view of the Joint Committee on Human Rights regarding the interpretation of the scope of the ruling in Gillan & Quinton:

> "8.35…Such comments have led distinguished commentators to advise that nothing short of a requirement of reasonable suspicion on the part of the officer selecting for stop and search can provide a sufficient legal basis for interferences with the right to respect for private life under Article 8.
>
> 8.36 I agree with the Joint Committee on Human Rights that it is not clear from the *Gillan* judgment that the European Court of Human Rights goes so far. On the other hand, it does seem plain that irrespective of the position as regards the making of authorisations, the Court considered the breadth of the discretion conferred on individual officers under section 44 to be too great. Officers should have clear guidance, as close as possible to the latter end of the spectrum which stretches from "random" at one end to "reasonable suspicion" at the other."

Relevant case law

[52] The applicant, Canning, seeks to draw parallels with the ECHR decision in Gillan & Quinton on the ECHR compliance of s44 of the Terrorism Act 2000. In this case the applicants were stopped and searched for less than 30 minutes while respectively demonstrating against and photographing an arms fair in London. Their claim that the powers used against them were illegal was unsuccessful in the High Court, Court of Appeal and the Supreme Court. The ECHR however held that the search amounted to an interference with their right to respect for their private lives, and that contrary to Art8 ECHR, the powers of authorisation, confirmation and stop and search under ss44–45 were "neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse". No conclusion was reached in relation to their claims founded on Arts 5, 10 and 11

ECHR, though the ECHR expressed the provisional view that the element of coercion inherent in the search was indicative of a deprivation of liberty.

[53] In respect of the alleged violation of Art8 ECHR, the ECHR began its assessment at para 61 by commenting on the concept of "private life" and then in para 62 by turning to consider the facts of the present case:

> "61. As the Court has had previous occasion to remark, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. The notion of personal autonomy is an important principle underlying the interpretation of its guarantees… The Article also protects a right to identity and personal development, and the right to establish relationships with other human beings and the outside world. It may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life". There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. In this connection, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive, factor…In *Foka*…where the applicant was subjected to a forced search of her bag by border guards, the Court held that "any search effected by the authorities on a person interferes with his or her private life.
>
> 62. Turning to the facts of the present case, the Court notes that sections 44-47 of the 2000 Act permit a uniformed police officer to stop any person within the geographical area covered by the authorisation and physically search the person and anything carried by him or her. The police officer may request the individual to remove headgear, footwear, outer clothing and gloves. Para 3.5 of the related Code of Practice further clarifies that the police officer may place his or her hand inside the searched person's pockets, feel around and inside his or her collars, socks and shoes and search the person's hair (see para 36 above). The search takes place in public and failure to submit to it amounts to an offence punishable by

> imprisonment or a fine or both (see para 33 above). In the domestic courts, although the House of Lords doubted whether Article 8 was applicable, since the intrusion did not reach a sufficient level of seriousness, the Metropolitan Police Commissioner conceded that the exercise of the power under section 44 amounted to an interference with the individual's Article 8 rights and the Court of Appeal described it as "an extremely wide power to intrude on the privacy of the members of the public" (see paras14 and 19 above)".

[54] Reference is made to the Government's arguments in para 63:

> "63. The Government argue that in certain circumstances a particularly intrusive search may amount to an interference with an individual's Article 8 rights, as may a search which involves perusing an address book or diary or correspondence, but that a superficial search which does not involve the discovery of such items does not do so. The Court is unable to accept this view. Irrespective of whether in any particular case correspondence or diaries or other private documents are discovered and read or other intimate items are revealed in the search, the Court considers that the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life. Although the search is undertaken in a public place, this does not mean that Article 8 is inapplicable. Indeed, in the Court's view, the public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment. Items such as bags, wallets, notebooks and diaries may, moreover, contain personal information which the owner may feel uncomfortable about having exposed to the view of his companions or the wider public".

[55] Para 64 describes the search powers under s44 of the Terrorism Act 2000, as follows:

> "…The individual can be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search".

[56] The ECHR went on to consider whether the interference was "in accordance with the law". At para76, the ECHR stated the words "in accordance with the law" require:

> "…the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual - if need be with appropriate advice - to regulate his conduct (*S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§ 95 and 96, ECHR 2008-...)".

[57] The ECHR commented on what is necessary in order for domestic law to meet the requirements referred to in para 76 above:

> "77. For domestic law to meet these requirements it 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 a 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 of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed…".

[58] The ECHR concluded that the safeguards provided by domestic law did not constitute "a real curb" on the wide powers afforded to the executive so as to provide an individual adequate protection against arbitrary interference:

> "79. The applicants, however, complain that these provisions confer an unduly wide discretion on the police, both in terms of the authorisation of the power to stop and search and its application in practice. The House of Lords considered that this discretion was subject to effective control, and Lord Bingham identified eleven constraints on abuse of power (see para 16 above). However, in the Court's view, the safeguards provided by domestic law have not been demonstrated to constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference".

[59] The ECHR commented that s44 of the Terrorism Act 2000 empowered the senior police officer to authorise an officer to stop and search a pedestrian if he considered it expedient for the prevention of acts of terrorism and that there was no requirement, at the authorisation stage, for the stop and search power be considered "necessary":

> "80. The Court notes at the outset that the senior police officer referred to in section 44(4) of the Act is empowered to authorise any constable in uniform to stop and search a pedestrian in any area specified by him within his jurisdiction if he "considers it expedient for the prevention of acts of terrorism". However, "expedient" means no more than "advantageous" or "helpful". There is no requirement at the authorisation stage that the stop and search power be considered "necessary" and therefore no requirement of any assessment of the proportionality of the measure. The authorisation is subject to confirmation by the Secretary of State within 48 hours. The Secretary of State may not alter the geographical coverage of an authorisation and although he or she can refuse confirmation or substitute an earlier time of expiry, it appears that in practice this has never been done. Although the exercise of the powers of authorisation and confirmation is subject to judicial review, the width of the statutory powers is such that applicants face formidable obstacles in showing that any authorisation and confirmation are *ultra vires* or an abuse of power".

[60] The ECHR stated the failure of the temporal and geographical restrictions on authorisations to act as a real check was demonstrated by an authorisation for the Metropolitan Police District being continuously renewed in a "rolling programme":

> "81. The authorisation must be limited in time to 28 days, but it is renewable. It cannot extend beyond the boundary of the police force area and may be limited geographically within that boundary. However, many police force areas in the United Kingdom cover extensive regions with a concentrated populations. The Metropolitan Police Force Area, where the applicants were stopped and searched, extends to all of Greater London. The failure of the temporal and geographical restrictions provided by Parliament to act as any real check on the issuing of authorisations by the executive are demonstrated by the fact that an authorisation for the Metropolitan Police District has been continuously renewed in a "rolling programme" since the powers were first granted (see para 34 above)."

[61] The ECHR referred to the additional safeguard of the Independent Reviewer but noted his powers were confined and did not include a right to cancel or alter authorisations:

> "82. An additional safeguard is provided by the Independent Reviewer (see para 37 above). However, his powers are confined to reporting on the general operation of the statutory provisions and he has no right to cancel or alter authorisations…".

[62] The ECHR moved on to express its concern about the breadth of the discretion conferred on the individual police officer:

> "83. Of still further concern is the breadth of the discretion conferred on the individual police officer. The officer is obliged, in carrying out the search, to comply with the terms of the Code. However, the Code governs essentially the mode in which the stop and search is carried out, rather than providing any restriction on the officer's decision to stop and search. That decision is, as the House of Lords made clear, one based exclusively on the "hunch" or "professional intuition" of the officer concerned (see para 23 above). Not only is it unnecessary for him to

> demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched. The sole proviso is that the search must be for the purpose of looking for articles which could be used in connection with terrorism, a very wide category which could cover many articles commonly carried by people in the streets. Provided the person concerned is stopped for the purpose of searching for such articles, the police officer does not even have to have grounds for suspecting the presence of such articles. As noted by Lord Brown in the House of Lords, the stop and search power provided for by section 44 "radically ... departs from our traditional understanding of the limits of police power" (see para 23 above)".

[63] Reference was then made to statistical evidence of the extent to which police officers resorted to using the powers under section 44 of the Terrorism Act 2000:

> "84. In this connection the Court is struck by the statistical and other evidence showing the extent to which resort is had by police officers to the powers of stop and search under section 44 of the Act. The Ministry of Justice recorded a total of 33,177 searches in 2004/5, 44,545 in 2005/6, 37,000 in 2006/7 and 117,278 in 2007/8 (see paras 44-46 above). In his Report into the operation of the Act in 2007, Lord Carlile noted that while arrests for other crimes had followed searches under section 44, none of the many thousands of searches had ever related to a terrorism offence; in his 2008 Report Lord Carlile noted that examples of poor and unnecessary use of section 44 abounded, there being evidence of cases where the person stopped was so obviously far from any known terrorism profile that, realistically, there was not the slightest possibility of him/her being a terrorist, and no other feature to justify the stop".

[64] The ECHR referred to the risk of arbitrariness in granting such a broad discretion to the police officer and to the risks of the discriminatory use of such powers:

> "85. In the Court's view, there is a clear risk of arbitrariness in the grant of such a broad discretion to

> the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration…".

[65] The ECHR referred to the limitations of domestic law challenges regarding use of the power to stop and search:

> "86. The Government argue that safeguards against abuse are provided by the right of an individual to challenge a stop and search by way of judicial review or an action in damages. But the limitations of both actions are clearly demonstrated by the present case. In particular, in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised".

[66] The ECHR concluded, *inter alia*, the power of stop and search under s44 of the Terrorism Act 2000 was not "in accordance with the law" and that there had been a violation of Art8 ECHR:

> "87. In conclusion, the Court considers that the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore, "in accordance with the law" and it follows that there has been a violation of Article 8 of the Convention".

[67] In respect of the alleged violation of Art5 of the ECHR, the government made a number of specific arguments against the applicability of Art5 ECHR:

> "87. The Government submitted that the Court had never found the exercise of a power to stop and search to constitute a deprivation of liberty within Article 5 of the Convention. Moreover, in a number of cases the Convention organs had refused to find that restrictions on liberty far more intrusive than those at issue in the present case fell within the ambit of Article 5…The Government argued that when the power to stop and search was looked at against this background, the ordinary exercise by the police of such a power would plainly not in usual circumstances engage Article 5, and did not do so in

> the applicants' cases. There were a number of specific features which argued against the applicability of Article 5 in the particular circumstances of each applicant's case. First, the duration of the searches (20 minutes in respect of the first applicant and either five or 30 minutes in respect of the second) was clearly insufficient to amount to a deprivation of liberty in the absence of any aggravating factors. Secondly, the purpose for which the police exercised their powers was not to deprive the applicants of their liberty but to conduct a limited search for specified articles. Thirdly, the applicants were not arrested or subjected to force of any kind. Fourthly, there was no close confinement in a restricted place. Fifthly, the applicants were not placed in custody or required to attend a particular location: they were searched on the spot…".

[68] The ECHR made its assessment on the issue of the alleged violation of Art5 ECHR in paras56 and 57 of its judgment:

> "56. The Court recalls that Article 5 § 1 is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4, which has not been ratified by the United Kingdom. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends…
>
> 57. The Court observes that although the length of time during which each applicant was stopped and search did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. They were

> obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5 § 1…In the event, however, the Court is not required finally to determine this question in the light of its findings below in connection with Article 8 of the Convention".

[69] In Austin v Metropolitan Police Commissioner [2009] 1 AC 564 the House of Lords held that an instance where a crowd was "kettled" for a period of seven hours did not infringe Art5 ECHR. The importance of the distinction between restrictions on movement and loss of liberty was recognised by the House of Lords:

> "The rights mentioned in Article 2 of the Fourth Protocol are relevant only in so far as they indicate that there is a distinction, for Convention purposes, between conditions to which a person may be subjected which are a restriction on his movement and those which amount to a deprivation of his liberty. The European Court has said that under its established case law Article 5 is not concerned with mere restrictions on liberty of movement. They are governed by Article 2 of the Fourth Protocol. This is an important distinction, even though the rights that this article describes are not binding on the United Kingdom. Article 2 of Protocol 4 is a qualified right. The protection that Article 5(1) provides against a deprivation of liberty is absolute…"

[70] Lord Hope then isolated these core principles at para21 of his speech:

> "…Whether there is a deprivation of liberty, as opposed to a restriction of movement, is a matter of degree and intensity. Account must be taken of a whole range of factors including the specific situation of the individual and the context in which the restriction of liberty occurs…"

[71] The House of Lords considered whether, in cases which fell within the ambit of Art5(1) ECHR, regard should be had to the purpose for which the person's movement was restricted. At para 34, Lord Hope held:

> "…there is room, even in the case of fundamental rights as to whose application no restriction or limitation is permitted by the Convention, for a pragmatic approach to be taken which takes full account of all the circumstances. No reference is made in article 5 to the interests of public safety or the protection of public order as one of the cases in which a person may be deprived of his liberty. This is in sharp contrast to Article 10(2), which expressly qualifies the right to freedom of expression in these respects. But the importance that must be attached in the context of Article 5 to measures taken in the interests of public safety is indicated by Article 2 of the Convention….. This is a situation where a search for a fair balance is necessary if these competing fundamental rights are to be reconciled with one each other..."

[72] The respondent also refers to the "paradigm case" of deprivation of liberty as outlined by Lord Hoffman at para 37 of the judgment in Secretary of State for the Home Department v JJ [2008] AC 385:

> "The prisoner has no freedom of choice about anything. He cannot leave the place to which he has been assigned. He may eat only when what his gaoler permits. The only human beings he may see or speak to are his gaolers and those whom they allow to visit. He is entirely subject to the will of others."

Victim Status

[73] The respondent refers to Re Northern Ireland Commissioner for Children and Young People [2009] NICA 10 in which Girvan LJ considered the jurisprudence in relation to "victim status". At para [12] he considered the Strasbourg jurisprudence:

> "[12] In Klass v Germany [1978] 2 EHRR 214 the victim requirement was extensively discussed. The court stated:-
>
> > 'Article 34 requires that an individual applicant should claim to have been actually affected by the violation he alleges. Article 34 does not institute for individuals a kind of actio popularis for the interpretation of the Convention; it

> does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention. In principle it does not suffice an individual applicant to claim that the mere existence of a law violates his rights under the Convention: it is necessary to show that the law should have been applied to his detriment. Nevertheless as both the Government and the Commission pointed out, a law may by itself violate the rights of an individual if the individual is directly affected by the law in the absence of specific measures of implementation.'
>
> This last sentence introduces a degree of flexibility into the concept of victim hood but it still requires that a claimant must show at least the potential for *his* rights to be affected by the impugned law. A relevant example can be found in Campbell and Cosans v UK [1982] 4 EHRR 293 in which a pupil was able to show that he was a victim when he complained that corporal punishment was inhuman treatment simply because his attendance at the school put him at risk of being exposed to inhuman treatment. What emerges from the Strasbourg case law is that the test of standing under the Convention does not permit a public interest challenge or *actio popularis* nor does the making of a complaint entitle the Court to review the law in the abstract. It has consistently emphasised in its decisions that it will confine itself to the particular facts of concrete cases".

The Applicant's Submissions

Breach of Article 8 ECHR

[74] The Court is invited to conclude, in light of the ECtHR's decision in Gillan & Quinton concerning s44 of the Terrorism Act 2000, that ss21 and 24 of the JSA are incompatible with Arts5 and 8 of the ECHR. Specific reference is made to paras77, 79, 83, 85 and 87 of the judgment.

[75] It is asserted the Report of the Independent Reviewer, Justice and Security (Northern Ireland) Act 2007 (Third report: 2009 – 2010) demonstrates a transition from the use of s44 of the Terrorism Act 2000 to the use of ss21 and 24 of the JSA.

[76] The applicant submits that, like s44 of the Terrorism Act 2000, ss21 and 24 of the JSA require no suspicion, reasonable or otherwise, before the power is exercised and there is no requirement of "necessity", so that there is no element of proportionality. Further, it is contended that ss21 and 24 of the JSA lack some of the 'safeguards' that were incorporated in s44 of the Terrorism Act 2000 which, in any event, were found to be inadequate by the ECHR. For example, a stop and search under s24 of the JSA does not first require an authorisation from a senior police officer which could only be granted where it was expedient in the prevention of acts of terrorism as was the case under s44 of the Terrorism Act 2000.

[77] The applicant argues no limits are imposed on the range and breadth of questions which can be asked (and must be answered) under s21 of the JSA in order to ascertain a person's identity and movements. Instead, it is asserted, without entertaining any suspicion whatsoever about a person, a police officer is empowered to require that person to inform him where exactly he has been (throughout a period in the past which is not limited in the statute) and where he intends to go (throughout a period in the future which is not limited in the statute). For these reasons, it is submitted, s21 of the JSA is potentially a more intrusive power than that provided in s44 of the Terrorism Act 2000.

[78] The applicant contends the powers under ss21 and 24 of the JSA confer an extremely wide discretion on police officers to interfere with the privacy of individuals and they are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. It is argued, therefore, that these powers are not "in accordance with the law" and they violate Art8 of the ECHR.

Crown Solicitor's Office response to pre-action protocol letter

[79] The applicant then moves on to consider, in turn, three points made in correspondence from the Crown Solicitor's Office (on behalf of the Secretary of State) in response to a pre-action protocol letter sent on 9 February 2011. The three issues for consideration and the applicant's submissions in respect of same are considered in turn:

(i) Section 21 of the JSA provides a power to stop and question whereas section 44 of the Terrorism Act 2000 provided a power to stop and search.

The applicant submits this distinction is without difference in terms of the operation of the principles of Gillan & Quinton. It is asserted the proposition that interrogation of this kind represents less of an interference with privacy is fallacious. The applicant argues the impugned provision authorises a *prima facie* infringement of Art8(1) ECHR and, therefore, the real issue is whether s21 of the JSA can be regarded as coming within the qualification in Art8(2) ECHR, ie is it "in accordance with law" in the sense that it is sufficiently circumscribed and subject to adequate safeguards against abuse and necessary in the interests of public safety.

(ii) Section 21 of the JSA is not a terrorism power

It is submitted s21 of the JSA originated as a terrorism power and the reference in s21(2) to explosions suggests this remains its primary purpose. The applicant asserts that, if it is not a terrorism power, this means it is of even wider ambit than generally understood and, therefore, more susceptible to challenge as being unjustifiably wide.

(iii) Section 21 of the JSA is a Northern Ireland specific power that has not been the subject of any compatibility ruling by the ECHR.

It is submitted the fact s21 of the JSA has not yet been declared to be incompatible with the ECHR is not of any persuasive value.

Article 5 ECHR

[80] The applicant refers to paras 54–57 of Gillan & Quinton in which the compatibility of s44 of the Terrorism Act 2000 with Art5 ECHR was addressed. Even though the ECHR was not required to determine this issue due to its findings in respect of Art8, the applicant highlights the European Court expressed the view the element of coercion arising from the criminal sanction incorporated in s44 of the Terrorism Act 200 was "*indicative of a deprivation of liberty*". It is submitted that identical considerations apply to the powers under ss21 and 24 of the JSA. As this issue is addressed at length in the Opinion provided by Rabinder Singh QC and Professor Aileen McColgan to the Equality and Human Rights Commission, the applicant also adopts the submissions contained therein.

The Respondent's Submissions

[81] The respondent makes a number of arguments under the headings set out below.

(i) The applicant has been subjected to a s21 JSA stop on only one occasion in the last two years

[82] The respondent refers to the affidavit of Marvin Canning dated 6 April 2011 in which the suggestion is made the applicant has been subject to a great number of stops by the police where many of these stops have been made pursuant to s21 of the JSA. It is asserted the affidavit of Marvin Canning dated 21 July 2011 then appears to accept the s21 power has rarely been used against him.

[83] Although the applicant has been subject to a number of stops by the PSNI, the respondent asserts that a stop conducted pursuant to a s21 JSA authorisation alone only took place on one occasion and on another four occasions, s21 of the JSA was used in combination with other statutory powers.

[84] It is submitted the two specific incidents referred to by the applicant in paras16 and 20–22 of his affidavit dated 6 April 2011 were not searches pursuant to s21 of the JSA. The respondent points out that, presently, there is no averment from the applicant which addresses the details of the one occasion on which police records show a s21 JSA stop and question was conducted upon the applicant. Further, the respondent highlights that para 36 of the applicant's second affidavit indicates he is unable to recall that specific incident and cannot provide any further details due to the passage of time.

[85] It is submitted there is an insufficient factual foundation to persuade the Court there has been an interference with the applicant's private life and, therefore, the Court should dismiss the s21 JSA challenge.

[86] By reference to Re Northern Ireland Commissioner for Children and Young People [2009] NICA 10, the respondent points out, in order to bring an ECHR challenge, an application must demonstrate the applicant is a victim within the meaning of s7(1) of the Human Rights Act 1998 and Art34 ECHR.

(ii) The s21 power in the JSA is not equivalent to the s44 power in the Terrorism Act 2000

[87] It is argued that s89 of the Terrorism Act 2000, as originally enacted, contained a power to stop and question in terms which were very similar to the powers of s21 of the JSA. It is explained that when the JSA came into force, s89 was not renewed by the Secretary of State.

[88] Further, it is asserted s44 of the Terrorism Act 2000 is not, in substance, a parallel provision to s21 of the JSA because s44 does not make provision for stopping and questioning suspects but, instead, is a more general provision which deals with the authorisation regime for stopping and searching. It is argued a power to stop and question is conceptually different from a power to stop and conduct a search of a person or vehicle as, essentially, s21 of the JSA affords no power to a constable to conduct any form of intrusive search upon a person stopped.

[89] It is contended Gillan & Quinton does not address the legality of s21 of the JSA as the ECHR made no observations at all on a power to stop and question. In that case the claimants sought to challenge the blanket authorisation regime which operated pursuant to s44 of the Terrorism Act 2000. Therefore, the respondent submits the applicant must persuade this Court *de novo* the power contained in s21 of the JSA is incompatible with the ECHR.

(iii) The use of the s21 JSA power did not involve any interference with the applicant's Art8 rights

[90] The respondent submits the applicant has put no positive evidence before the Court relating to an actual "stand-alone" s21 JSA stop. The same submission is

made in respect of the applicant's Art5 ECHR argument with regard to s21 of the JSA. It is asserted the applicant has failed to present a factual matrix which will provide a proper basis for the determination of this issue and, therefore, there is no interference with Art8 ECHR.

[91] Reference was made to Lord Bingham's words in both *Gillan* [2006] 2 AC 307 and Costello - Roberts v United Kingdom 19 EHRR 112 (1995) where it is stated, from ECHR jurisprudence, that intrusions must reach a certain level of seriousness in order to engage the ECHR or not every act or measure which may be said to affect adversely the physical or moral integrity of a person necessarily gives rise to such an interference. The respondent invites the Court to consider how, if at all, the applicant can demonstrate the use of the s21 JSA stop and question power against him can be argued to have adversely impacted upon his physical or moral integrity. The respondent submits the applicant cannot demonstrate such an impact and, consequently, he cannot establish the first foothold in the Art8 ECHR argument.

[92] It is acknowledged the ECHR in Gillan & Quinton did not accept Lord Bingham's analysis regarding Art8 ECHR interference. However, the respondent refers to paras61 and 62 of Gillan & Quinton to assert the ECHR did not reject the notion of a threshold level of seriousness. It did not expressly comment on the threshold of seriousness but it did enumerate a number of factors which led to the conclusion there had been an interference being: there was physical contact with the person searched; their clothing was examined; and their personal belongings were inspected. It is submitted all of these features are absent from a s21 JSA stop and question conducted in accordance with the PSNI *aide-memoire* and, accordingly, the respondent submits the applicant has failed to demonstrate any, or any significant, interference with his private life.

(iv) If there was any interference with the applicant's Article 8 ECHR rights then the use of the power was justifiable and in accordance with Article 8(2).

[93] If, in the alternative, the applicant can establish interference with his private life in the abstract circumstances of his s21 JSA case, it is submitted any such interference is in accordance with law. It is argued s21 of the JSA is a plainly accessible statutory provision and, therefore, it has an appropriate basis in domestic law. It is asserted the application of that law is both defined and foreseeable. Reference is made to the guidance issued to police officers conducting s21 JSA stops (which is publicly available) and to the *aide-memoire* used by officers (which is "not protectively marked"). It is contended the power is not open to arbitrary use because of the narrowly confined scope of the statutory provision.

[94] In light of the evidence from the Independent Reviewer on the general security context applicable at present in Northern Ireland, the respondent submits the availability of a power to stop and question persons about their identity and movements is demonstrably necessary in Northern Ireland. It is submitted the

availability of a simple, but limited, power to stop and question pursuant to s21 of the JSA is, in the specific context of Northern Ireland, a necessary tool to prevent and disrupt terrorist activity in this jurisdiction.

(iv) The s24 power is not equivalent to the s44 power in the Terrorism Act 2000

[95] It is submitted the power in para4(1) of Schedule 3 of the JSA is not a direct analogue of the power in s44 of the Terrorism Act 2000 and the applicant's contention the principles enunciated by the ECHR in ***Gillan & Quinton*** apply with "equal force" in this context is both opportunistic and legally ambitious. In addition, the point is made that the contextual factors which apply in Northern Ireland are wholly different from those which applied in ***Gillan & Quinton.***

[96] It respect of the applicant's averments regarding the ten specific instances of being stopped and searched under s24 of the JSA, the respondent makes the following points:.

(a) The Court has no factual basis on which to conduct an analysis of the legality of the stops which occurred on 23 April, 25 April, 9 May or 24 May 2011 as the applicant has no specific recollection at all of these stops.

(b) The stop on 18th April 2011 lasted for five minutes and resulted in the applicant's arrest and committal to prison for apparent breach of warrants. The applicant was stopped while involved in political campaigning.

(c) The stop on 21st April 2011 lasted for five minutes. The applicant refused to provide an address to police and avers that he did not do so because they were clearly aware of his identity and his address.

(d) The stop on 22nd April 2011 lasted for eight minutes. The applicant avers that he has a very limited recollection of it.

(e) The stop on 8th May 2011 lasted for five minutes. The applicant avers that police knew who he was and he did not speak to them because of that.

(f) The incident on 7th June 2011 did not relate to a stop and search in a public place. It does not appear to involve the use of the s24/para 4, Schedule 3 power. The document records that the applicant was present during a house search. He avers that he was arrested and charged with offences pursuant to s12 of the Terrorism Act 2000.

(h) The incident on 14 June 2011 appears to have lasted for 24 minutes. The applicant avers that he did not speak to the police because they were already aware of his identity and his address.

[97] The PSNI do not dispute that the applicant has been subjected to stops and searches pursuant to the s24 JSA regime but it is argued the interaction between the applicant and the PSNI is far removed from the type of "random" stop and search procedures impugned in ***Gillan & Quinton.*** It is asserted, in light of the applicant's evidence, he is very well known to the police and the s24 JSA searches relating to the applicant are not random but based on police information relating to him.

[98] It is asserted, in the present case, the challenge only corresponds to the second limb of argument in Gillan & Quinton regarding the wide discretion afforded to individual officers conducting the s44 searches under the Terrorism Act 2000. In respect of this second limb, the respondent states the ECHR expressed concern that the individual decisions with respect to the use of the s44 power in the Terrorism Act 2000 were based exclusively on the "hunch" or "professional intuition" of the officer in question. The ECHR appeared to be concerned that not only was it unnecessary to demonstrate the existence of any reasonable suspicion but there was no requirement, even subjectively, to suspect anything about the person stopped and searched. It is submitted the concern expressed by the ECHR cannot straightforwardly be applied to the facts of the present case.

[99] The respondent submits Gillan & Quinton is fact sensitive; the ruling of the ECHR on the use of the s44 power in the Terrorism Act 2000 cannot be said to bind a domestic court's interpretation of a different statutory provision; and, therefore, the assessment of the ECHR compliance of s24/para 4(1) of Schedule 3 of the JSA must be conducted as a freestanding exercise applying the fundamental principles of Strasbourg jurisprudence.

(v) The use of the s24 JSA power did not involve any interference with the applicant's Art8 ECHR rights

[100] The respondent repeats its submissions in respect of interference with the s21 JSA power as addressed above.

[101] The respondent refers to the factual circumstances of the present case: the applicant indicates he has been subjected to stops by police pursuant to s24 of the JSA on a number of occasions; the applicant has a limited recollection of many of those stops; the stops appear to have been of very short duration with the majority lasting for approximately five minutes; the applicant has not been required to answer intrusive questions about his identity because he avers the police officers know who he is and where he lives; the applicant does not complain of any intrusive searches of his person; and the applicant does not complain of being intrusively questioned, physically touched, handcuffed or publicly restrained. In such circumstances it is submitted, on the facts relied upon by the applicant, the threshold level of seriousness for the engagement of Art8 ECHR has not been reached.

[102] The respondent refers to para 63 of Gillan & Quinton in which the ECHR rejected the House of Lords view regarding Art8 ECHR interference. It is submitted, in the present case, the applicant does not make any complaint about the *searches* conducted by the PSNI. Rather he complains about being stopped and in those cases where he has a specific recollection he complains about the public nature of the event. There is no complaint about detailed searches of his person, his clothing or his personal belongings. Accordingly, it is submitted that the Court does not have a sufficient factual basis upon which to make a finding of an Art8 ECHR interference.

(vi) If there was any interference with the applicant's Article 8 ECHR rights then the use of the power was justifiable and in accordance with Article 8(2).

[103] If, in the alternative, the Court finds there has been an Article 8 ECHR interference, the respondents submit any such interference complies with the requirements of Art8(2) of the ECHR.

[104] It is pointed out that in Gillan & Quinton, having found the authorisation regime pursuant to s44 of the Terrorism Act 2000 was not in accordance with law, the ECHR did not address the issues of necessity and proportionality. It is submitted it would be wholly inappropriate for this Court to adopt a similar approach. Instead, if the Court considers the application of the s24 JSA powers to the applicant did constitute an interference, it must move on to assess, fully, whether that interference was justified.

[105] In conducting such an assessment, the respondent invites the Court to carefully consider the Third Report of the Independent Reviewer into the Justice and Security (Northern Ireland) Act 2007. Specific reference is made to paras 108,120, 174 and 279 – 280. The respondent submits the Independent Reviewer's careful analysis of the use of the JSA stop and search powers can readily be adopted by the Court.

[106] The ECHR in Gillan & Quinton found there was a breach of Art8 ECHR because the interference in question was not "in accordance with the law." The ECHR accepted that s44 of the Terrorism Act 2000 provided a statutory basis for the stop and search but found fault with the "quality of the law" argument on the basis of perceived arbitrariness. It is submitted s24 of the JSA similarly provides a proper statutory footing for the conduct of stops and searches and the area of jurisprudential controversy, if any, in the present case is confined to the question of the "quality of the law."

[107] In assessing the merits of any argument about the "quality of the law" inherent in the s24 regime, the respondent directs the Court to paras 80 – 82 of Gillan & Quinton in which the ECHR rejected the House of Lords' analysis there was every indication Parliament appreciated the significance of the power it was conferring but thought it an appropriate measure to protect the public against the grave risks posed by terrorism provided the power was subject to effective

constraints. The House of Lords has identified 11 specific safeguards with respect to constraining any abuse of the s44 power in the Terrorism Act 2000. The respondent states this dialogue between the House of Lords and the ECHR focussed on the issue of the authorisation regime in s44 of the Terrorism Act 2000 and points out no such regime is in place with respect to s24/para 4(1) of Schedule 3 of the JSA. Therefore, it is argued the critique of the ECHR on the quality of the law simply does not speak to the statutory framework of s24 of the JSA.

[108] The respondent highlights the ECHR did not make a finding the use of a stop and search power without reasonable suspicion was *per se* incompatible with Art8 ECHR. It is submitted the applicant's assault on the s24 JSA regime is a straightforward attack on the use of the power without reasonable suspicion on the basis that it thereby breaches Art8 ECHR. It is contended this argument breaks new ground beyond the boundaries of the European Court's ruling in Gillan & Quinton.

(vii) The use of the s24 JSA power does not, generally, involve an interference with Art8 ECHR

[109] The respondent then considers the question of whether a stop and search power of this type was necessarily incompatible with Art8 ECHR by reference to the Fourteenth Report of the Joint Committee on Human Rights and the Report on the operation in 2010 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 (published July 2011).

[110] It is submitted, properly analysed, the use of the s24 JSA regime in Northern Ireland, generally and in this specific case, is located at the "reasonable suspicion" end of the spectrum. Reference is also made to the infrastructural safeguards referred to in the second affidavit of T/Chief Inspector Jackson (more specifically paras16, 17, and 20) and to the external scrutiny of the Independent Reviewer which are additional features to the use of the JSA powers in Northern Ireland that did not apply to the use of the s44 power in the Terrorism Act 2000.

[111] It is contended the argument the use of stop and search power without reasonable suspicion will necessarily be in breach of Art8 ECHR is not supported by a proper analysis of the effect of the ruling in ***Gillan & Quinton*** on the provisions of the JSA.

(viii) Article 5 ECHR

[112] It is asserted there is a threshold question to be addressed by the Court in the assessment of any Art5 ECHR argument being, has the applicant been subjected to a restriction of his movement during the police stops or has he been subjected to a deprivation of his liberty?

[113] The respondent submits a key and relevant distinction must be drawn between the terms of Art5 ECHR and Art2 of the Fourth Protocol of the ECHR. The

respondent argues Art5 ECHR is not concerned with mere restrictions on freedom of movement but rather with the deprivation of liberty. The respondent says the importance of this distinction was recognised by the House of Lords in Austin v Metropolitan Police Commissioner [2009] 1 AC 564. The respondent refers to the "paradigm case" of deprivation of liberty as outlined by Lord Hoffman at para 37 of *Secretary of State for the Home Department v JJ* [2008] AC 385. It is submitted the further a given fact situation strays from the elements of the paradigm case, the less likely it is that it breaches Art5 ECHR. The respondent then refers to the core principles which Lord Hope isolated in para 21 of Austin.

[114] The respondent notes how the House of Lords in Gillan [2006] AC 307 addressed the question of Art5 ECHR breach with respect to the s44 power in the Terrorism Act 2000, as follows:

> "the procedure will ordinarily be relatively brief. The person stopped will not be arrested, handcuffed, confined or removed to any different place. I do not think, in the absence of special circumstances, such a person should be regarded as being detained in the sense of confined or kept in custody, but more properly of being detained in the sense of lept proceeding or kept waiting. There is no deprivation of liberty."

[115] It is argued the applicant in the present case does not contend he has been handcuffed, confined or removed to any other place during a s21 or s24 JSA stop. The respondent asserts the applicant's situation is truly remote from Lord Hoffman's paradigm case of deprivation of liberty.

[116] Reference is made to the ECtHR's observations in paras 56 and 57 of Gillan & Quinton regarding the Art5 ECHR threshold question. It is submitted it is of significance the ECHR gave no final ruling on the Art5 ECHR question in Gillan & Quinton**.** The respondent asserts the ECHR did not expressly reject Lord Bingham's analysis on this point and, accordingly, it is submitted that this Court can readily find the circumstances of the applicant's stops fall squarely within the restriction of movement category. The respondent points out that none of the stops exceeded thirty minutes; most of the stops were concluded within 5 minutes; and the applicant was asked to wait and little more. Therefore, it is contended that Art5 ECHR is not in play.

[117] If, in the alternative, the Court considers some or all of these stops come close to the paradigm case of deprivation of liberty, then the respondent invites close consideration of the judgment in ***Austin***. In that case the House of Lords considered whether, in cases which fell within the ambit of Art5(1) ECHR, regard should be had to the purpose for which the person's movement was restricted. Lord Hope found the importance which must be attached in the context of Art5 ECHR to measures taken in the interests of public safety is indicated by Art2

ECHR and that this was a situation where a search for a fair balance is necessary if these competing fundamental rights are to be reconciled with each other.

[118] Therefore, the respondent submits, even if a detention of the applicant in the present case is found to fall within the ambit of Art5 ECHR, the Court is required per Austin to conduct a "fair balance" analysis. It is contended such an analysis will necessarily require a careful weighing of the brief periods of restriction of liberty against the real risks posed to this society by the uncontrolled and unrestrained violent acts of residual paramilitary groups. The respondent argues, in conducting such an analysis, the Court can readily conclude the use of targeted stop and search powers in the interest of community safety, cannot properly be considered to be the kind of arbitrary detention proscribed by the ECHR.

Conclusion

[119] The respondent has argued that the threshold of seriousness required to engage Art8 has not been established and that accordingly there has been no "interference" with the applicants' Art8 rights. I am inclined to the view that the exercise of a power to stop and question a person about their identity and movements, when failure to stop and answer is a criminal offence, constitutes an interference. Similarly the exercise of the power to stop and search on pain of criminal sanction under s24 and para4(1) of Schedule 3 of the JSA constitutes an interference which must be justified. This approach chimes readily with that of the ECHR in Gillan & Quinton particularly at para 62 (set out above at para 53).

[120] Nor am I persuaded that the paucity of detail surrounding the stops and searches of which Canning complains, which it is not disputed took place, invalidates his claim to be a victim within the meaning of s7 of the Human Rights Act. The applicant Canning is not complaining *in abstracto* simply because he feels that the existence of these powers contravenes the Convention. He is, as it seems to me, complaining that the exercise of these powers have been applied to his detriment (see Klass v Germany [1978] 2 EHRR 214, Re NICCY [2009] NICA 10 and the passages set out above at para 74).

[121] Art 8 has been set out at para 18 above. Art 8 (2) prohibits interference with the exercise of the guaranteed right except such "as is in accordance with law". What these words require was given extensive consideration in Gillan & Quinton in the passages I have set out at para 56 et seq of this judgment. Since the impugned powers have their basis in statute it is uncontested that the first limb of this requirement, identified in para 76 of Gillan & Quinton, is satisfied. I have set this out at para 56 above and there is no need to repeat it here. The focus of the jurisprudential controversy (as Mr McGleenan QC termed it) in the present applications concerns the second limb of the test adumbrated at para 77 of Gillan & Quinton regarding the *quality* of the impugned law. I have set this out at para 57 above.

[122] Gillan involved a challenge to the blanket authorisation regime which was operated under s44 of the Terrorism Act 2000 but did not address the compatibility of either s21 or para 4(1) of Schedule 3 of the JSA.

[123] In law context is everything, as Lord Steyn famously observed. The contextual factors which apply in Northern Ireland are markedly different from those that applied in Gillan. It is simply not sustainable to try and read across the decision in Gillan & Quinton to the impugned statutory powers the subject of the present proceedings. Merely by way of example in Gillan & Quinton at para79 (set out at para 58 above) the Court expressed its view that the eleven safeguards identified by Lord Bingham in the House of Lords had *not* been demonstrated to constitute a real curb on the wide powers afforded to the Executive so as to offer the individual adequate protection against arbitrary interference; at para84 (set out at para 63 above) the Court expressed how it was "*struck*" by the statistical and other evidence showing the extent to which resort was had by police officers to the powers of stop and search under s44 having leapt from 33,177 searches in 2004/5 to 117,278 searches in 2007/8; in the same paragraph the Court recalled Lord Carlile's 2007 report into the operation of the 2000 Act where he had noted that *none* of the many thousands of searches had ever related to a terrorism offence and his 2008 report where he noted that examples of poor and unnecessary use of s44 *abounded* there being evidence of cases where the person stopped was so obviously far from any known profile that realistically there was not the *slightest possibility* of him/her being a terrorist and *no* other feature to justify the stop. At para85 the Court expressed its view that there was a "clear risk of arbitrariness ... and that the risks of discriminatory use of the powers against [black applicants or those of Asian origin] ... is a very real consideration".

In the present case the context includes:

(i) the ongoing undisputed and manifestly high level of threat to life and security by dissident republicans;

(ii) that the impugned powers are "vital tools" in the efforts by the PSNI to reduce the level of threat to police personnel and the public from dissident republican terrorism;

(iii) that the powers are directed to the discharge of the PSNI obligations under Art2 ECHR to ensure that reasonable operational steps are taken to avert a real and immediate risk to life (see para19 of affidavit of T/Chief Inspector Jackson affidavit, 29 September 2011);

(iv) that the impugned powers are not used on a random or blanket basis but rather are intelligence led on the basis of threat;

(v) the presence of the safeguards referred to at para 32 above namely:

(a) the Terrorism and Security Powers User Group scrutinises the use of such powers on a quarterly basis;

(b) the Terrorism and Security Powers User Group reports to the Security and Serious Harm Programme Board; and

(c) as and when is necessary issues can be elevated to the Service Executive Board of the PSNI.

(vi) these safeguards are in addition to the fact that the powers are subject to regular review by the independent reviewer, the existence of judicial review and the possibility of bringing civil claims for damages in the event that the powers are misused;

(vii) the absence of evidence of abuse. On the contrary the Court is satisfied on the evidence presented that the totality of safeguards has been demonstrated to constitute a real curb on the powers afforded to the PSNI under these provisions and that there is no evidence of systemic misuse or discriminatory use of the powers.

[124] For these reasons I reject the contention that the impugned powers are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. I accordingly conclude that the impugned powers are "in accordance with law" and that no violation of Art 8 has been established.

[125] As far as the Art5 claim is concerned I accept the respondent's arguments that the case of all of the applicants involves restriction of movement rather than deprivation of liberty and that Art5 is not engaged. In any event, even if Art5 was engaged I am satisfied per ***Austin*** that the use of targeted s21 and s24 powers in the interests of protecting lives and security cannot properly be considered as the kind of *arbitrary* detention which Art5 proscribes.

[126] Accordingly, for the above reasons, the applications are dismissed.