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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MARK CAVANAGH FOR JUDICIAL REVIEW

_____

KEEGAN J

Introduction

[1] In this application for judicial review the applicant seeks relief in relation to the imposition of a "threat to life disruption notice" of 18 May 2016. The claim contained in an Amended Order 53 Statement relates to three aspects of this case namely:

(i) the decision to issue the disruption notice;

(ii) reliance on the disruption notice during a bail variation; and

(iii) retention in relation to the disruption notice.

[2] The claim is grounded upon alleged breach of procedural fairness and Article 8 of the European Convention on Human Rights (ECHR). The relief sought includes an Order of Certiorari quashing the notice, an Order of Mandamus requiring the Chief Constable of the Police Service of Northern Ireland and the Public Prosecution Service to prohibit police officers from issuing such notices and prohibit reliance upon such a notice and various other forms of declaratory relief. Leave was granted by Maguire J on 18 November 2016. Subsequent to that the applicant brought an application for discovery of the foundational documents which is reported at [2018] NIQB 42 a decision of McCloskey J. That application was dismissed.

[3] Ms Doherty QC appeared with Mr Devine BL for the applicant and Mr McLaughlin BL for the respondent. I am very grateful to all counsel in this case

for the constructive way in which the case was presented. In particular, counsel agreed and signed a Statement of Facts and issues which has assisted greatly in the preparation of this case. I now utilise that document as follows.

Agreed Facts

[4] On 4 March 2016 the applicant was granted bail by Colton J, subject to conditions, on charges including incitement to commit robbery, possession of a firearm and ammunition with intent to endanger life and conspiracy to possess a firearm and ammunition. The proceedings are currently at the committal stage. Committal proceedings commenced on 5 November 2018 and are due to continue on 8 March 2019

[5] On 13 May 2016 intelligence was entered onto police intelligence systems relating to the applicant and a number of others. The gist of the intelligence was that they were actively targeting drug dealers in the greater Belfast area for the purposes of extortion. The applicant and the others named were all known to police.

[6] An Occurrence and Enquiry Log was created under the title "Targeting drug dealers for extortion" which recorded the action taken on foot of the intelligence. It records that the intelligence had been disseminated to other divisions with PSNI to whose responsibility it may have been relevant. It also records that background profiles of the applicant and the others names were requested.

[7] On 22 May 2016, the intelligence was brought to the attention of the PSNI Commander for the Belfast Area. He made an assessment of the risk posed by the applicant and the other named individuals. He assessed that there was a real risk that the applicant and the other individuals may cause serious harm to a member of the public. He was not able to assess whether the risk was an immediate one, but considered that the possibility could not be ruled out. He directed that the threat to life disruption notices should be served by police upon the applicant and the other named individuals.

[8] Police attended the applicant's home at approximately 3:20am on 25 May 2016 and read contents of the disruption notice to him. The applicant was not provided with a copy of the document and refused to sign it. The main portion of the notice reads:

> "Police are in receipt of information which indicates that you intend to commit unlawful actions against persons in the Belfast area. You are advised to desist from this activity."

[9] On 24 May 2016 police opened a second Occurrence Enquiry Log relating to the service of the disruption notice. It records the attendance of police officers at the applicant's home to provide him with the details in the notice and the actions and

decisions taken by police following that visit relating to the management of the threat.

[10] The second Occurrence Enquiry Log entry records the gist of the underlying intelligence in the following terms:

> "… the applicant and a number of named associates were actively targeting drug dealers within the greater Belfast area for the purposes of extortion."

The log entry further states:

> "No potential victims identified. Nothing to suggest any threats to life of potential victims just robbery."

[11] The second Occurrence Enquiry Log also records that on 2 June 2016, the duty officer for the PSNI Division in which the applicant resides carried out a review of the threat and of the steps taken on foot of the threat information. He was content that the actions which had been taken by PSNI until that time and did not consider that any further action was required. It was decided that the matter could be closed.

[12] Also on 2 June 2016, the applicant's bail conditions were varied administratively by consent.

[13] The applicant made a further application to vary his bail conditions which came on for hearing on 10 June 2016 before Horner J. The application was opposed by the Crown, following instructions from PSNI. In advance of the application, the Crown gave notice of its intention to rely upon the disruption notice in opposition to the application. A copy of the Notice was shown to and photographed by the applicant's legal representatives. During the course of the bail variation application the disruption notice was produced to the court and relied upon by the Crown in opposition to the application. The bail variation was granted.

[14] The process of issuing and serving disruption notices by PSNI is not the subject of express statutory provisions. PSNI consider it is a form of operational measure with a statutory basis in more generally applicable statutory provisions. It is also the subject of policy provision within the PSNI Threats to Life policy which was in force at the time. Extracts from that policy document are in evidence. The portions that deal with disruption notices were not publicly available at the time of issue of this disruption notice and are not now publicly available.

[15] A hard copy of the original disruption notice is currently retained by PSNI in a secure storage facility. An unsigned electronic copy is currently retained on the police records management system, NICHE. The investigating officer with carriage of the ongoing criminal proceedings against the applicant accessed the disruption

notice on the PSNI NICHE system and used it to provide instructions to Crown Counsel in opposition to the bail variation application.

[16] There are no statutory or policy provisions which regulate the possible future use by police of a disruption notice or of the underlying information which gave rise to it. The applicant has expressed concern about its future use, such as within an enhanced criminal record certificate (under Part 5 Police Act 1997) or as part of a bad character application in criminal proceedings. Any future use of police information of this nature will be subject to any applicable legal obligations, procedures and safeguards.

[17] The disruption notice is stored and retained by PSNI subject to its legal obligations relating to the storage of personal data and police records. The PSNI has a service procedure relating to the retention and review of records: Records Management (SP3/12) which incorporates the PSNI Review, Retention and Disposal Schedule ("RRD Schedule"). The RRD Schedule is published on the PSNI website and had previously been approved by the Public Record Office of Northern Ireland ("PRONI"), the Department of Culture, Arts and Leisure ("DCAL") and the NI Assembly. The remaining parts of the policy are not currently published on the PSNI website or otherwise publicly available, but are non-sensitive and are available on request.

[18] The arrangements for the disposition of a particular category of documents can be found within the RRD Schedule. The parties are agreed that the disruption notice falls within category 10 of the document types identified on the schedule, namely policing records relating to serious crime.

[19] The RRD Schedule records that the retention period for documents within this category is as follows:

> "Retain for 100 years or until the youngest suspected person has reached 100 years of age, whichever comes first."

It also records that the final action is "review by record reviewer".

[20] The parties are not agreed on the application and interpretation of these provisions. In summary the respondent's position is that these entries must be construed along with the remaining provisions within the RRD Schedule, in particular those relating to category 10 documents and the references to review of those documents for retention. It considers that the reference to a retention period of 100 years is the maximum retention period prior to a decision on final disposal. Prior to that time, final disposal of the record may be determined by means of a review process initiated by PSNI. The applicable procedure is the normal review process described in SP3/12 which involves a first review after 5 years and a second

review after a further 15 years. A review may also be requested at any other time, upon request by the individual, pursuant to the Data Protection Act 2018.

[21] The applicant does not agree that the PSNI's governing policy documents (Service Procedure 3/12 in RRD Schedule) can be read as indicating that the normal review procedure applies in this case. The applicant submits that a proper reading of those documents indicates the disposition of the material in this case, as provided for in the RRD Schedule, is a retention period of 100 years or until the applicant turns 100 without prior review.

[22] The retention of the disruption notice has been reviewed once since its creation. The review took place in December 2018, in the course of these proceedings and the outcome was to retain the notice.

Agreed Issues

[23] There are four broad issues for the court, with sub-issues as follows:

(i) Does the Data Protection Act 2018 (and did the Data Protection Act 1998) provide an effective alternative remedy to judicial review proceedings.

(ii) Issue of disruption notice:

  (a) Was the issue of the disruption notice procedurally unfair?

  (b) Did the issue of the disruption notice amount to an interference with the applicant's Article 8 rights?

  (c) If so, was it justified, as being (i) in accordance with law and (ii) proportionate?

(iii) Retention of the disruption notice by police:

  (a) Was/is the retention of the disruption notice on PSNI systems a justified interference with the applicant's Article 8 rights as being:

    (i) in accordance with law; and

    (ii) proportionate?

(iv) Use of disruption notice in opposition to bail:

  (a) Was the use of the disruption notice by PSNI on 10 June 2016 during opposition to the bail variation an interference with the applicant's Article 8 rights?

(b) If so, was it justified as being:

(i) In accordance with law; and

(ii) proportionate?

Legal and Policy Context

[24] Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides as follows:

> "**Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety … for the prevention of disorder or crime, … or for the protection of the rights and freedoms of others."

[25] Section 32 of the Police (Northern Ireland) Act 2000 reads as follows:

> "(1) It shall be the general duty of police officers—
>
> (a) to protect life and property;
>
> (b) to preserve order;
>
> (c) to prevent the commission of offences;
>
> (d) where an offence has been committed, to take measures to bring the offender to justice."

[26] The Data Protection Act 2018 repealed and replaced the Data Protection Act 1998. It came into force on 27 May 2018. Chapter 2 of Part III of the Data Protection Act 2018 sets out the principles that apply to the processing of data by law enforcement. This includes the data processing principles as follows:

> **"35 The first data protection principle**
>
> (1) The first data protection principle is that the processing of personal data for any of the law enforcement purposes must be lawful and fair.

(2) The processing of personal data for any of the law enforcement purposes is lawful only if and to the extent that it is based on law and either—

(a) the data subject has given consent to the processing for that purpose, or

(b) the processing is necessary for the performance of a task carried out for that purpose by a competent authority.

(3) In addition, where the processing for any of the law enforcement purposes is sensitive processing, the processing is permitted only in the two cases set out in subsections (4) and (5).

(4) The first case is where—

(a) the data subject has given consent to the processing for the law enforcement purpose as mentioned in subsection (2)(a), and

(b) at the time when the processing is carried out, the controller has an appropriate policy document in place (see section 42).

(5) The second case is where—

(a) the processing is strictly necessary for the law enforcement purpose,

(b) the processing meets at least one of the conditions in Schedule 8, and

(c) at the time when the processing is carried out, the controller has an appropriate policy document in place (see section 42).

(6) The Secretary of State may by regulations amend Schedule 8—

(a) by adding conditions;

(b) by omitting conditions added by regulations under paragraph (a).

(7) Regulations under subsection (6) are subject to the affirmative resolution procedure.

(8) In this section, "sensitive processing" means—

(a) the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership;

(b) the processing of genetic data, or of biometric data, for the purpose of uniquely identifying an individual;

(c) the processing of data concerning health;

(d) the processing of data concerning an individual's sex life or sexual orientation.

36 The second data protection principle

(1) The second data protection principle is that—

(a) the law enforcement purpose for which personal data is collected on any occasion must be specified, explicit and legitimate, and

(b) personal data so collected must not be processed in a manner that is incompatible with the purpose for which it was collected.

(2) Paragraph (b) of the second data protection principle is subject to subsections (3) and (4).

(3) Personal data collected for a law enforcement purpose may be processed for any other law enforcement purpose (whether by the controller that collected the data or by another controller) provided that—

(a) the controller is authorised by law to process the data for the other purpose, and

(b) the processing is necessary and proportionate to that other purpose.

(4) Personal data collected for any of the law enforcement purposes may not be processed for a purpose that is not a law enforcement purpose unless the processing is authorised by law.

37 The third data protection principle

The third data protection principle is that personal data processed for any of the law enforcement purposes must be adequate, relevant and not excessive in relation to the purpose for which it is processed.

38 The fourth data protection principle

(1) The fourth data protection principle is that—

(a) personal data processed for any of the law enforcement purposes must be accurate and, where necessary, kept up to date, and

(b) every reasonable step must be taken to ensure that personal data that is inaccurate, having regard to the law enforcement purpose for which it is processed, is erased or rectified without delay.

(2) In processing personal data for any of the law enforcement purposes, personal data based on facts must, so far as possible, be distinguished from personal data based on personal assessments.

(3) In processing personal data for any of the law enforcement purposes, a clear distinction must, where relevant and as far as possible, be made between personal data relating to different categories of data subject, such as—

(a) persons suspected of having committed or being about to commit a criminal offence;

(b) persons convicted of a criminal offence;

(c) persons who are or may be victims of a criminal offence;

(d) witnesses or other persons with information about offences.

(4) All reasonable steps must be taken to ensure that personal data which is inaccurate, incomplete or no longer up to date is not transmitted or made available for any of the law enforcement purposes.

(5) For that purpose—

(a) the quality of personal data must be verified before it is transmitted or made available,

(b) in all transmissions of personal data, the necessary information enabling the recipient to assess the degree of accuracy, completeness and reliability of the data and the extent to which it is up to date must be included, and

(c) if, after personal data has been transmitted, it emerges that the data was incorrect or that the transmission was unlawful, the recipient must be notified without delay.

39 The fifth data protection principle

(1) The fifth data protection principle is that personal data processed for any of the law enforcement purposes must be kept for no longer than is necessary for the purpose for which it is processed.

(2) Appropriate time limits must be established for the periodic review of the need for the continued storage of personal data for any of the law enforcement purposes.

40 The sixth data protection principle

The sixth data protection principle is that personal data processed for any of the law enforcement purposes must be so processed in a manner that ensures appropriate security of the personal data, using appropriate technical or organisational measures (and, in this principle, "appropriate security" includes protection against unauthorised or unlawful processing and against accidental loss, destruction or damage).

Sections 46, 47 and 48 provide as follows:

"46. Right to rectification

(1) The controller must, if so requested by a data subject, rectify without undue delay inaccurate personal data relating to the data subject.

(2) Where personal data is inaccurate because it is incomplete, the controller must, if so requested by a data subject, complete it.

(3) The duty under subsection (2) may, in appropriate cases, be fulfilled by the provision of a supplementary statement.

(4) Where the controller would be required to rectify personal data under this section but the personal data must be maintained for the purposes of evidence, the controller must (instead of rectifying the personal data) restrict its processing."

"47. Right to erasure or restriction of processing

(1) The controller must erase personal data without undue delay where—

(a) the processing of the personal data would infringe section 35, 36(1) to (3), 37, 38(1), 39(1), 40, 41 or 42, or

(b) the controller has a legal obligation to erase the data.

48. Rights under section 46 or 47: supplementary

(1) Where a data subject requests the rectification or erasure of personal data or the restriction of its processing, the controller must inform the data subject in writing—

(a) whether the request has been granted, and

(b) if it has been refused—

(i) of the reasons for the refusal,

(ii) of the data subject's right to make a request to the Commissioner under section 51,

(iii) of the data subject's right to lodge a complaint with the Commissioner, and

(iv) of the data subject's right to apply to a court under section 167."

[27] There are three main policies to consider namely:

(i) Service Procedure Threats to Life which is designated by identification number 15/12. This was first issued on 2 November 2012. The version I have examined is dated 27 July 2015 and the review date is three years from issue date.

(ii) Service Procedure Records Management which is designated 3/12. This was first issued on 27 February 2012. The version I have examined is dated 14 March 2016 and the review date is three years from issue date.

(iii) Review, Retention and Disposal Schedule (in compliance with the Management of Police Information (MoPI) 2010. This does not contain an implementation date and the review date is 15 June 2013.

[28] The aim of the Threats to Life policy is contained in paragraph 2.1 of it as follows:

> "This Service Procedure provides a standardised and structured framework upon which to record, assess, manage and resolve threats to life. Some threats may be made to cause serious injury that may prove fatal (e.g. a threat to shoot someone in the legs, an escalation of or repeated low threats or threats towards a child) it would be appropriate and reasonable to follow this procedure guidance when dealing with threats of this nature."

[29] The policy also highlights the following:

> "The general duties of the police are set out in Section 32(1) of the Police (Northern Ireland) Act 2000."
>
> "Section 32(1)(a) sets out the general duty on police to protect life. It also requires police to take action to prevent the commission of offences and investigate where offences have been committed. Schedule 1 to the

> Human Rights Act 1998 indirectly incorporates many of the rights set out in the European Convention on Human Rights (ECHR) into UK law. One of these rights is Article 2 of the ECHR, which protects the right to life. It is often referred to as the positive obligation of the Osman ruling. One aspect of the right to life is that it requires the State to take feasible operational measures within its power to avert a real and immediate threat to life of which it was, or should have been aware."

[30] Section 8 of this document sets out the "PSNI procedure for dealing with threats to life." Within this part there is reference made to Threats to Life – Disruption/Warning Notices (TM1) in the following sections:

(aa) Schedule 1 to the Human Rights Act 1998 indirectly incorporates many of the rights set out in the European Convention on Human Rights (ECHR) into United Kingdom law. One of these rights is Article 2 of the ECHR which protects the right to life. It is often referred to as the positive obligation of the Osman ruling. One aspect of the right to life is that it requires the State to take feasible operational measures within its power to avert a real and immediate threat to life of which it was or should have been aware.

(ff) A suspect may be issued with a notice when the District Duty Officer (rank of Chief Inspector or above) believes that the existence of a threat posed by them is known. The process is known as the service of a Threat to Life Disruption Notice (see Appendix G). This is not intended to allow a suspect to identify intelligence sources, but remains a tactical option to consider when the identity of the potential victim is unknown or is unclear.

(gg) The use of a disruption notice should be carefully considered and not used as an alternative to arrest. Advice must be sought from the police human rights lawyer as to the wording of a disruption notice.

[31] Section (b)(iii) also states:

> "The District Duty Officer (rank of Chief Inspector or above) who decides to issue a warning to a victim or a disruption notice to a suspect should consult with the senior investigating officer (SIO) if the incident relates to an ongoing major investigation. Where the District Duty Officer (rank of Chief Inspector or above) decides not to warn an intended victim or suspect the rationale for doing so must be documented. This should be recorded on NICHE."

A pro forma Disruption Notice is contained at Appendix G to this Service Procedure.

[32] The aim of this Records Management policy is found in paragraph 2 as follows:

> "The aim of this service procedure is to outline the PSNI's (the Police Service) approach and commitment to the implementation of an effective and efficient records management programme. It aims to present a consistent and clear approach to the creation, review, use, management, disposal and preservation of records."

[33] At paragraph 6 of this policy document reference is made to managing record review, retention and disposal in the following general terms:

> "Information is stored and maintained because it is of value not only to the Police Service but also to the government and the public. Information that has no ongoing business value, is out of date or inaccurate should not be retained. Unless the information is of historical significance and therefore needs to be retained permanently, it should be disposed of in compliance with the PSNI RRD Schedule."

[34] Paragraph 6(a) is entitled PSNI Review, Retention and Disposal Schedule and it reads as follows:

(i) The disposition of a record is assigned at the point of creation or declaration and is determined by the PSNI RRD Schedule. As a consequence there is a need to identify categories of records and predict their value to the organisation. This involves categorising records into the following five categories:

(aa) Records to be destroyed after a defined period – this refers to information whose useful life can be predetermined, and can therefore be destroyed or deleted once it has met its specified time period. For example, financial information, this can usually be destroyed 7 years after the last action.

(bb) Records to be reviewed – this refers to information which requires a later judgment to confirm or change the initial retention period applied. For example, information relating to tenderers' decisions.

(cc) Records to be permanently preserved – this refers to information that has social or historical value. This includes records selected for

transfer to the Public Records Office of Northern Ireland (PRONI) as well as information that has long term value to the police service but will not require eventual transfer to PRONI. For example, information relating to the investigation of a high profile murder case.

(dd) Normal Review Process – this refers to information that may have social or historical value. This information is reviewed for destruction/retention 5 years initially after file is closed. The Public Records Officer of Northern Ireland (PRONI) must ultimately approve the destruction of these files.

(ee) Records to be retained for 100 years – this refers to information which relates to serious crime which requires to be reviewed subject to retention period definition.

[35] The Review, Retention and Disposal Schedule ("RRD") is a separate document which was provided during these proceedings. In section 3 it references four categories of disposal:

(i) Records to be destroyed after a defined period.

(ii) Records to be reviewed.

(iii) Records to be permanently preserved.

(iv) Records to be retained for 100 years.

[36] Section 6 of this document sets out in a Schedule the PSNI review, retention and disposal procedures in relation to various classes of documents and records that this is in compliance with the Management of Police Information (MoPI 2010). MoPI refers to the Code of Practice and Management of Police Information made by the Secretary of State for the Home Department under Sections 39 and 39(a) of the Police Act 1996 and Sections 28, 28A, 73 and 73A of the Police Act 1997. It is dated July 2005 and prepared by the National Centre for Policing Excellence. It is an English Code of Practice and whilst it does not apply in Northern Ireland the policy documentation refers to it and adopts its principles. I have been provided with an extract of MoPI which sets out some key principles governing the management of police information. These include paragraph 4.5, review of police information and 4.6 retention and deletion of police information.

[37] There was no issue taken with the applicant's assertion in the skeleton argument that "an incomplete version of this Service Procedure (Threats to Life) is available on the internet. Section 8 and following of the Service Procedure is not publically available." In the skeleton argument the applicant also refers to a difficulty in accessing the policy guiding the management of information.

[38] I was also referred to policies from other police forces in this area from Surrey Police and Devon & Cornwall Police. These are clearly more specific policies which are public and deal with the management of threats to life. Specific reference was made to the Surrey policy which refers to the storage of material at paragraph 15 as follows:

> "All documentation relating to the threat to life including suspect/s, victim/s, location, tactical options, risk assessment/s and outcome, as well as original threat to life warning/disruption notices, will be securely stored by Records and Evidence Centre and retained for 7 years."

Consideration

[39] I am very grateful to counsel for the expertise they have all applied in arguing this case before me. I do not intend to recite all of the legal authorities referred to me but suffice to say I have considered them all. This is a dynamic area illustrated by the fact that during the hearing the European Court of Human Rights delivered judgment in *CATT v UK*, 24 January 2019. I have also had the benefit of considering the Supreme Court judgment in the case of *Gallagher* [2019] UKSC 3. In dealing with the specific issues in this case I have had regard to the following legal principles.

[40] In *Gallagher* the complexion of Article 8 is explained in the following terms at paragraph 12:

> "It is not disputed that article 8 is engaged. It confers a qualified right of privacy, subject to important exceptions for measures which are (i) "in accordance with the law", and (ii) "necessary in a democratic society in the interests of … public safety … for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights … of others." Conditions (i) and (ii) impose tests of a very different character, with very different consequences. Condition (i) is concerned with the legal basis for any measure which interferes with the right of privacy. Any such measure must not only have some legal basis in domestic law, but must be authorised by something which can properly be characterised as law. This is an absolute requirement. In meeting it, Convention states have no margin of appreciation under the Convention, and the executive and the legislature have no margin of discretion or judgment under domestic public law. Only if the test of legality is satisfied does the question arise whether the measures in question are necessary for some legitimate purpose and

represent a proportionate means of achieving that purpose."

[41] Lord Sumption also highlights the cases of *Huvig v France* [1990] 12 EHRR 528, at paragraph 26, and *Kruslin v France* [1990] 12 EHRR 547, and the dual test of foreseeability and accessibility of law described by the European Court of Human Rights most recently in *Catt v United Kingdom* (Application No 43514/15, 24 January 2019) as follows:

> "The expression 'in accordance with the law', within the meaning of article 8.2, requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law."

[42] At paragraph 17 Sumption JSC also says this:

> "The accessibility test speaks for itself. For a measure to have the quality of law, it must be possible to discover, if necessary with the aid of professional advice, what its provisions are. In other words, it must be published and comprehensible. The requirement of foreseeability, so far as it adds to the requirement of accessibility, is essentially concerned with the principle summed up in the adage of the American founding father John Adams, "a government of laws and not of men". A measure is not "in accordance with the law" if it purports to authorise an exercise of power unconstrained by law. The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers discretions, in terms or in practice, which make its effects insufficiently foreseeable. Thus a power whose exercise is dependent on the judgment of an official as to when, in what circumstances or against whom to apply it, must be sufficiently constrained by some legal rule governing the principles on which that decision is to be made. But a legal rule imposing a duty to take some action in every case to which the rule applies does not necessarily give rise to the same

> problem. It may give rise to a different problem when it comes to necessity and proportionality, but that is another issue. If the question is how much discretion is too much, the only legal tool available for resolving it is a proportionality test which, unlike the test of legality, is a question of degree."

[43] At paragraph 18 Sumption JSC states that:

> "This much is clear not only from the *Huvig* and *Kruslin* judgments themselves, but from the three leading decisions on the principle of legality on which the Strasbourg court's statement of principle in those cases was founded, namely *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245, *Silver v United Kingdom* [1983] 5 EHRR 347 and *Malone v United Kingdom* [1985] 7 EHRR 14."

[44] At paragraph 23 Sumption JSC also refers to *Amann v Switzerland* [2000] 30 EHRR 843, *Rotaru v Romania* 8 BHRC 449 and *S v United Kingdom* [2009] 48 EHRR 50. The case of *Rotaru* was relied upon in this case because in that case the applicant objected to the retention on the files of the Romanian state security service of information, some of it false, about his dissident activities in the early years of the post-war communist regime nearly half a century before. In particular, as Ms Doherty referenced that judgement referred to the fact that there must be, "safeguards established by law which apply to the supervision of the relevant services' activities" (para 59). After examining the relevant domestic law, which conferred broad discretionary powers on the security service, and concluding that there were no safeguards, the court stated its conclusion as follows at para 61:

> "That being so, the court considers that domestic law does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities."

[45] In, *Catt v United Kingdom* (Application No 43514/15), the case of *MM* [2012] ECHR 1906 was referenced and in particular at paragraph 94 the following is found:

> "94. As the court has recalled the expression 'in accordance with the law' not only requires the impugned measure to have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate

> with sufficient clarity the scope and discretion conferred on the competent authorities and the manner of its exercise (see, among other authorities, *MM v United Kingdom*, no 24029/07, [2012] ECHR 1906, para 193, 13 November 2012 with further references)."

[46] I also refer back to a line of domestic authority including *Gillan v UK* [2010] 50 EHRR 45 in which the court stated, in the context of stop and search powers:

> "Domestic law must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of democratic society enshrined in the Convention, for a legal discretion granted to the Executive to be expressed in terms of an unfettered power. Consequently the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. The level of precision required with domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed."

[47] Of course the context of this case is not four-square with any of the cases that I have mentioned above. I remind myself of the factual characteristics of this case which must inform an analysis of this nature. In particular, I bear in mind that this case is far removed from the circumstances of *Mr Catt*, an elderly protestor who complained about his name being kept on an extremist database. It is also removed from the facts in *Gallagher* and the related cases which involve relatively minor offending. It is different to *Ms T's* situation as she was being warned about a course of conduct which might amount to harassment. This case involves information about serious crime and its use and retention.

[48] I have read the applicant's affidavits. His complaints relate to the decision to issue the notice and in that regard he claims a breach of Article 6/procedural fairness and a breach of Article 8. He then argues that the use of the notice in a bail hearing was unlawful. Finally, he argues that retention is unlawful with particular emphasis on the review process. The relief claimed seeks to effectively end the use of disruption notices as part of police practice. I was also told that the applicant's solicitor (an experienced practitioner) had not heard of disruption notices.

[49] An analysis of the evidence filed on behalf of the respondent is of key importance in dealing with these claims and so I will reference it in some detail as

follows. Firstly, the affidavit evidence explains the context of this case. It is clear from that exposition that the applicant is currently on bail and waiting to be tried for certain alleged offences. He is 43 years of age. He also has an extensive criminal record, consisting of 84 criminal offences which include serious offences in relation to firearms and robbery. This criminality spans a period of some 30 years and he has in the course of his criminal history served a sentence of imprisonment for instance of 11 years for armed robbery in April 2007 and one of 5 years and 7 months for drugs offences in July 2015.

[50] At the time of the bail hearing which forms the focus of this case the applicant was the subject of robbery and firearms charges. In the respondent's affidavit evidence the investigating officer points out that the applicant was granted bail on 4 March 2016 on firearms and incitement charges subject to conditions. There was an issue about the applicant being permitted to travel with his partner in a vehicle to attend appointments with the Probation Service but otherwise he was restricted from travelling in a private motor vehicle.

[51] The affidavit states that on 2 June 2016 a further series of variations to the bail conditions were agreed with PSNI and implemented administratively and these related to the use of a mobile phone and further variations to the driving restrictions. It is pointed out that within 12 hours of these variations being approved by the court the applicant made a further variation application which came on for hearing on 10 June 2016. This was because he proposed to work as a car valeter on site and to be trained in car body repair and that he would be required to drive two additional identified vehicles.

[52] In the evidence the respondent states that the bail variation application was brought to his attention as the investigating officer. The deponent states that he was suspicious of the arrangement as he thought it would provide "the applicant with the opportunity to drive vehicles unaccompanied in a broad range of circumstances." He says this had been a concern of the judge when originally granting bail. The judge had permitted the applicant limited access to only two vehicles. The affidavit states that the investigating officer was suspicious of the potential relationship between the applicant and the employer. The evidence states that in the course of preparing the PSNI response to the bail application he carried out a search on the police NICHE data base to ascertain whether police held any updated information and thereafter he became aware of the threat to life disruption notice.

[53] At paragraph 16 of the investigating officer's officers affidavit the following averment is found:

> "I formed the view that the PSNI should oppose the bail variation. It was entirely consistent with the applicant's previous pattern of offending that he would engage in criminal activities whilst subject to bail and/or licence

> conditions. In the light of the decision to serve the disruption notice, I formed the view that the intelligence was considered to be sufficiently reliable and that it was appropriate to bring the fact of the notice to the attention of the court."

[54] This affidavit concludes with the following:

> "It was and remains my opinion and that of the PSNI that the applicant poses a serious risk to the general public of committing serious criminal offences and, in particular, he poses a risk to the cash in transit industry. In those circumstances, I believe it was appropriate to make this information and the fact of the disruption notice available to the court when considering the bail variation application."

[55] The circumstances surrounding the decision to issue the disruption notice are explained in other affidavits filed on behalf of the PSNI. There is further affidavit evidence which sets out the facts of the matter as follows:

> "The applicant and each of the named associates were all known to police and had significant criminal records for the commission of serious criminal offences. In the case of the applicant, this included previous convictions for conspiracy to commit robbery and also serious firearms offences. The intelligence information had already been graded and was considered by me to be credible and reliable. I was aware from my own experience that within the recent past there had been attacks on known drug dealers within the Belfast area, including murder. This background knowledge appeared to me to be consistent with the intelligence report. In light of what I also knew of the past history and criminal records of the individuals mentioned in this report, I concluded that there was a real risk that the applicant or one of his associates may cause serious harm to a member of the public. Since the report did not give any indication as to when any criminal conduct may take place, I was not in a position to make a conclusion about whether the risk was an immediate one. However, I considered that this possibility could not be excluded and that police should take measures on foot of this information to reduce or avert the risk of harm."

[56] The evidence details the police procedure pursuant to the Service Procedure 15/12 Threats to Life and avers that disruption notices are generally only appropriate where the information available to police identifies a potential perpetrator but not a victim. It states that:

> "These are written notices served upon the suspected potential perpetrator, advising them that police have information relating to the existence of a threat posed by them. The purpose of the notice is both to alert the individual to the fact that police are aware of the threat and thereby to deter any possible future actions by the person which may cause harm to another person."

[57] The affidavit also states that the current underlying intelligence report is currently stored electronically on the PSNI NICHE system and is subject to the Data Protection Act and the PSNI published police guidelines on management of police information. The deponent expresses the view that it is appropriate and proportionate for PSNI to continue to hold this intelligence material, in light of the short time period since the information was received, the fact that the applicant is currently on bail and his activities are subject to strict conditions, the nature of the threat which the applicant poses in the light of his criminal record and history of offending and also the possible importance of the information and the applicant's associations with the police function of preventing and detecting crime.

[58] A further explanatory affidavit was filed by the respondent during the course of proceedings. This is the affidavit dated 14 December 2018. This is again from the Chief Superintendent. This affidavit expands on the process at issue and it refers to the PSNI Service Procedure Records Management and the various schedules. The affidavit states that the Records Management Service Procedure makes provision for record reviews to take place in accordance with two alternative procedures. The first is a scheduled review which takes place when the document falls within a category for which the RRD Schedule prescribes that the review should place after a fixed period of time. The second procedure is the normal review process which applies to all other records for which a review is required. This provides for the retention of the record to be carried out on at least two occasions. The first review takes place five years from the date on which the last paper is added to the file.

[59] This affidavit states that both the intelligence information and the disruption notice are policing records within Category 10 identified in the RRD Schedule. It states that in both cases, retention of the records is to be reviewed by the District Record Reviewer in accordance with the normal review process. This should therefore take place in May/June 2021.

[60] The affidavit concludes with the following averment:

"I consider that it is both appropriate and proportionate for the PSNI to retain the information for the reasons set out below:

(i) The applicant has been known to police for many years – he has an extensive criminal record for serious crime.

(ii) The applicant's activities giving rise to his most recent conviction for drug related offences and the current charges for conspiracy to commit robbery and firearms offences also relate to events which took place while the applicant was on licence.

(iii) The intelligence information indicated that the applicant may be engaged in criminal activities and may cause harm to unknown persons.

(iv) The intelligence information is also likely to assist police in the assessment and management of future risks posed by the applicant.

(v) Retention of the disruption notice, as distinct from the underlying intelligence, is also important for police purposes since it informs officers that the applicant has been made aware of the underlying information.

(vi) Retention of the disruption notice also forms part of police records of its activities.

(vii) The disruption notice could also have investigative and/or evidential significance in the event of harm to the applicant, his associates or other persons as a result of a criminal act."

[60] This evidence was comprehensive but I do note that it was only at a late stage that the full picture emerged in relation to the policy basis for intervention. I was not provided with any evidence about the extent of usage of this measure or the outworking of the policy in practice.

Conclusions

[61] The first argument in sequence relates to whether or not the issue of the disruption notice itself offends the principles of procedural fairness engaging Article 6 and/or Article 8 of the Convention. Ms Doherty QC rightly drew my attention to

the fact that the rules of procedural fairness are rooted in a contextual framework flowing from the case *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] NI 154. In that case the Supreme Court looked at the issue of procedural unfairness in the common law, Lord Reed said at paragraph 67:

> "There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested."

[62] I note that in the case of *Swann* [2014] NIQB 81 the procedure adopted by police was found to be unfair in the context of a safe harbour notice. I was also referred to the case of *BM1* [2018] NIQB 13 where the opposite was found on the facts in relation to Police Information Notices ("PIN"). I pause to observe the detail of each of these regimes which was available and accessible. In any event, this case turns upon its own facts. As I have already said this case involves intelligence material which points to the potential for serious crime, including a risk to life. A disruption notice is an operational measure taken by police, reliable intelligence having been received. The dual purpose is therefore the protection of an intended victim(s) and to provide pre warning to a potential perpetrator. In my view such a measure is clearly pursued for a legitimate aim. The notice does not constitute a finding of criminal liability against the applicant. Rather it points out that the police have intelligence and advises against unlawful activity. I understand the point being made that the police should have consulted in advance. There was some emphasis put upon the fact that the matter cannot have been urgent given the gap between the receipt of intelligence and the notice. I have taken on board all of these points however I do not see that failure to consult in advance renders the actions of the police unlawful. I bear in mind the particular facts of this case involving intelligence and the potential for serious crime. My view also accords with that of the Supreme Court in the *T* case.

[63] Whether Article 8 is engaged at the stage when the notice is issued is also dependent on the factual matrix. In this regard I am of the view that the respondent's arguments prevail. In particular, I agree with Mr McLaughlin's argument that the gateway to Article 8 protection in respect of private life is a reasonable expectation of privacy. There can be no reasonable expectation of privacy in relation to disclosures by PSNI to the applicant of the information it holds in relation to him. Such disclosures enhance his ability to protect his privacy by both informing him and enabling him to exercise statutory procedures under the Data Protection Act. The applicant's expectation of privacy relates to disclosures by PSNI to third parties. Accordingly, I consider that disclosure to the applicant by way of a disruption notice does not amount to Article 8 interference. I also bear in mind that in the *T* case in the Supreme Court, Article 8 was not found to be engaged in relation to the issue of the PIN notice and leave to appeal was refused on that ground.

[64] The next question is whether there was a breach of Article 8 by virtue of the use of the disruption notice in the bail hearing. This was a hearing which ultimately resulted in a favourable outcome for the applicant. He was also made aware of the issue and had the benefit of legal representation. There was no dispute in this case that along well drawn lines the utilisation of intelligence material involving serious crime such as this is appropriate in bail hearings. As such I cannot see that this use of the disruption notice was unlawful or unfair on the facts of this case. I therefore do not accept the applicant's arguments in relation to this aspect of the case.

[65] The fact that the disruption notice was used in the bail hearing does however highlight the fact that it is retained on a police database and may be disclosed to third parties. I accept that this places it in a different sphere from the underlying intelligence material. It is clear that the issue of retention and storage engages Article 8. Counsel rightly agreed on this point. There was no dispute that the storage and retention pursue a legitimate aim in this case. The purpose of such an intervention is clearly set out in the respondent's evidence with which I agree. However, this case really focuses on whether the intervention is in accordance with law. The law in this area is not on a statutory footing. The measure must also have the quality of law and be accessible and foreseeable. This does not mean that every eventuality must be specifically defined however the law must be clear and safeguards should be apparent to protect against the arbitrary interference with Article 8 rights.

[66] In my view there is a lawful basis for the retention of this material which is found in section 32 of the Police (Northern Ireland) Act 2000 and common law. In addition the Data Protection Act provides statutory protections. The final source is the policy documents, which deal with threats to life and management of information.

[67] Ms Doherty on behalf of the applicant argued that the operative aspects the policy are not public facing. Secondly, she contrasted the position in Northern Ireland with the clearer policy base in other police forces all of whom are committed to MoPI principles. Thirdly, she contended there is a fundamental problem in relation to how this material is reviewed within the current structure given that it falls within the 100 year retention category which she said does not engage the normal review process. The argument advanced by Mr McLaughlin conceded that there should be some periodic review of this type of material. I also note the evidence of the Chief Superintendent which explains that a review has occurred as part of these proceedings and will occur again in accordance with normal review procedures. I have listened carefully to Mr McLaughlin's analysis of RRD Schedule which he says provides for a review within the normal review process procedures in this type of case.

[68] The final argument is in relation to whether or not there is an alternative remedy under the Data Protection Act 2018. I have considered this and in particular the specific provisions of the legislation as regards rectification and erasure and

onward complaint to the Information Commissioner if necessary. It is clear to me that these avenues will provide a remedy in very many cases. In particular they should be utilised in cases where there is straightforward dispute over retention. However, Section 47 does not apply to Section 39(2) which is in relation to review. I also agree with Ms Doherty that the provisions do not engage with the requirements of quality of law. Hence, on the facts of this case I do not consider that the Data Protection Act provides an effective alternate remedy.

[69] It will be apparent from the foregoing that I accept much of the respondent's case. I accept that disruption notices serve an important purpose which is legitimate. I am not minded to quash the notice or to issue any order of mandamus. However, before I finalise the case I am going to allow the respondent a short time to reflect on its position particularly as a review of the relevant policies should be imminent. I will hear from counsel in relation to this and any other issue that arises. The applicant is not prejudiced as he has had the benefit of a review in December 2018. I therefore reserve my position on the retention issue and I will hear further submissions in due course.