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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Fox (Bernard) and McNulty's (Christine) Application and Canning's (Marvin) Application [2013] NICA 19

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

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

_____

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

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GIRVAN LJ (delivering the judgment of the court)

INTRODUCTION

[1] The present appeals relate to two separate sets of judicial review proceedings which we have heard together as were the proceedings at first instance before Treacy J. The proceedings raise issues relating to the lawfulness of the power of the Police Service of Northern Ireland ("PSNI") to stop and question and to stop and search individuals under the provisions of section 21 and section 24 of the Justice and Security (Northern Ireland) Act 2007.

[2] In the application brought by Marvin Canning Mr Macdonald QC SC appeared with Mr Devine for the applicant/appellant. In the applications brought by Bernard Fox and Christine McNulty Ms Quinlivan QC appeared for the applicants/appellants with Ms Doherty. Dr McGleenan QC appeared with

Ms Maguire for the respondent. The court is grateful to all counsel for well marshalled and helpful submissions.

The statutory context

[3] Section 21 of the 2007 Act provides under the heading "Stop and Question":

> "(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)."

[4] Section 24 which relates to searches for munitions and transmitters provides that Schedule 3 (which confers powers to search for munitions and transmitters) shall have effect. Schedule 3 so far as material provides as follows:

"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.

(2) …….

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

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

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

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

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

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

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

(2) A requirement imposed under this paragraph shall cease to have effect after the conclusion of the search in relation to which it was imposed.

(3) Subject to sub-paragraphs (4) and (5), no requirement under this paragraph for the purposes of a search shall be imposed or have effect after the end of the period of four hours beginning with the time when the first (or only) requirement is imposed in relation to the search.

…..

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.

(2) An officer may search a person—

(a) who is not in a public place, and

(b) whom the officer reasonably suspects to have munitions unlawfully with him or to have wireless apparatus with him.

……

Seizure

5(1) This paragraph 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 paragraph 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 paragraph 3, or

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

……

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

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

[5] Section 33(2) provides that the powers conferred by sections 21 to 30 are additional to powers which an officer has at common law or by virtue of any other enactment and under sub-section (3) a constable may if necessary use reasonable force for the purpose of exercising a power conferred on him. Under sub-section (4) where anything is seized it may, unless a contrary intention appears, be retained for so long as is necessary in all the circumstances. Under sub-section (5) a power to search premises conferred by virtue of the act shall be taken to include a power to search a container.

[6] Section 34 empowers the Secretary of State to make codes of practice in connection with the exercise by the police or HM forces of the powers conferred by the Act. Where the Secretary of State proposes to issue a code of practice he shall publish a draft, consider any representations made to him about the draft and, if he thinks it appropriate, modify the draft in the light of representations made to him. A draft of the code shall be laid before Parliament. When the Secretary of State has laid

a code before Parliament he may bring it into operation by order made by statutory instrument provided that the draft is approved by resolution of the House.

[7] Under section 37 the Chief Constable shall make arrangements for securing that a record is made of each exercise by a constable of a power under, *inter alia,* section 21 and section 24, so far as reasonably practicable and as not otherwise required by another enactment.

[8] Under section 40 the Secretary of State is required to appoint a reviewer to review the operation of sections 21 to 32 and the procedures adopted by the General Officer Commanding Northern Ireland for receiving and investigating and responding to complaints. The reviewer is required to conduct a review as soon as reasonably practicable after 31 July in each year. The Secretary of State is required to lay the annual report before Parliament. Although the reviewer has the power to investigate the operation of the procedures in relation to a particular complaint or class of complaints, this is in the context of section 40(1)(b) (and thus relates to complaints relating to acts of members of HM forces). Mr Robert Whalley CB was duly appointed as reviewer for the operation of the powers. He has published three annual reports.

[9] Schedule 4 sets out provisions relating to the payment of compensation when real and personal property is taken, occupied, destroyed or damaged or any other act is done which interferes with private property rights..

[10] Section 63 of, and Schedule 6 to, the Protection of Freedoms Act 2012, with effect from 10 July 2012, makes various amendments to paragraph 4 of Schedule 3 to the 2007 Act. The effect of these amendments is as follows:

(a) The powers in sub-paragraphs (1) and (2) of paragraph 4 are amended to apply only to members of HM forces.

(b) A new paragraph 4(4) is inserted which provides that "a constable may search a person (whether or not that person is in a public place) whom the constable reasonably suspects to have munitions unlawfully with him or to have wireless apparatus with him".

(c) Paragraphs 4A to 4I are inserted which give constables a power to search for munitions and/or wireless apparatus without reasonable suspicion in an area or place if an authorisation has been made by a senior officer in relation to that place and confirmed by the Secretary of State within 48 hours. The new paragraphs also outline the process for making authorisations.

Factual background to the Canning case

[11] Marvin Canning who is 55 years of age asserts that over a three year period he had been stopped and questioned by the police on a great many occasions ("dozens of occasions") initially under sections 43 and 44 of the Terrorism Act 2000 and, he asserts, more recently under section 21 and section 24 of the 2007 Act. He claims that on some occasions police officers can be oppressive and confrontational. It is his contention that following the decision of the European Court of Human Rights in Gillan and Quinton v UK (2010) 50 EHRR 45, which impugned the lawfulness of powers under section 44 of the Terrorism Act 2000, the police sought to rely on section 21 and section 24 of the 2007 Act "to pay lip service to the judgment of the European Court of Human Rights". The appellant asserts that these steps are unwarranted and cause a great deal of embarrassment since they are carried out in public view. This has led to people avoiding being seen in his company. He refers in particular to two incidents. In July 2010 when returning from a wedding he says that his taxi was stopped, that he was physically pulled out of the taxi, and that he was assaulted by the police. He made a complaint to the Police Ombudsman about the incident (which was subsequently dismissed). The police brought assault charges against him. On 13 September 2010 he was allegedly subject to aggressive police conduct outside Strand Road Police Station which ceased when his solicitor came on the scene. The appellant asserts that he cannot say exactly what powers the police are using to stop him. He denies any involvement in terrorist or criminal activity. He confirms that he is a member of the 32 Counties Sovereignty Movement which he states is not an illegal organisation. In relation to occasions when he was stopped and questioned under section 42 of the Terrorism Act 2000 (which by common case ceased to have effect after 7 July 2010) he says that "he could at least retain some dignity by maintaining a polite silence because he was entitled to keep silent whereas under section 21 he is bound to actively respond to as many questions as a police officer wants to ask in relation to his identity and movements".

[12] Mr Jackson, a T/Chief Inspector in the PSNI, in his affidavit deposes that the PSNI maintain a database which records the use of stop, search and question powers by officers. Since November 2010 the PSNI operates a STOPS database which is an electronic database designed to capture stop and search information. Data can be input directly by mobile data devices or by hard copy PACE/ITA forms. The database shows that the appellant was stopped on one occasion on 7 March 2011 pursuant to section 21 and section 24 of the 2007 Act. Hard copy records show that the applicant was on four occasions stopped and questioned under section 21 in 2010 and once in 2011. This, according to the PSNI, indicates that section 21 was exclusively relied on only once in the period from April 2010 and section 21 was used in combination with other provisions on four occasions. However, apart from the exercise of section 21 stop and question powers, the applicant has been stopped and searched on approximately 50 occasions. The PSNI assert that the applicant is a dissident republican and that there exists credible and reliable evidence to support reasonable suspicion that the applicant has been involved in terrorist activity.

[13] Police evidence shows that between 1 October 2010 and 31 December 2010 11,126 persons were stopped and searched or stopped and questioned. 5,046 persons were stopped and searched pursuant to section 24 of the 2007 Act with 41 persons being arrested. On 1,423 occasions the section 21 power was exercised resulting in seven arrests. In the period from April 2010 until December 2010 the section 21 powers were used about 16 times per day. The PSNI denies that the section 21 powers have been arbitrarily used against the appellant.

Factual situation in relation to Bernard Fox and Christine McNulty

[14] According to his affidavit sworn on 28 June 2011, Bernard Fox was travelling in a car with Christine McNulty from Cullyhanna to Newry on 10 March 2011 when he was stopped by a police officer. Mr Fox asserts that he was asked whether he could record their conversation but the police officer said that he could not because he might be a terrorist. The car was searched for munitions and a police officer went through his wallet. Christine McNulty's handbag was taken and a police woman is alleged to have gone through the contents which included a diary and notebook. The officer searched the handbag and the notebook was retained. No receipt was provided although it was asked for. The appellant was told that the notebook would be handed to intelligence. When Mr Fox asked for documentation he was told that there was a new procedure in place and that if he wanted documentation he could go to the internet and apply to Ardmore PSNI to be advised of the reasons for being stopped, searched and detained. The appellants assert that the procedure took until 3.55 and that they were thus detained for a period of just under an hour.

[15] PC McGarry deposed that the vehicle was alerted as being of interest. Subsequent checks revealed that the vehicle was of interest as it was registered to the applicant Bernard Fox who was considered to be a dissident suspect. According to her affidavit, the car was stopped at about 3.20 pm and a search carried out around 3.30 to 3.45 under section 24. She deposed that the appellants were informed of the powers being used. When PC McGarry searched Ms McNulty's handbag a notebook was found which contained lists of names, amounts of money and goods including tobacco and alcohol. Ms McNulty told the police officer she was unemployed, according to Constable McGarry. She claimed that the lists related to Christmas presents. PC McGarry told her that she felt the list could be evidence of an offence under the Customs and Excise Act and said that she would seize the item under article 21 of PACE to allow a further investigation to be carried out. The deponent asserts that Ms McNulty and Mr Fox were aggressive and abusive. PC Fleming, the other officer on the scene, said that he searched Mr Fox and the vehicle for munitions and wireless apparatus pursuant to section 24 of the 2007 Act. Following completion of the search Mr Fox and Ms McNulty remained on the scene and were argumentative and aggressive. Search records for the vehicle and in relation to Ms McNulty were submitted within a short time of the search. He stated that the

search records for Mr Fox had not gone through electronically. On 23 March 2011 he submitted a hard copy on a written PACE/1TA.

[16] T/Chief Inspector Jackson stated that the stop and search power under 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 and search under section 24. The threat to security posed by dissident republicans continues to be high and the threat to serving police officers has been classified as "severe", meaning that an attack is highly likely. Paragraph 11 of his affidavit refers to a number of potentially lethal attacks and the actual murder of a police officer. The increased level of activity by terrorist groupings is reflected in the arrest and charge statistics. It is the police view that the stop and search power which does not require reasonable suspicion is a vital tool in the efforts of the PSNI to reduce the level of threat. 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.

[17] T/Chief Inspector Jackson identifies a number of procedural safeguards within the PSNI corporate governance structure. The use of such powers is subject to scrutiny by the Terrorism and Security Powers User Group on a quarterly basis. It reports to the Security and Serious Crime Programme Board which convenes under the chairmanship of ACC Crimes Operations. As and when necessary, matters can be elevated to the Service Executive Board of PSNI. The PSNI is subject to the oversight of the Northern Ireland Policing Board. At local level accountability structures require senior officers to attend meetings of the District Policing Partnership where specific concerns about police actions can be raised. Specific complaints can be taken to the Police Ombudsman as has happened in the case of Canning, Fox and McNulty whose complaints were not accepted.

[18] It was the police case that the power is not intended to be used on either a purely random or blanket basis but rather on the basis of threat. It is unlikely that a person would be subject to a section 24 stop and search unless there is an intelligence led basis for the use of the power. Exercise of the power under section 21 often reduces the likelihood of recourse to the use of section 24 powers. The use of section 21 and section 24 is directed to the discharge of the article 2 obligations under the Convention. At the time of swearing of the police affidavits, an internal authorisation requirement was under development which intended to require an authorisation to be put in place to permit the use of the section 24 stop and search powers with such an authorisation to be made by an officer of at least the rank of Assistant Chief Constable who would have received detailed intelligence indicating that the safety of persons may be endangered by the unlawful use of munitions or wireless apparatus. The authorisation request would include legal advice from the respondent's human rights legal advisor as to compliance of the authorisation with the law. Before the granting of any authorisation the chief officer would have to be satisfied that the authorisation was necessary and proportionate. By the time the dependent swore his second affidavit on 10 October 2011 the PSNI had adopted the internal authorisation regime proposed and it was operational from 6 October 2011.

Subsequently section 63 of, and Schedule 6 to, the Protection of Freedoms Act 2012 took effect from 10 July 2012 and put the new procedures on a statutory footing.

[19] Mr Fox denies that he is a dissident republican and says that he has never been questioned about any dissident activity. He challenges the timescale of the stop and search operation stating that the stop and search record notes that the car was stopped at 2.50 pm and a search continued until 3.45 pm. Ms McNulty claims that she told the police that she was a carer of a disabled child and denies that the police referred at all to the Customs and Excise Act. PC McGarry explained the discrepancy in the timing of the search because of delays in sending data electronically. She pointed out that the Police Ombudsman in the investigation of the complaint by the appellants accepted that there had been an input error. It is clear that there are factual issues in dispute between the parties as to what actually happened in relation to the stop and search episode.

The appellants' claims

[20] In his finally amended Order 53 statement the appellant Marvin Canning claims a declaration that section 21 and paragraph 4(1) of Schedule 3 of the 2007 Act are incompatible with articles 5 and 8 of the Convention. He seeks an order of mandamus requiring the Chief Constable to prohibit police officers from exercising those powers. He claims that those statutory provisions permit disproportionate and unnecessary interference with the right to privacy and result in detention of individuals in circumstances breaching the protections contained in article 5.

[21] In their finally amended Order 53 statement the appellants Bernard Fox and Christine McNulty seek a declaration that the PSNI's exercise of the power to stop and search under section 24 without any requirement that the police reasonably suspected that the applicants had munitions or wireless apparatus unlawfully with them amounted to a breach of articles 5 and 8. They claim to be entitled to an assurance or undertaking that they will not be stopped and searched is a purported exercise of section 24. They sought in the amended Order 53 statement declarations that section 24 is incompatible with article 5 and article 8. They further sought declarations that the decision to stop them without giving reasons was unlawful, in breach of section 24 and articles 5 and 8 and that the policy of stopping, searching and detaining persons amounted to a breach of articles 5 and 8.

The judgment at first instance

[22] Treacy J inclined to the view that the exercise of the power to stop and question a person about his identity and movements and to stop and search under section 24, when failure to stop, answer and submit to the search constituted criminal offences, gave rise to an interference with the individual's rights under article 8. He concluded that the appellants had established that they satisfied the requirement of victimhood under the 1998 Act. He concluded that the focus of attention was in relation to the quality of the impugned law, the statutory provisions

containing a domestic law basis for the police actions in question. Treacy J did not consider that the Strasbourg decision in Gillan provided an answer in the case. Regard had to be had to the context of the statutory provisions and the way in which they operated. In his view the context included:

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

(ii) the fact 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) the fact that the powers are directed to the discharge of the PSNI obligations under article 2 to ensure that reasonable operational steps are taken to avert a real and immediate risk to life;

(iv) the fact 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 discussed by the judge namely:

  (a) scrutiny by the Terrorism and Security Powers User Group;

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

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

(vi) those safeguards were 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; and

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

He rejected the argument that the impugned powers were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. He decided that the impugned powers were "in accordance with law" and that no violation of article 8 had been established. In relation to article 5 he accepted as correct the respondent's argument that in the case of the three appellants there had been no deprivation of liberty but rather restriction in movement. Even if article 5 was

engaged, the judge concluded that the use of targeted section 21 and section 24 powers in the interests of protecting lives and security could not be considered as the kind of arbitrary detention proscribed by article 5.

The appellants' submissions

[23] Counsel for the appellant Canning relied on Gillan v UK as authority for the challenge to the compatibility of the relevant provisions with article 8. Gillan, it was submitted, was clear authority for the need to provide protection against arbitrary interference with the rights safeguarded by the Convention. It is contrary to the rule of law for an executive discretion to be expressed in terms of an unfettered power. Safeguards provided by domestic law must demonstrably provide a real curb on the unfettered discretion. As in Gillan so in the present case, counsel submitted, there was a real risk of arbitrariness. The power was not sufficiently circumscribed or subject to legal safeguards against abuse. Section 21 and section 24 required no suspicion, reasonable or otherwise, and there was no requirement of necessity. Section 21 and section 24 lacked even some of the safeguards incorporated in section 44 of the Terrorism Act (which were found by Strasbourg to be inadequate in Gillan). In relation to a section 44 stop and search that could only be conducted if an authorisation was in place for a specified area, which could only be given by a senior officer and only when it was expedient in the prevention of acts of terrorism. Such restrictions did not apply to section 21 or section 24. There are no limits to the range and breadth of questioning to ascertain identity and movements or the time frame for the consideration of those movements. The state authorities claim that section 21 is not an anti-terrorism power but that means that it has a very wide ambit indeed. The fact that section 24 has now been amended represented a tacit concession that as originally framed it was incompatible with article 8. In relation to article 5, in Gillan, while the court was not required to determine the question of the compatibility of section 44 with article 5, it did express the view that the element of coercion arising from the criminal sanction included in section 44 was indicative of a deprivation of liberty. Counsel contended that Treacy J had failed to address the quality of the impugned law. None of the matters, which in the judge's view formed the context in which the powers were exercisable, afforded legal protection against their arbitrary use nor did they indicate with sufficient clarity the scope of the unfettered discretion. The safeguards which the judge mentioned were no more than reporting and monitoring mechanisms after the event and the right to bring judicial review or civil claims. These were no more effective as safeguards than those regarded as inadequate by Strasbourg in Gillan. Mr Macdonald pointed out that notwithstanding the terrorist level threat in Great Britain there had been no decision to extend an equivalent power to the rest of the United Kingdom.

[24] Mr Macdonald referred the court (*inter alia*) to what Mr Whalley CB, the Independent Reviewer said in his Third Report:

> "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 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 movement the issue is not so straightforward. If the basis of the questioning related to recent incidents or known threats it would be indeed justified, but in a case where there was no such linkage the questioning would be very hard to justify. The information given on the copy of the PACE/1TA form is the starting point for anyone who believes that he been unjustly stopped and can provide the basis for any complaint."

Counsel argued that this passage illustrated one of the situations in which the section 21 power can be abused and exercised on an arbitrary basis.

[25] Counsel for Bernard Fox and Christine McNulty accepted that since the hearing of the case in the High Court the relevant law had changed. The Protection of Freedoms Act 2012, which, so far as relevant, came into effect on 10 July 2012, has changed the 2007 Act by virtue of section 23 and Schedule 6 of the 2012 Act. The impugned provision no longer exists in the same form as it did. The power that now exists is not the power which existed when the appellants' search took place. The appellants, thus, no longer pursue their application for declarations of incompatibility. However they claim to be entitled to the other reliefs sought. They contend that the objective evidence shows that they were detained for approximately one hour while the search was on-going. The factual dispute should be resolved in favour of the applicants. The judge in his judgment concluded that the period in question was 55 minutes. PC McGarry's explanation as to the discrepancy between the electronic record and the affidavit evidence was an incredible explanation since the timings recorded were earlier and not later than the times for which the officers now contend. The judge found that the appellants had been detained for 55 minutes. The officer had no justification or legal basis for perusing or seizing the notebook in Ms McNulty's bag, counsel relying in particular on what Lord Bingham said in paragraph 28 of R (Gillan) v Metropolitan Police Commissioner [2006] 2 AC at 344.

[26] While accepting that the power to stop and search had a basis in domestic law, Ms Quinlivan, in common with Mr Macdonald's argument, contended that the power did not meet the quality of law requirement and that the *ex post facto* oversight mechanisms were not relevant to showing that the quality of law test was satisfied. While T/Chief Inspector Jackson averred that the intent was that the power was not used on either a purely random or blanket basis but on the basis of threat, that averment was not supported by any clear accessible evidential or

statutory material. Furthermore the power, and its use in this particular case, was not necessary in a democratic society. The power and its use were not proportionate and the reasons given to justify it were not relevant and sufficient. What the statistics demonstrated was that there was little need for section 24 powers before section 44 of the Terrorism Act ceased to have effect. The power was being used to fill up some of the gaps left by discontinuance of the use of section 44. There was a very low rate of arrest and presumably recovery of munitions and transmitters. The material provided did not show whether the same number of arrests and recovery would have been made if the power to stop and search required reasonable suspicion. It is clear that an alternative, less intrusive, power could be fashioned to allow for searches on an intelligence led basis. The new paragraph 4 of Schedule 3 confirms that. Counsel went through each of the seven contextual factors referred to by the judge and sought to demonstrate that there was overuse of the powers and a lack of protections against arbitrary abuse.

[27] Ms Quinlivan further contended that there had been a deprivation of liberty. She called in aid what the Strasbourg court said in Gillan. ("They were obliged to remain where they were and submit to the search and that 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 circumstances analogous to that involving the appellants a search of less than 30 minutes was regarded as sufficient to amount to a deprivation of liberty. Article 5(1) required that the obligation conform to substantive and procedural rules of national law. The quality of law requirement was not met in relation to article 5. Nor had the State demonstrated which of the exceptional cases justified loss of liberty as set out in article 5(1).

[28] Counsel also submitted that the appellants were entitled to an assurance that section 24 powers would not be used against them in future and that they were entitled to be properly informed on the specific provisions under which they were being stopped and detained. Mr Fox, it was alleged, was not supplied with a copy of the record of the search of the vehicle and was only supplied with an inadequate copy in the context of the present proceedings.

The respondent's case

[29] Dr McGleenan contended that the section 24 and Schedule 3 paragraph 4 challenges were no longer of relevance. He referred the court to the new provisions of the 2012 Act which had withdrawn section 44 of the Terrorism Act 2000 and replaced it with section 47A, which it accompanied with a revised Code of Practice which came into effect in July 2012. It amends Schedule 3 of the 2007 Act. The power to stop and search persons in relation to ammunition and wireless apparatus is now made subject to an authorisation procedure. A draft code has been produced for consultation governing the exercise of the power in sections 21, 23, 24 and Schedule 3.

[30] In summary, in relation to section 21 the respondent invited the court to dismiss the section 21 claim on the basis that the affidavit evidence showed that the appellant had been subjected to a section 21 stop on only one occasion. The section 21 power was not equivalent to the section 44 power in the Terrorism Act and did not generally involve an interference with article 8 rights and did not do so on this occasion. Counsel argued that there was an insufficient factual foundation for the section 21 application. The court could not make a finding of an interference with the applicant's private life in a factual vacuum. Dr McGleenan contended that the appellant had put no positive evidence before the court relating to an actual stand-alone section 21 exercise of power. Section 21 affords no power to conduct any form of intrusive search on a person. What the court was dealing with in Gillan was a quite different statutory power. Counsel called in aid Lord Bingham's statement in paragraph [28] in his judgment in Gillan [2006] 2 AC 307 that the intrusion into private life must reach a certain level of seriousness in order to engage the operation of the Convention (see also Costello Roberts v UK (19 EHRR 112)):

> "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 appellant has not demonstrated an adverse impact on his physical or moral integrity. Although Strasbourg has not accepted Lord Bingham's analysis, it did not reject the notion of a threshold level of seriousness. In Gillan there was physical contact with the person searched, the clothing was examined and personal belongings were inspected.

[31] If the appellant Canning could establish interference with his private life in the abstract, the interference was "in accordance with law". The power is not open to arbitrary use because of the narrowly confined scope of the statutory provision. The availability of the power was necessary because of the serious and persistent threat from residual terrorist groupings. Counsel relied heavily on the view expressed by the independent reviewer who favoured the availability and use of the section 21 power which has to be viewed as a necessary tool to prevent and disrupt terrorist activity. The appellant's challenge seeks to draw force from an inappropriate comparison with section 44 of the Terrorism Act.

[32] In relation to the section 24 argument, counsel contended that the appellant had no specific recollection at all of the stops which occurred on 23 April, 25 April, 9 May and 24 May. The other episodes were of short duration. The section 24 power was not exercised on a random or blanket basis. It was exercised on the basis of police information relating to the appellant. If the court considered that the application of the section 24 powers to the appellant did constitute an interference, it had to assess whether the interference was justified. The issues raised by the appellant had been overtaken by the amendments to the statutory regime. Counsel contended that the criticism made in relation to the quality of law did not speak to the statutory framework of section 24 and Schedule 3 of the 2007 Act as it stood

when the challenge was brought. In particular, Strasbourg did not make a finding that the use of stop and search without reasonable suspicion was *per se* incompatible with article 8. In the Northern Ireland context the use of section 24 was located at the reasonable suspicion end of the spectrum.

[33] On the question of article 5, counsel distinguished between article 5 and article 2 of the Fourth Protocol (which had not been ratified by the United Kingdom). Article 2 of the Protocol 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 order in public, for the prevention of crime for the protection of rights and freedoms of others.
>
> 4. The right set forth in paragraph 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."

Article 5 is not concerned with mere restrictions on freedom of movement but with the deprivation of liberty. Counsel adopted Lord Hope's analysis in Austin v Metropolitan Police Commissioner [2009] 1 AC 564 which distinguished between the absolute protections in respect of deprivation of liberty under article 5 and the qualified rights arising under article 2 of the Protocol. He called in aid Lord Hoffman's description of what is involved in a deprivation of liberty (see Secretary of State for the Home Department v JJ [2008] AC 385). Whether there is a deprivation of liberty depends on a range of factors and is a matter of degree and intensity. The European Court of Human Rights gave no final ruling on the article 5 question in Gillan. The factors in the case of Canning did not support a finding of loss of liberty. Even if a detention of the appellant is found to fall within the ambit of article 5, the court is required to conduct the fair balance analysis indicated by Lord Hope in Austin, at paragraph 34. The use of targeted stop and search powers in the interests of the community cannot properly be considered as an arbitrary detention proscribed by the Convention. Counsel argued that the Grand Chamber

in Austin had referred with approval to the reasoning of the Court of Appeal and House of Lords.

[34] Dr McGleenan rejected Ms Quinlivan's argument that Fox and McNulty were entitled to an assurance that the section 24 powers would not be used against them. It would be irrational to provide specific assurances as to future use of police powers in the context under consideration. He submitted that the appellant's argument about the lack of reasons for the stop and search was entirely speculative.

Determination of the application by Martin Canning

[35] The focus of the appellant's claim is on the compatibility of section 21 and paragraph 4(1) of Schedule 3 (incorporated into the 2007 Act by section 24) with the Convention rights and on the lawfulness of the PSNI use of those statutory powers. Thus the spotlight is on the legality of the legislative framework rather than on the individual actions of police officers. Some of the episodes in which the appellant was stopped by the police in exercise of the powers under the 2007 Act have been the subject of separate complaints to the Ombudsman. In view of the nature of the relief sought it is unnecessary to consider further any particular episodes referred to in the evidence. However, in order to pursue a claim for declarations of the kind sought by the appellant, the appellant must establish that he is a victim for the purposes of section 7 of the Human Rights Act 1998. In this context the victim test was considered to be satisfied by Treacy J. The test of victimhood is succinctly stated by the European Court of Human Rights in Colon v The Netherlands App. No. 49458-06:

> "60. Article 34 entitles individuals to contend that legislation violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it; that is, if they are required either to modify their conduct or risk being prosecuted, or if they are members of a class of people who risk being directly affected by the legislation ..."

The impugned measure was applied to the appellant's detriment (Klass v Germany (1978) 2 EHRR 214). The appellant is not complaining of the exercise of powers *in abstracto* but in relation to powers which have directly affected him. Accordingly Treacy J was clearly correct to conclude that the victimhood test was satisfied in relation to the three appellants.

[36] In relation to the appellant's challenge to section 24 and Schedule 3 paragraph 4(1), it is clear that that statutory power is now exercisable subject to

conditions and requirements which differ from those applying prior to 10 July 2012. The granting of a declaration of incompatibility can relate only to primary legislation in force at the time when the court grants the declaration. Section 4(1) of the Human Rights Act 1998 provides that section 4(2) applies in any proceedings in which a court determines whether a provision "*is* compatible with a Convention right". The court's power to grant a declaration only arises when it is satisfied that the provision *is* incompatible. A declaration of incompatibility does not affect the validity, continued operation or enforcement of a provision which continues to be binding. One of the consequences of a declaration of incompatibility is that the state authorities must consider exercising the power to take remedial action under section 10 by introducing amending regulations. Where, in fact, legislation has been changed no purpose would be served by declaring that the previous legislation was incompatible and there is no statutory power to do so.

[37] In relation to the challenge brought to the provisions of section 21 and to the use of the power by the police, the following questions arise for consideration.

(1) Does a power conferred on the police to stop a person to ascertain his identity and movements engage article 5 and/or article 8 of the Convention?

(2) If so, set in its overall statutory context, is the power to stop and question under section 21 "in accordance with law" for the purposes of article 8?

(3) Is the conferring on the police of such a power necessary in a democratic society for one or more of the legitimate interests set out in article 8.2? This involves considering the question of proportionality.

[38] Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and public 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."

[39] Treacy J concluded that the exercise of a power to stop and question a person about his identity and movements, when failure to stop and answer constitutes a criminal offence, constitutes an interference with a party's article 8 rights.

[40] It is undoubtedly one of the hallmarks of a free and democratic society that its citizens have a right to move freely within their state subject only to justifiable and necessary legal restraints on that freedom. The individual is entitled to expect that he can exercise his freedom to move untrammelled by the need to account for those movements. It is also a hallmark of a free society that people are entitled when they wish to keep private their personal identity in the absence of some justifiable reason why they should be required to identify themselves. The exercise by agents of the state of a state power to ask a citizen to identify himself and to account for his movements has the clear potential to interfere with the individual's private life. A person coming or going to venues, the identification of which he may quite legitimately consider to be private or confidential, would justifiably consider it an invasion of his privacy to be stopped and questioned about his movements. Such questions may involve enquiries requiring him to divulge information relating to aspects of his private life which may, for example, relate to his involvement in lawful political, social, cultural or sexual activities which may be considered by some to be controversial or unacceptable. The power to stop and question, particularly, when this may occur in a public place and in the presence or hearing of others, could clearly invade the private life of the individual concerned. While it is argued by the respondent that such a power does not pass a threshold of seriousness so as to give rise to any potential breach of article 8, it is not difficult to envisage factual scenarios and lines of questioning which could occur within the exercise of an untrammelled section 21 power that would give rise to an interference with the private life of the individual.

[41] Much of the focus of the appellant's argument was directed to the question whether the statutory power satisfies the "in accordance with law" requirements in article 8.2. Undoubtedly section 21 confers a statutory power and discretion on individual police officers to stop and question and thus there is a clear domestic law basis for the exercise of such a power. The question is whether that statutory power satisfies the "quality of law" requirement demanded by Convention law.

[42] This question raises issues which have some resonance in relation to the field of surveillance law and which fell to be considered in Re C and others [2007] NIQB 101. The Strasbourg case law clearly establishes that covert and secret surveillance by the state constitutes a particular threat to democracy and freedom. Such surveillance requires strict justification in the interests of national security or the prevention of crime. Such a system has to provide adequate and effective guarantees against abuse (see Klass v Germany (1978) 2 EHRR 214, S v Switzerland [1991] 14 EHRR 670 and Erdem v Germany [2002] 55 EHRR 383).

[43] In Kopp v Switzerland [1999] EHRR 91 in the context of Swiss law relating to official telephone tapping Strasbourg stated at paragraph 84:

> "The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances and conditions under which public authorities are empowered to resort to any such secret measures."

As the judgments in Re C and Others [2007] NIQB 101 show, it is possible to deduce from the authorities in the surveillance context the following applicable principles (See [2007] NIQB 101 at page 35 paragraph [9]):

> "Where Article 8(1) is in play interference with the right must be in accordance with law. This necessitates the existence of a legal entitlement for the public authority to carry out the surveillance. It must be demonstrated that the interference is necessary in a democratic society in the interests of one of the permitted matters. It has to be ascertained whether the means provided under the impugned legislation is for the achievement of the relevant aim and falls in all respects within the bounds of what is necessary in a democratic society. There must exist adequate and effective guarantees and safeguards against abuse. The relevant law must be clear and precise and it is essential to have clear detailed rules on the subject."

[44] In Gillan v UK [2010] 50 EHRR 45 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."

[45] A power vested in the police to openly stop and question a person is not the exercise of a covert surveillance power but it partakes of some of the characteristics of surveillance. The fact that it can lead to open stopping and questioning in circumstances which do not ensure even privacy between the police and the individual adds to the potential for invasions of the article 8 right. It is a power which does require justification and which requires to provide effective guarantees and safeguards against abuse. The relevant law must be clear and precise and thus will require rules to ensure that the power is not capable of being arbitrarily exercised in circumstances which do not justify its exercise.

[46] It is clear that section 21 expressed as a broad discretionary power does not in itself provide guarantees or safeguards against abuse. It is widely framed and it does not contain any rules designed to ensure that the power is not arbitrarily exercised. This is not to say that the 2007 Act read as a whole does not contain the means to ensure a legislative framework which would satisfy the "in accordance with law" requirement, provided that the power is a necessary one which satisfies the test of necessity and proportionality under article 8.2. Section 34 enables the Secretary of State to make a code of practice in connection with, *inter alia*, the section 21 power. Such a code could contain appropriate terms and conditions relating to the exercise of the powers. Such a statutory code governing and controlling the exercise of section 21 powers would form part of the relevant legislative framework. A properly formulated code qualifying and guiding the exercise of the section 21 power when read with section 21 could provide a legal framework that would satisfy the "quality of law" test.

[47] Thus, section 21 when read with section 34 contains a framework which is not inevitably incompatible with the article 8 rights. Section 21 is thus not in itself incompatible with article 8. There arises a separate question, namely whether the power is properly exercisable in the absence of a code of practice which ensures that only an article 8 compliant exercise of the general section 21 power is permitted. This brings us to the question raised by the application in the Order 53 statement in which the appellant seeks an order against the Chief Constable prohibiting the police from exercising powers under section 21.

[48] A permissive power such as that contained in section 21 is not a power which must be exercised. The police are not compelled to stop and question individuals. Section 6 of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. The question is whether it is unlawful for a public authority to exercise a general statutory power which requires additional legal underpinning not yet in place if it is to satisfy the Convention's quality of the law requirement.

[49] As we have seen, the legal framework in relation to the exercise of the section 21 power, pending the introduction of an effective code, does not contain the kind of safeguards against potential abuse or arbitrariness envisaged by the

Strasbourg case law. This is borne out, for example, by the recognition that individuals whose identities are already known to the police have on occasions been stopped with a view to being asked about their identity. It is not, of course, the function of the court to identify or spell out what a relevant code of practice should contain. The formulation of the code will involve the exercise of a margin of appreciation vested in the executive and the legislature. It is clear that it should ensure an exercise of the section 21 power which seeks to achieve the minimum intrusion necessary into the private lives of individuals and clearly specifies the circumstances which justify the exercise of the power. Pending the introduction of such a code, the PSNI does not have a proper Convention law compliant basis for exercising the section 21 power.

[50] Bearing in mind that the section 21 power cannot be properly exercised in the absence of a valid and effective code of practice which ensures article 8 compliance, the question of the necessity of the legal power to stop and question cannot be answered in the abstract. The question will be whether section 21, as it will fall to be applied in accordance with such a code, is necessary and proportionate in a free and democratic society. The code will be required to address the circumstances showing necessity and proportionality.

[51] In relation to the argument whether section 21 is incompatible with article 5 of the Convention, the stopping of an individual with a view to establishing his identity and movements clearly interferes with his freedom of movement, usually for only a very short period of time. It is clear that within the Convention and its Protocols a distinction is drawn between an arrest and detention in article 5 and an interference with the right to free movement under article 2 of the Fourth Protocol.

[52] Lord Hope in Austin v Metropolitan Police Commissioner [2009] 1 AC 564 distinguished between the rights mentioned in article 2 of the Fourth Protocol and the protections conferred by article 5. He stated:

> "The rights mentioned in article 2 of the Fourth Protocol are relevant only insofar as they indicate that there is 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 Protocol 4. 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."

[53] In assessing the question regard must be had to the paradigm case of deprivation of liberty referred to by Lord Hoffman in Secretary of State for the Home Department v JJ [2008] AC 385 at paragraph [37]:

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

In the same case Lord Hope pointed out that the question 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 restriction of the individual and the context in which the restriction of liberty occurs.

[54] Depending on the particular facts of a given case it is possible to conceive of circumstances arising from the manner in which the power to stop and question is exercised that in fact give rise in effect to a loss of liberty. It will be a fact specific matter as to whether the actions taken by the police have moved from merely stopping and questioning an individual to effectively detaining him.

[55] Under article 5(1) no one shall be deprived of his liberty save in the cases set out in (a) to (f) and in accordance with a procedure prescribed by law. The only potentially relevant provision in article 5(1) which may come into play is that set out in (b), namely the situation in which the detention is "in order to secure the fulfilment of any obligation prescribed by law". Section 21 provides that a person can be stopped and questioned. Such a stopping for limited purposes specified can only be so long as is necessary to ascertain the limited amount of information permitted. Section 21 is so worded that it cannot be construed as a lawful power to move from a mere stopping of a person to pose a number of questions to effectively detaining him. Thus, if in fact the police officer's purported exercise of the section 21 power constitutes an action which, properly interpreted, amounts to a deprivation of liberty, he has exceeded the powers in section 21. Any code of practice made under section 34 must take account of the limitations of the power conferred in section 21.

Determination of the applications of Fox and McNulty

[56] These appellants have abandoned their incompatibility challenge in respect of section 24 of the 2007 Act. For the reasons set out above this is a concession well made.

[57] However, as already noted, the appellants contend that they should be granted declaratory relief that the purported past exercise by the police under

section 24 of the power to stop and search was an unlawful breach of the applicants' article 5 and 8 rights in the absence of any requirement that the police reasonably suspected that the applicants had munitions or wireless apparatus.

[58] As in the Canning case the question arises as to whether the wide discretionary power contained in section 24 and Schedule 3 was properly exercised by the police pending the introduction of a code of practice or some other legislative formulation of the legal conditions under which the power should be exercised. In Gillan and Quinton v UK [2010] the Strasbourg Court stated:

> "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. There is therefore a zone of interaction of persons with others even in a public context which may fall inside the scope of private life. There are a number of elements relevant to consideration of whether a person's private life is concerned and measures effective outside a person's home or private premises. In this connection a person's reasonable expectations as to privacy may be significant though not necessarily a conclusive factor. In Foka at paragraph [85] where the applicant was subjected to a forced search of her bag by Border guards the court held that any search effected by authorities on a person interferes with his or her private life."

The court went on state:

> "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 takes place 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 certain information which the owner may feel uncomfortable about having exposed to the view of his companions or the wider public."

[59] Once an interference with article 8.1 has been established the court must then consider whether the breach can be justified under article 8.2. As in the case of section 21, the quality of law test must be satisfied. We have set out at some length above the considerations which apply in determining the nature of the relevant quality of law concerned. Since adequate safeguards to prevent the arbitrary exercise of the power under section 24 and Schedule 3 paragraph 4 had not been put in place, the power contained therein was not properly exercisable.

[60] Insofar as the appellants sought to argue that the power could never have been validly exercised in the absence of a reasonable suspicion that the appellants had munitions or wireless equipment unlawfully with them, we must reject that narrow argument. The terms of any code made under section 34 were not bound to exclude the possibility of requiring or permitting searches to be carried out on some basis other than the presence of reasonable suspicion of unlawful conduct by the party stopped and searched. To take but one simple example, if intelligence indicated to the police that terrorists were transporting a bomb travelling in the direction of a given town centre in a red Ford vehicle, the stopping by the police of red Ford vehicles in the vicinity of the town, even in the absence of individual suspicions in relation to an individual driver, could properly be considered as justifiable and as a necessary and proportionate response to the risk of mass death and destruction. No reasonable law abiding and humane citizen could properly object to a relatively minor invasion of his privacy to help prevent a potential atrocity which could result in death or destruction. The new amended legislation represents the current legislative choice as to the applicable basis to stop and search. That legislation is not the legislation under consideration in the present case.

[61] The power to stop and search an individual need not give rise to an interference with the article 5 rights of the individual. As already pointed out, it will be a question dependent on the facts and circumstances of a particular case. In the context of a challenge to the lawfulness of the exercise of a stop and search power under section 60 of the Criminal Justice and Public Order Act 1994 in R (Roberts) v Metropolitan Police Commissioner [2012] EWHC 1977 Moses LJ at paragraph [11] stated:

> "The first question is whether the search in the instant case amounted to a deprivation of liberty. Resolution of this question depends upon all the facts and circumstances of the particular case: the type of search, its duration, the manner in which it was conducted and its effect (see eg HL v United Kingdom [2004] 40 EHRR 761

> paragraph 89 cited by Lord Bingham in Gillan & Quinton [25]). Mr Gillan was stopped pursuant to powers conferred by section 44 of the Terrorism Act 2000 whilst riding his bicycle and he and his rucksack were searched; the search lasted about 20 minutes. Miss Quinton was searched for about 5 minutes, said the police, but she estimated it lasted for 30 minutes. Lord Bingham described the procedure as usually being `relatively brief'. Usually the person would not be arrested handcuffed, confined or removed he concluded:-
>
> > `I do not think in the absence of special circumstances such a person (a person searched under sections 44 and 45 of the Terrorism Act 2000) 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 kept from proceeding or kept waiting. There is no deprivation of liberty.'

[62] Moses LJ at paragraph 12 of his judgment referred to what the Grand Chamber in the European Court of Human Rights stated in Austin & Ors v UK (39692-09):

> "As mentioned above, Article 5.1 is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol 4. In order to determine whether someone has been `deprived of his liberty' within the meaning of Article 5.1, 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 liberty and restriction on movement is one of degree or intensity, and not of nature or substance."

Moses LJ considered that, accordingly, the doubts expressed in the decision in Gillan v UK [2010] 50 EHRR 45 as to whether a stop and search not exceeding 30 minutes indicated a deprivation of liberty within the meaning of article 5.1 have, to a large extent, been allayed by the subsequent decision of the Grand Chamber in Austin.

[63] The questions whether on the facts of the present case the stopping of the appellants, the carrying out of the search in question and the interference with the notebook and handbag of Miss McNulty (none of which had a proper legal basis for the reasons we have given,) constituted circumstances giving rise to a compensatable

private law cause of action is not a matter suitable to be determined in the present judicial review proceedings. In the Roberts case the applicant alleged that the questioning and searching to which she was subjected was discriminatory on the grounds of race. This, she claimed, entitled her to claim for a breach of article 14 read with article 8. The court concluded that the judicial review proceedings were not an appropriate means of resolving the issue and that they should not be resolved in those proceedings. We have already noted in paragraph [19] the factual dispute between the parties. In view of the conflicting evidence as to the precise circumstances of the purported exercise of the stop and search power in the present case, by parity of reasoning with Roberts, we conclude that this aspect of the proceedings gives rise to a dispute which is not suitable for determination in the present proceedings and the appellants' remedies lie in a different forum.

[64] In view of the conclusions we have reached, the appellants' claims arising out of an alleged failure by the police to give an undertaking not to exercise the stop and search power against them in the future is no longer relevant. This applies also to the claims relating to a failure to give proper reasons for carrying out the stop and search.

Disposal of Appeals

[65] For the reasons set out in this judgment we allow the appeal and we will hear counsel on the question of the proper relief and on the question of costs.