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Judgment: approved by the Court for handing down | *Delivered:* **31/10/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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JR1's Application [2008] NIQB 125

AN APPLICATION FOR JUDICIAL REVIEW
BY JR1 BY HER MOTHER AND NEXT FRIEND

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INTERIM RELIEF APPLICATION

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MORGAN J

The introduction of tasers

[1] A taser is a device which can be used to point and fire at an individual. When the taser is pointed preparatory to the discharge of the cartridge a red laser sight dot appears on the target. When the cartridge is discharged it releases a barbed dart attached to the main device by insulated wires. The dart attaches to the target and an electrical current is transmitted from the main device through the wires and into the body of the target thereby incapacitating them. It appears that the device has an operational maximum range of 35 feet although the PSNI guidance recommends its use within 21 feet of the target.

[2] Tasers have been available to police forces in Great Britain since 2003 and are also used by An Garda Siochana. It is contended that they are a further less lethal option for deployment at incidents which merit the deployment of firearms by officers. In December 2005 Her Majesty's Inspectorate of Constabulary recommended that the PSNI examine the acquisition of tasers for this purpose. In August 2007 it was decided that an Equality Impact Assessment should be conducted in respect of their deployment and a pilot of tasers implemented in tandem. Throughout this process the PSNI has consulted its human rights advisers and in January 2008 the pilot scheme commenced. The consultation period for the Equality Impact Assessment ended in April 2008 and a draft final report became

available at the end of September 2008. On 2 October 2008 the Northern Ireland Policing Board agreed by majority view to support the Chief Constable's proposal to introduce tasers and the Board recorded in its press statement that its human rights adviser was satisfied the PSNI had now met the legal and human rights framework within which tasers could be used.

[3] On 1 July 2008 the applicant applied for leave to issue judicial review proceedings in respect of the decision of the Chief Constable to introduce tasers for use by the PSNI. That application came before me on 12 September 2008 and leave was granted on the basis that this was an application of considerable public importance where public concern had been aroused. The respondent did not take issue with that approach. The following grounds are relied upon by the applicant.

> "(a) The Chief Constable erred in introducing tasers for use in circumstances where it had not been established that their use was required as a matter of necessity as an alternative to the use of firearms by police officers.
>
> (b) The Chief Constable erred in introducing tasers for use without a comprehensive review of the data concerning the potentially fatal consequences of the use of the taser, in particular on children, the mentally disordered, pregnant women and those with medical conditions.
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> (c) The Chief Constable erred in introducing tasers for use in the absence of express authorisation by the Northern Ireland Policing Board as required by sections 3 (3) and 6 of the Police (NI) Act 2000.
>
> (d) There decision to introduce taser for use by the the Police Service of Northern Ireland is incompatible with article 2 ECHR and therefore in breach of section 6 of the Human Rights Act 1998.
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> (e) The decision to introduce taser for use by the Police Service of Northern Ireland is incompatible with article 3 ECHR and therefore in breach of section 6 of the Human Rights Act 1998.
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> (f) The decision to introduce taser for use by the Police Service of Northern Ireland is incompatible with article 14 ECHR (in conjunction with articles 2

and 3 ECHR) and therefore in breach of section 6 of the Human Rights Act 1998.

(g) In taking the decision to introduce taser the Chief Constable failed to have due or any regard to the need to promote equality of opportunity in breach of section 75 of the Northern Ireland Act 1998.

(h) The Chief Constable's decision to introduce taser in advance of the completion of the Equality Impact Assessment was irrational in light of the concerns expressed by the Chief Commissioner of the Equality Commission for Northern Ireland.

(i) The Chief Constable's decision to introduce taser in advance of the completion of the Equality Impact Assessment and the full approval of the Policing Board's Human Rights Advisers was irrational in light of the concerns expressed by the Northern Ireland Policing Board.

(j) The Chief Constable's decision was unfair, unreasonable and unlawful."

The submissions of the parties

[4] In support of this application for interim relief Miss Doherty BL for the applicant relies firstly on the paucity of medical evidence as to the weapon's effects on certain vulnerable groups. She referred to exhibited materials from Canada and the United States of America which suggested that tasers had been responsible for or contributed to deaths in those jurisdictions and she relied upon the Amnesty International response to the Policing Board consultation on the introduction of tasers which also drew attention to those risks. She also relied upon the Police Service of Northern Ireland Guidelines on the Operational Use of Taser issued on 21 January 2008 which set out the risks to health from the use of tasers in the following terms at paragraph 4.6.

"Medical evidence indicates that certain categories of persons may be at heightened risk from negative health effects resulting from taser. While there is no definitive list of such categories, pregnant women, juveniles and children, persons of low body weight, persons under the influence of certain illegal drugs (including amphetamines and cocaine), persons suffering from mental illness and persons with pre-existing heart conditions are generally considered to

> be more vulnerable to serious medical consequences as a result of taser use. Current guidance relating to taser states that: "until more research is undertaken to clarify the vulnerability of children to taser currents, children and persons of small stature should be considered at possibly greater risk than adults and this should be stated in the Guidance and training modules."

[5] Secondly the applicant drew attention to international concern about the use of tasers. Although not directly relevant to the United Kingdom the Committee against Torture in its report on 19 February 2008 of its meetings in Portugal expressed deep concern about the recent purchase by that state of taser weapons and recommended that the state should consider relinquishing the use of such weapons. Further in its report dated 3 October 2008 the Committee on the Rights of the Child expressed its concern at the authorisation of taser guns for police officers in England and Wales and in Northern Ireland as a pilot project in circumstances where they can be used on children. It recommended that the state should treat taser guns as weapons subject to the applicable rules and restrictions and put an end to the use of all harmful devices on children.

[6] The third principle limb of the submissions made on behalf of the applicant rests on the fact that the pilot scheme has been introduced while the EQIA is still being conducted. The Equality Commission for Northern Ireland, which was established pursuant to section 73 of the Northern Ireland Act 1998, has consistently advised the Chief Constable that the issue of taser units to any officer would be inappropriate until the EQIA has been completed and its conclusions taken into account. If this advice, which was given in accordance with its statutory duty under schedule 9 of the Northern Ireland Act 1998 to advise public authorities on their obligations under s. 75 of the 1998 Act, had been acted upon the taser would not now be available to PSNI.

[7] For the respondent Mr McMillen BL noted that tasers had been introduced in Great Britain since April 2003 but no fatalities had been attributed to their use since then. He submitted that the comparison with the United States and Canada was not accepted because of the stringent training and instructions in place in the United Kingdom.

8. He further submitted that the threshold test for the use of tasers by PSNI officers is that "the use of taser will be justified where the officer honestly and reasonably believes that it is necessary in order to prevent a risk of death or serious injury." The reason for the introduction of tasers is to provide a non-lethal alternative to the use of deadly firearms. The respondent submits that

use in those circumstances is designed to protect life and consequently cannot be a breach of either articles 2 or 3 of the ECHR.

Interim relief in public law proceedings

[9] It is common case that the court has power to order interim relief in these proceedings. Section 19 of the Judicature (Northern Ireland) Act 1978 provides a general power.

> "19. On an application for judicial review, the High Court may grant a stay of proceedings or of enforcement of an order or may grant such interim relief as it considers appropriate pending final determination of the application."

Order 53 Rule 3(13) of the Rules of the Supreme Court (Northern Ireland) provides for the exercise of power in certain circumstances.

> "(13) Where leave to apply for judicial review is granted, then (without prejudice to the generality of section 19 of the Act)-
>
> (a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;
>
> (b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ."

Whatever the reach of Order 53 Rule 3(13) it is clear that the remedy sought can be provided pursuant to s.19 of the 1978 Act

[10] The principles on which the court acts in determining whether or not to grant interim relief are reasonably well-established. The starting point is to examine whether there is an arguable case for granting judicial review. I accept that there are well-documented health concerns in relation to the use of tasers on children, pregnant women, certain people with disabilities and black and minority ethnic groups as now identified in the draft EQIA. The respondents rely on the absence of any fatal injuries attributable to a taser since 2003, the rigorous training which users must undergo and the prescribed circumstances in which the taser can be used. Taking into account the statements made by the Committee against Torture and the Committee on the Rights of the Child I consider that the applicant has demonstrated an

arguable case in this application at least in relation to the section 75 ground and the decision to proceed in advance of the EQIA.

[11] Both parties recognise that this is not a case in which damages could be an adequate remedy and that the issue for the court is then where the balance of convenience lies. The approach that the court should adopt is found in Re Eurostock Meat Marketing Limited's Application [1998] NI 13. In that case the appellant was an importer of Ox heads from the Republic of Ireland. The UK government had introduced a measure to ban the importation of such heads in animals more than 12 months old. The appellant successfully argued at first instance that the ban was contrary to European law governing the free movement of goods and the relevant Order was quashed. On appeal a number of matters were referred to the European Court of Justice and in those circumstances the respondent sought a stay of the judge's Order. Carswell LCJ set out the approach of the court.

> "The court has to decide where the balance of convenience lies. Unlike the proof of a material fact, where the onus probandi rests upon the proponent, this is the application of a criterion to the established facts. Each party attempts to persuade the court that the balance comes down on its side, and the court has to make a decision. There is not an onus of proof in the proper sense on either side, but if the court concludes that the matter is evenly balanced then the issue may arise where the matter should rest. This is ordinarily not difficult to determine, since the party which has applied to the court for an injunction will have failed to make out his case."

The appellant successfully resisted the stay on the basis that it had already a judgment in its favour and was likely to be put out of business before a full hearing if the stay was granted.

[12] The appropriate principles were also considered by the Privy Council in Belize Alliance of Conservation Non-Governmental Organisations v Dept of the Environment of Belize [2003] UKPC 63. That was a case in which the Department decided to carry out works in connection with a power generation project in an environmentally sensitive area. The applicants for judicial review contended that the decision had been made without proper consultation in accordance with the relevant Regulations. They lost in the Court of Appeal but sought an injunction from the Privy Council pending the hearing of the appeal some four months later. The Privy Council relied in particular on the observations of Lord Goff in R v Secretary of State for Transport, Ex p Factortame Ltd [1991] AC 603 at 674.

> "I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of a law must-to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law-show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken."

That case was different from this in that there was the potential of substantial commercial loss to the company which had been engaged to carry out the project and the appellant was not in a position to provide a cross undertaking in damages. Although it was accepted that the appellant's case was arguable and that the matter was of great public concern the application for the injunction did not succeed.

Conclusion

[13] In the course of the pilot scheme it appears that tasers have been deployed on four occasions. On three of those occasions the weapon was targeted and a total of 11 laser red sight dots were recorded. Fortunately it appears that no further action was necessary. On one occasion the taser was fired. The circumstances are disputed and I cannot resolve them in this application. The applicants rely on this to demonstrate that a decision to grant relief is not likely to significantly interfere with operational actions. They also rely on material suggesting that there are now very limited occasions requiring the use of lethal force. On the other hand if this allegedly non-lethal option is withdrawn it will be necessary for the respondent to reassess how it should deploy its resources between lethal and non-lethal options in the

period between now and trial in January 2009 in the areas covered by the interim scheme. I consider that the arguments are finely balanced on this issue.

[14] Tasers had been deployed under the pilot scheme for approximately 8 months before this interim relief application was made. They are apparently provided only to trained personnel in relation to planned operations. Although a taser was carried on duty on 562 occasions it was only deployed on the four occasions referred to above and discharged on only one occasion. I have now listed the matter for a full hearing on 13 January 2009 so that there will be an early resolution of the substantive application. In my view the fact that the interim scheme has been in operation for so long without challenge and that operational arrangements been made by way of training and deployment on foot of that strongly supports the argument that the status quo should be preserved. That outcome is also supported by the fact that there will be a trial of the substantive issues within three months.

[15] I recognise that where public interest matters are involved it is necessary to look at the balance of convenience more widely (see Smith v Inner London Education Authority [1978] 1 All ER 411). In particular I pay close regard to the fact that the risks at issue relate to the right to life and freedom from torture. At this stage the parties make competing arguments in relation to these matters and I do not consider that I can form a view at this stage which strongly favours one party or the other.

[16] I can see considerable substance in the arguments advanced by the applicant in relation to the obligation to have due regard to the interests protected by section 75 of the Northern Ireland Act 1998. The advice from the Equality Commission was that the need for an EQIA was just as important in relation to the pilot project as it was to the project as a whole. That point may be of considerable substance on the final hearing and the applicant makes the point that if the advice had been acted upon the taser would not have been deployed. Attractive though that argument may be I have to recognise that the respondent has now carried out such an assessment and the draft final report was provided to me in the course of the hearing. It has been the subject of some consideration by the respondent and the issues at the trial will include whether the assessment is sufficient and whether the consideration complies with the statutory requirement. In those circumstances I do not consider that this issue should cause me to depart from the maintenance of the status quo.

[17] Accordingly I refuse the application for interim relief.