Neutral Citation No. [2014] NIQB 62

Ref: **TRE9268**

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

Delivered: **09/05/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McAreavy's (Emmet) Application [2014] NIQB 62

AN APPLICATION BY EMMET McAREAVY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN ONGOING DECISION TAKEN BY THE POLICE SERVICE OF NORTHERN IRELAND

AND

A DECISION BY THE SECRETARY OF STATE FOR NORTHERN IRELAND

TREACY J

Introduction

[1] This is a challenge to a number of determinations by both the first and second-named respondents, namely:

(a) A challenge to the ongoing decision by the first respondent that the applicant will not be supplied with immediate written documentary evidence following the use of stop and search powers under the Justice and Security (NI) Act 2007 ("JSA 2007") but will need to attend in person at an operational police station to obtain a record of the search.

(b) A challenge to the purported adherence by the first respondent to a draft Code of Practice under JSA 2007 until 15 May 2013 and the failure by the second proposed respondent to implement a Code of Practice.

(c) A challenge to the failure by the first respondent to apply properly or at all paragraph 8.78 of the draft code.

(d) A challenge to the first respondent's purported adherence to a Code of Practice under JSA 2007 since 15 May 2013 in the absence of proper or full consultation.

(e) A challenge to the failure of the second respondent to consult adequately or at all on the Code of Practice and in particular on paragraph 8.78 and the changes from the draft code made thereto in breach of section 34 JSA 2007.

(f) A challenge to the implementation by the second respondent of the Code of Practice from 15 May 2013

Relief Sought

[2] The applicant seeks the following relief:

Against the PSNI

(a) An order of certiorari to quash the ongoing decision of the first respondent that the applicant will not be supplied with immediate written evidence when he is stopped and searched.

(b) A declaration that the current scheme for the provision of a written record of a 'stop' under section 21 or section 24 of the JSA 2007 is incompatible with Article 8 ECHR.

(c) An order of mandamus compelling the first respondent to supply the applicant with immediate written proof after each and every incident

(d) A declaration that the first respondent's use of a draft code until 15 May 2013 breached the applicant's rights under Articles 5 and 8 ECHR, contrary to Section 6 of the Human Rights Act 1998.

(e) A declaration that the first respondent failed to properly interpret and apply paragraph 8.78 of the draft code when purporting to follow same.

Against the Secretary of State

(f) An order of certiorari to quash the decision of the second respondent to issue the Code of Practice on 15 May 2013 in the absence of any or adequate consultation thereon.

(g) An order of mandamus compelling the second respondent to properly consult on a Code of Practice and thereafter consider amendment. In the interim, use of the said Code should be suspended.

(h) A declaration that the above decisions are unlawful, *ultra vires* and of no force or effect.

(i) A declaration that the second respondent has not consulted adequately or at all on the Code of Practice or the draft, contrary to section34 JSA 2007, in respect of paragraph 8.78 in particular.

Grounds upon which Relief is Sought

[3] The relief is sought on the following grounds:

Against the PSNI

(a) The first respondent failed to take into account adequately or at all a number of relevant considerations including paragraph 8.78 of the draft code.

(b) The first respondent breached the applicant's legitimate expectation that he would be provided with immediate written evidence following the use of stop and search powers against him.

(c) The first respondent breached the Rules of Natural Justice and acted contrary to law in failing to provide immediate written proof to the applicant.

(d) The first respondent was under a legal obligation to give the applicant immediate written recorded proof of each stop and search.

(e) The first respondent has acted in a manner which is unfair and procedurally improper.

(f) The first respondent has breached the applicant's rights under Article 5 and Article 8 ECHR contrary to section 6 of the Human Rights Act 1998.

(g) The ongoing decision fails to take into account the concerns expressed by the NIHRC, CAJ, IPCC, Justice, Liberty, the Joint Committee on Human Rights and other concerned organisations in this arena.

Against the Secretary of State

(a) The second respondent has failed to consult properly or at all on the Code of Practice implemented on 15 May 2013, in particular in relation to paragraph 8.78 of the draft code published by the second respondent in breach of section 34 JSA 2007.

(b) The second respondent has failed to take into account adequately or at all these ongoing legal proceedings in considering changes to paragraph 8.78 and breached the applicant's legitimate expectation that any changes would be properly consulted upon.

(c) The second respondent has breached the Rules of Natural Justice and acted procedurally unfairly, *ultra vires* and in error of law.

(d) The second respondent has breached the applicant's rights under Article 5 and Article 8 ECHR contrary to section 6 of the Human Rights Act 1998.

Factual Background / Sequence of Events

[4] The applicant has been regularly subjected to the exercise of several stop and search powers. Until approximately January 2012 he was provided with a written docket after each incident, confirming the power exercised. However, since then he has not been provided with any record, except on some occasions a partly completed information card. Generally, the PSNI officers have purported to record the details on a Blackberry mobile device and no copy of the entry has ever been given to him.

[5] In November 2012 the applicant sent the first pre-action letter in these proceedings.

[6] On 5 December 2012 a 12 week public consultation on the draft code of practice began. The draft code of practice included, at paragraph 8.78, a provision whereby an officer conducting a search must provide a copy of the record via a portable printer if he had access to same.

[7] On 9 May 2013 the decision in Re Canning, Fox & McNulty [2013] NICA 19 was delivered by the Court of Appeal in which it was decided, *inter alia*, that the section 21 power could not be exercised in an Article 8 compliant manner without a valid and effective code of practice ensuring same.

[8] On 15 May 2013 the Code of Practice (with an amended paragraph 8.78) was brought into force using the urgent procedure. The amended paragraph 8.78 removed the reference to providing a copy of the record via a portable printer and left only the second part of that paragraph, whereby an officer should provide a unique reference number and guidance on how to obtain a full copy of the record.

Statutory Framework

[9] Section 21 of the JSA 2007 states as follows:

> "(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.
>
> (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)."

[10] Section 24 of the JSA 2007 states:

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

[11] Paragraph 4 of Schedule 3 states as follows:

"4.(1) An Officer may –

(a) Stop a person in a public place.

(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.

(3) A member of Her Majesty's forces may search a person entering or found in a dwelling entered under paragraph 2."

[12] Section 34 of the JSA 2007 states:

"The Secretary of State may make codes of practice in connection with –

(a) The exercise by police officers of a power conferred by this Act, and

(b) The seizure and retention of property found by police officers when exercising powers of search conferred by this Act.

The Secretary of State may make codes of practice in connection with the exercise by members of Her Majesty's forces of a power conferred by this Act.

Where the Secretary of State proposes to issue a code of practice he shall –

(a) Publish a draft.

(b) Consider any representations made to him about the draft.

(c) If he thinks it appropriate, modify the draft in the light of any representations made to him.

The Secretary of State shall lay a draft of the code before Parliament.

When the Secretary of State has laid a draft code before Parliament he may bring it into operation by order made by statutory instrument.

The Secretary of State may revise the whole or any part of a code of practice issued by him and issue the code as revised subsections (3) to (5) shall apply to such a revised code as they apply to an original code."

[13] Section 37 of the JSA 2007 states:

"The Chief Constable of the Police Service of Northern Ireland shall make arrangement for securing that a record is made of each exercise by a constable of a power under sections 21 to 26 in so far as –

(a) It is reasonably practicable to do so.

(b) A record is not required to be made under another enactment."

[14] Article 8 ECHR states:

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

[15] Paragraph 8.73 of the Draft Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007 states:

> "A record must be made of every stop and search. An officer who is present at a search should ensure that a record is made at the time unless it is impractical to do so. The person should be informed that a full record will be available, how it can be accessed and that it can be requested within 12 months of the search."

[16] Paragraph 8.78 of the Draft Code states:

> "When an officer makes a record of the stop electronically and if the officer is able to provide a copy of the record at the time of the stop and search, he or she must do so. This means that if the officer has or has access to a portable printer for use with the electronic recording equipment, then a copy of the record must be provided. Otherwise a unique reference number and guidance on how to obtain a full copy of the record should be provided to the person searched."

[17] Paragraph 8.78 of the Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007 states:

> "A record of the stop will be made electronically by the officer. A unique reference number and guidance on how to obtain a full copy of the record must be provided to the person searched. If for any reason an electronic record cannot be made or a unique reference number cannot be provided at

the time, guidance must still be given to the person searched."

Arguments

Applicant's Arguments

[18] Stop and search powers must be used sparingly and their use should be carefully monitored. The provision of documented evidence of the fact and detail of a stop and search is a fundamental safeguard to a detainee. A requirement to provide it operates as a reminder to a police officer that there must be a good reason for exercising the power and it guarantees the provision of that reason to the person stopped and searched at the time of the event: as such, it operates as an important curb on the exercise of the power. Since the provision of the form is contemporaneous, it can be checked on the spot for accuracy. It can be retained conveniently as a record by that detainee and as available proof if required at a later stage. For those who are vulnerable or challenged in any way, they have proof without further inquiry or onus on them to acquire it.

[19] Sections 21 and 24 of the JSA 2007 confer an extremely wide discretion on police officers to interfere with the privacy of individuals without creating any or sufficient safeguards against arbitrary use of the power. In order to be Article 8 compliant the law must afford a measure of legal protection against arbitrary interferences by public authorities. The powers under section 21 and section 24 of the JSA 2007 are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.

[20] It was held previously by the Court of Appeal that until appropriate safeguards were designed to govern and control the exercise of section 21 powers, likely by means of a Code of Conduct developed by the Secretary of State under section 34 of the JSA 2007, there was no convention compliant means by which the section 21 powers could be exercised. The applicant argued that the Code of Conduct now developed is insufficient to comply with the requirements of Article 8.

[21] The applicant submitted that all exercises of section 21 and section 24 powers, while there was only a draft code in existence, (ie until 15 May 2013) were illegal and that resource issues (in relation to the provision of portable printers) do not excuse the failure to provide an Article 8 compliant procedure.

[22] The applicant argues that the object of the consultation exercise required by section 34 is to permit interested parties to make representations on the proposals in the draft code and to oblige the Secretary of State to take those representations into account. In the instant case the applicant submits that the manner in which the consultation

exercise was carried out subverted that purpose in that paragraph 8.78, mandating an officer to provide the detainee with a copy record at the time of the stop and search, was erased *after* the consultation process had been completed meaning that interested parties were deprived of the opportunity to make representations on the wholly different provision that actually appeared in the final code. The applicant submits that the new provision was the result, not of a genuine consultation process but of an exchange of views between the two respondents, and that ultimately there was literally no opportunity for those affected by the section to comment upon it. The applicant submits that this was in breach of the Sedley Principles.

Respondent's Arguments

[23] The first respondent contended that the draft JSA Code of Practice did not, on a proper analysis, impose any requirement on police to provide for contemporaneously printed records to be provided to a subject at the time of a stop and search. If the court agrees with this contention then it follows, says the second respondent, that the related changes made to the draft JSA Code when introduced in its final version would not fall foul of any consultation duty, because there was no material change to the contents of the Code when properly construed. The first respondent denies that it failed to follow its draft Code of Practice.

[24] The first respondent argues that section 37 of the JSA 2007 is the primary legislation that relates to the obligations on the PSNI in relation to records under the JSA. The respondent notes that section 37 is silent on the issues of:

(i) whether a record must be provided to the subject; and

(ii) the format of that record.

[25] The PSNI submit that the applicant has misinterpreted what was required by paragraph 8.78 of the Code and does not accept that the draft Code contained any explicit or implicit requirement to provide for access to portable printers as standard practice in connection with the recording of stop and search details by way of electronic devices.

[26] The PSNI considers that the draft provisions must be considered in the context of the entire section of the draft Code that deals with stop and search records. In particular, the PSNI considers that it is evident from paragraph 8.73 that not only is it not required that a hard copy record must be provided to the detainee, but it is also expressly indicated that this would not be standard practice as it notes that any such person must be informed that a full record will be available and as to how it can be accessed and the time limit for doing so.

[27] The PSNI further submits that the wording of paragraph 8.78 that *'if the officer has access to a portable printer for use with the electronic recording equipment, then a copy of the record must be provided'* does not impose any requirement on the respondent to provide for such access. As such any failure on the part of the respondent to provide such access is not unlawful or otherwise in breach of the Code nor does it undermine this particular provision because the code, when properly construed, does not start from the premise that a written record should be provided at the time of stop and search. As noted above, the draft Code starts from the assumption that there is no such requirement.

[28] The first respondent submits that this interpretation of the text of the draft Code has now been confirmed as correct in so far as the intention of the drafting authority has now been made abundantly clear by the amendment made to paragraph 8.78 in the final version of the Code.

[29] The first respondent submits that the draft Code did not mandate the use of portable printers nor did it mandate the provision of a contemporaneous written record nor did it include the provision of a Unique Reference Number (URN) as a fall back provision only. As such this scenario is not analogous to Re James Martin's Application (2012) NIQB 89 as it is not a case where the respondent accepts that it was in breach of some requirement but pleaded lack of resources as a defence to that breach.

[30] The first respondent argues that the applicant did not have any entitlement under the draft JSA Code to be supplied with immediate written documentary evidence following the use of stop and search powers under the JSA.

[31] The first respondent argues that it did adhere to the JSA Code until replaced. That change did not in fact make any material difference to police obligations under the Code regarding an alleged requirement to provide contemporaneous written dockets at the time of stop and search. Such a requirement did not exist under the draft Code and does not now exist under the current Code.

[32] The first respondent argues that the applicant has failed to adduce any or sufficient evidence to demonstrate that any of the stop and searches conducted within the relevant period would engage Article 5. The first respondent further submits that the applicant has not provided adequate evidence to support a claim of deprivation of liberty in this case. The respondent submits that it did not stray beyond merely stopping and questioning the applicant. The respondent further submits that the applicant has not adequately articulated how – even if it was engaged – Article 5 would be breached by a failure to provide a written record at the time of a stop and search.

[33] The first respondent argues that no adequate evidence has been adduced to demonstrate how the applicant's Article 8 rights have been breached. Both the first and second respondents submit that Article 8 does not impose any requirement to provide the applicant with a contemporaneous written record of a stop and search.

[34] In relation to the applicant's contention that the respondent failed to take into account the concerns of various interested parties, the respondent submits that the legal basis for any obligation for the same is not adequately stated.

[35] The respondent argues that the applicant has failed to point to any legal obligation that requires the respondent to provide contemporaneous written records of stop and search.

[36] The respondent submits that the applicant's submissions in relation to the duty to consult are misconceived, as they are predicated on the assumption that the amendments made to the final version of the Code effectively removed an essential safeguard in the stop and search process. The respondent argues that this assumption is incorrect because the draft Code did not actually contain any such requirement.

[37] The second respondent submits that the proper approach to the issue of further consultation is to be found in Smith [2002] EWHC 2640 (Admin), that is, that such a duty only exists if there is a fundamental change in the proposal. As such the second respondent argues that there was no duty to re-consult either at common law or by section 34 of the JSA.

Discussion

Pre 15 May 2013

[38] It was made clear in Re Canning, Fox and McNulty (2013) NICA 19 at paragraph [50] 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'*. Prior to 14 May 2013 no such code had been validly brought into operation.

Duty to Consult

[39] The respondents argue that the duty to re-consult will arise where the *'fundamental change is a change of such a kind that it would be conspicuously unfair for the decision-maker to proceed without having given consultees a further opportunity to make representations about the proposals as so changed'* Elphinstone [2008] EWHC 1287 (Admin). This is accepted.

[40] Given that one of the major purposes of the drafting of the Code of Practice was to ensure that the use of section 21 and ection 24 powers was convention compliant, the nature and extent of provisions intended to accord essential safeguards to those affected by the powers were some of the most fundamental provisions to be consulted upon. Whatever the subjective intention of the two respondents in putting together the draft Code, objectively and from the perspective of interested parties, the provision of on the spot written evidence went to the level of safeguards attending the various powers and was therefore fundamental. Truncating the nature and extent of the safeguards in the Code was clearly a fundamental change and one which in the interests of fairness needed to be consulted upon.

[41] While the draft Code did not impose an absolute requirement to provide a contemporaneous written record of the search, it did impose an absolute requirement to do so where the officer *'has or has access to a portable printer for use with the electronic recording equipment'*. Further, it seems to read that if this is not possible, *then* a unique reference number and guidance on how to obtain a full copy of the record should be provided. It does, therefore, seem from a plain reading of the draft Code that the provision of a contemporaneous record was to take precedence over the provision of a URN in circumstances where it was possible to do so. Given this apparent preference in the Code for a contemporaneous written record it could only have appeared to consultees as a fundamental safeguard to be generally applied and the provision of the printers would have been assumed to have been part of this safeguard.

[42] In relation to the respondent's contention that paragraph 8.73 of the Code evidences that the provision of a contemporaneous written record was not intended to be standard practice, this is not accepted. Paragraph 8.73 deals with the basic requirement to make a record of every stop and search. An officer is required to inform the person searched *'that a full record will be available, how it can be accessed and that it can be requested within 12 months of the search'*. Paragraph 8.78 then adds a separate duty to provide a written record or URN. Paragraph 8.73 is to ensure that a record is kept, and that the person searched is informed of how this record of personal information is stored and how it can be accessed. Paragraph 8.78 goes further than this to ensure that the person searched is given something detailing the search for their records. Paragraph 8.78 builds on the duty at paragraph 8.73 in that it assumes that the record is made and then directs the officers as to their further duty to the person searched.

Post 15 May 2013

[43] For the reasons given above the failure to re-consult in respect of fundamental changes to the final Code was unlawful.

Conclusion

[44] I will hear the parties as to the appropriate relief.