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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

AN APPLICATION BY SEAN McVEIGH FOR JUDICIAL REVIEW (No. 2)

Before: Gillen LJ, Weatherup LJ and Weir LJ

WEATHERUP LJ (delivering the judgment of the court)

[1] This is an application for Judicial Review of a decision of a Lay Magistrate on 1 November 2012 pursuant to Schedule 5 paragraph 1(2) of the Terrorism Act 2000 to issue a search warrant in relation to the applicant's home and of the decision of the Police Service of Northern Ireland ("PSNI") to apply for that search warrant and further to search the applicant's home on 2 November 2012 and seize and retain the applicant's property. Mr MacDonald SC QC and Mr McGowan appeared for the applicant, Mr Coll QC for the Lay Magistrate and Mr McGleenan QC and Mr McLaughlin for the PSNI and the Secretary of State.

[2] The applicant seeks a Declaration of Incompatibility that Schedule 5 paragraph 1 of the Terrorism Act 2000 is incompatible with the European Convention on Human Rights in relation to the right to respect for private life and home under Article 8, the right to property under Article 1 of Protocol 1 and the right to a fair trial under Article 6. The Secretary of State is represented in response to the Notice of Incompatibility.

[3] At approximately 7.30am on 1 November 2012 Prison Officer [PO] David Black was shot dead while travelling to work in his car on the M1 motorway. Witnesses indicated that a vehicle with a Republic of Ireland number plate had pulled alongside PO Black and discharged shots into the vehicle being driven by PO Black. Later that morning the Fire Brigade were called to Inglewood in Lurgan, a housing estate close to the Kilwilkie housing estate, where a vehicle with a Republic of Ireland number plate was on fire. This vehicle was later established to have been used by the perpetrators of the murder of PO Black.

[4] The applicant's grounding affidavit states that around 00.30 on 2 November 2012 he was arrested at his home in Lurgan under section 41 of the Terrorism Act 2000 in relation to the murder of PO Black and membership of the IRA and taken to Antrim Crime Suite. The applicant lived at the property with his mother who remained at the property while police executed a search warrant and seized a number of items that included footwear, clothes, mobile phones and a Vauxhall Astra motor car.

[5] An application for extended detention of the applicant under Schedule 8 to the Terrorism Act 2000 was refused by Her Honour Judge Loughran and the applicant was released on 4 November 2012.

[6] Detective Inspector John Caldwell was the intelligence manager in the investigation into the murder of PO Black. At 11.10 am investigating officers received a briefing from Detective Superintendent Agnew about the murder of PO Black and the burning of the motor vehicle at Inglewood estate. At 11.27am DI Caldwell received a further briefing from DS Agnew on information regarding possible suspects, being the applicant and another person I shall refer to as L. At 12.46pm DI Caldwell attended a briefing by a PSNI intelligence officer about the structures of the new IRA and its leadership. At 1.00 pm the intelligence officer advised of intelligence indicating that L had been involved in suspicious activity in the Republic of Ireland the previous night which may have involved the movement of a vehicle.

[7] DI Caldwell then received intelligence reports relevant to the applicant and a further suspect I shall refer to as D. At 8.30 pm DS Agnew called a meeting of senior investigators and at 8.55 pm he decided that the applicant and L and D should be arrested in connection with the murder of PO Black and that applications should be made for search warrants for each of their houses. The material sought included firearms, masks, gloves, male footwear, mobile phones, sim cards and phone documents, dissident republican paraphernalia, computers and gaming machines, unwashed male clothing, vehicle keys and documents and number plates.

[8] DI Caldwell briefed Detective Constable Cross for the purposes of the arrest of the applicant and Detective Constable Crothers for the purposes of applications for search warrants in respect of the homes of the applicant and L and D. DI Caldwell briefed DC Crothers on the intelligence information and DC Crothers made a notebook entry on the briefing. DC Crothers then made an application for a search warrant for the applicant's home to a Lay Magistrate, who granted the application and issued the warrant that was subsequently executed at the applicant's home in the early hours of 2 November 2012.

[9] The applicant contends that the intelligence information concerning the applicant that was presented by DC Crothers to the Lay Magistrate was "inflated" so that the Lay Magistrate issued the search warrant on the basis of inaccurate information so as to render the search warrant invalid. It is necessary to examine more closely the intelligence information available and the information acted on by the Lay Magistrate.

[10] DI Caldwell relied on four intelligence documents, copies of which were exhibited. The first contained a narrative that the applicant and D were seen driving an ROI registered vehicle in the Kilwilkie estate during the night of 31 October 2012 to 1 November 2012. The second document contained the narrative that a Southern registered car was at the back of houses in Kilwilkie on the night of 31 October 2012 with an unknown male driver, that the applicant and D were in Kilwilkie that night and that the applicant and D met the driver of the car and they walked off together. The third document stated that on the evening of 31 October 2012 D and two unidentified males were seen in the vicinity of a vehicle in the Kilwilkie estate and that later that evening one of the two unidentified males was seen in possession of an AK47 style weapon. The fourth document contained the narrative that the applicant was believed to be a member of the new IRA and was a close and trusted associate of D who was believed to be directing the operational activities of the new IRA.

[11] Of note is the record that D was seen in the vicinity of a vehicle in the Kilwilkie estate with two unidentified males and that later that evening one of the two unidentified males was seen in possession of an AK47 style weapon. That particular intelligence document does not state that the applicant was one of the unidentified males nor does it state that anyone was in possession of an AK47 style weapon in the vicinity of the vehicle or in the presence of D or in the presence of the applicant.

[12] DC Crothers' notebook records the briefing by DI Caldwell. In respect of the applicant the notebook records that the applicant was a member of the IRA who had been in Kilwilkie the previous night with D, that D was with two further males, one of whom had an AK47 in a Southern registered car. The notebook entry in respect of D states that information suggested that D was in Kilwilkie with the applicant in a Southern registered car and that there were two unidentified males, one of whom "later" had an AK47 assault rifle.

[13] In his affidavit DC Crothers states that when he attended the Lay Magistrate he was asked to outline the information which police had received. DC Crothers then proceeded to recount to the Lay Magistrate the information which had been provided to him during the briefing by DI Caldwell and he used his notebook as a reference point as he explained the content of the intelligence relied on in respect of each suspect. The same Lay Magistrate issued the search warrant in respect of D.

[14] The Lay Magistrate made a note of his meeting with DC Crothers. The note states that the applicant was suspected of being part of a group of men seen in Kilwilkie area on 31 October in or near a Southern registered vehicle and that one of the group had an AK47. By affidavit the Lay Magistrate states that "for the avoidance of doubt I wish to make it clear that my understanding of the position was that the applicant was believed to have been seen in the company of a person who had the rifle at that time".

[15] Paragraph 1 of Schedule 5 of the Terrorism Act 2000 provides for the issue of search warrants as follows *(italics added)* –

"(1) A constable may apply to a justice of the peace for the issue of a warrant under this paragraph for the purposes of a terrorist investigation.

(2) A warrant under this paragraph shall authorise any constable–

(a) to enter the premises specified in the warrant,

(b) to search the premises and any person found there, and

(c) to seize and retain any relevant material which is found on a search under paragraph (b).

(3) For the purpose of sub-paragraph (2)(c) *material is relevant if the constable has reasonable grounds for believing that–*

(a) it is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation, and

(b) it must be seized in order to prevent it from being concealed, lost, damaged, altered or destroyed.

(4) A warrant under this paragraph shall not authorise–

(a) the seizure and retention of items subject to legal privilege, or

(b) a constable to require a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves.

(5) Subject to paragraph 2, *a justice may grant an application under this paragraph if satisfied–*

(a) that the warrant is sought for the purposes of a terrorist investigation,

(b) that there are reasonable grounds for believing that there is material on premises specified in the application which is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation and which does not consist

of or include excepted material (within the meaning of paragraph 4 below), and

(c) that the issue of a warrant is likely to be necessary in the circumstances of the case."

[16] The applicant's grounds for Judicial Review are:

(a) The PSNI failed to give any or adequate reasons for the decision to seek the warrant.

(b) The Lay Magistrate failed to give any or adequate reasons for the decision to issue the warrant.

(c) The PSNI had insufficient evidence to justify seeking the warrant and, in particular, did not have reasonable grounds to believe that the material sought could be of substantial assistance to that terrorist investigation.

(d) The Lay Magistrate had insufficient cause to grant the warrant and, in particular, did not have reasonable grounds to believe that the material sought could be of substantial assistance to that terrorist investigation.

(e) The decisions to seek the warrant, to issue the warrant, to execute the warrant, to search the applicant's property and to seize and retain the applicant's goods-

(i) were made without lawful grounds and therefore incompatible with Article 8 of the European Convention and constituted a breach of section 6 of the Human Rights Act 1998.

(ii) were made without permitting the applicant the right to challenge the decisions in a Court and therefore incompatible with Article 6 and constituted a breach of section 6.

(iii) were made without lawful grounds and were therefore incompatible with Article 1 of Protocol 1 and constituted a breach of section 6.

(iv) were made unlawfully and in breach of Article 8 and Article 1 of Protocol 1 as in the course of the application for the search warrant the PSNI incorrectly informed the Lay Magistrate that they had information that the applicant had been in the presence of an individual armed with an AK47 weapon on the evening of 31 October 2012.

(f) The decision was unfair, unreasonable and unlawful.

(g) Schedule 5 paragraph 1 of the Terrorism Act 2000 provides for the interference with the applicant's private life, home and property rights but does not contain adequate or effective safeguards against abuse and is consequently incompatible with Article 8 and Article 1 of Protocol 1.

(h) Schedule 5 paragraph 1 of the Terrorism Act 2000 is incompatible with Article 6 insofar as it provides for the interference with the applicant's private life, home and property rights but does not permit the applicant to challenge any such interference in a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

(i) The warrant was obtained by way of bad faith insofar as the PSNI incorrectly informed the Lay Magistrate in the course of the application for the search warrant that they had information that the applicant had been in the presence of an individual armed with an AK47 weapon on the evening of 31 October 2012.

(j) The warrant was issued on the basis of a mistake of fact, namely that the PSNI had information that the applicant had been in the presence of an individual armed with an AK47 weapon on the evening of 31 October 2012.

(k) The application for the search warrant was made unlawfully as an officer of the rank of inspector or above did not authorise Constable Crothers or any other officer to make the application contrary to PACE Code B paragraph 3.4.

The statutory requirements for the search warrant.

[17] One group of the applicant's grounds concerns whether the statutory provisions relating to the issue of the search warrant can be satisfied in the present case. This raises issues about whether there was bad faith on the part of the police in relation to the information provided to the Lay Magistrate, whether, in the absence of bad faith, the information was inaccurate, whether inaccurate information invalidates the search warrant, the significance of the finding of Judge Loughran that the arrest of the applicant was unlawful, whether the application for the search warrant was properly authorised and whether the statutory requirements were met.

[18] In R (G) v Commissioner for the Police of the Metropolis [2011] EWHC 3331 (Admin) Laws LJ set out three important propositions:

> "1. The issue of a search warrant or a warrant for seizure is a very serious interference with the liberty of the subject.

> 2. The officer applying for such a warrant must give full, complete and frank disclosure to the magistrate so as to enable the latter to base his decision on the fullest possible information.
>
> 3. The court itself must give the most mature and careful consideration to all the facts of the case."

Bad Faith

[19] The applicant alleges bad faith on the part of DC Crothers in relaying information to the Lay Magistrate. The content of the intelligence is said to have been 'inflated'. The result of the briefing by DC Crothers was that the Lay Magistrate understood the position to be that the applicant was believed to have been seen in the company of a person who had the rifle at that time. The notebook entries of DC Crothers in relation to the briefing on the applicant and on D illustrate that the information was conveyed to DC Crothers that the presence of a man with a weapon occurred later than the presence of the men at the vehicle. However, while the record in relation to D noted the difference in time between the two events, the record in relation to the applicant conflated the two events. It appears to have been the conflated version that was presented to the Lay Magistrate. The manner in which the information was recorded in the notebook does not suggest an intention to misrepresent the information. As the briefing of the Lay Magistrate by DC Crothers relied on the notebook entry, it is apparent that there would have been a lack of clarity in conveying the information. The Court is unable to conclude that there has been a deliberate inflation of the intelligence information presented to the Lay Magistrate.

Inaccurate information

[20] It is apparent that the information conveyed to the Lay Magistrate and as understood by the Lay Magistrate was not accurate. There was no information that an unidentified male with an AK47 was at or near the vehicle or was present with the applicant or L or D while in possession of the AK47. The Lay Magistrate was led to believe that the applicant was present with a person in possession of an AK47.

The effect of inaccurate information

[21] When the information provided to the Lay Magistrate is inaccurate, it must be determined whether the inaccuracy is material, in other words whether the accurate information would have led to a different outcome. The question for this Court, in Judicial Review proceedings, is whether the information that it is alleged should have been given to the Lay Magistrate might reasonably have led him to refuse to issue the warrant (following Stanley Burnton LJ in R (Dulai) v Chelmsford Magistrates' Court [2013] 1 WLR 220, at para [45]).

[22] An accurate account of the information generated by the intelligence documents would have been:

(i) The applicant was believed to be a member of the new IRA.

(ii) The applicant and D were in a ROI registered vehicle in the Kilwilkie estate the night before the murder.

(iii) The applicant and D met the unknown male driver of a Southern registered car at the back of houses in Kilwilkie the night before the murder and they walked off together.

(iv) D and two unidentified males were seen in the vicinity of a vehicle in the Kilwilkie estate and later that evening one of the two unidentified males was seen in possession of an AK47 style weapon.

[23] Under paragraph 1(5) of Schedule 5 to the Terrorism Act 2000 a Lay Magistrate may grant an application for a search warrant for the purposes of a terrorist investigation where there are reasonable grounds for believing that there is material on premises to which the application relates which is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation and that the issue of a warrant is likely to be necessary in the circumstances of the case.

[24] As police were investigating a terrorist murder involving the use of an ROI registered vehicle and there was intelligence connecting the applicant to a terrorist organisation and to such a vehicle on the evening before the murder and possibly to another person who later was in possession of a weapon, the Court is satisfied that the Lay Magistrate would have had good grounds to issue the search warrant in relation to the applicant. To put the question in terms of whether the information that should have been given to the Lay Magistrate might reasonably have led him to refuse to issue the warrant, we are satisfied that there would have been no such refusal.

The finding of Judge Loughran

[25] The applicant refers to the finding of Judge Loughran in refusing the application for extended detention of the applicant. The application was made to Judge Loughran under paragraph 32 of Schedule 8 to the Terrorism Act 2000. The Judge heard the evidence of Detective Constable Cross, who had arrested the applicant, that he had intelligence about the applicant's membership of the IRA and involvement in the murder but he was unwilling to disclose any element of that intelligence in the presence of the applicant and his lawyers. Counsel for the PSNI asked the Court to sit in closed session pursuant to paragraphs 33 and 34 of Schedule 8 of the Terrorism Act 2000. Judge Loughran acceded to that application. Having heard the evidence in closed session Judge Loughran indicated to the PSNI what she regarded as the minimum disclosure about the intelligence leading to the arrest of the applicant that would be required to vindicate the Convention rights of the

applicant. Counsel for the PSNI responded that they were unwilling to make any disclosure and that the Court should therefore proceed only on the evidence given in open session. The PSNI were unwilling to disclose any element of the intelligence information because of a desire to protect police sources and methodology.

[26] At paragraph 19 of her decision on the application for extended detention Judge Loughran stated in relation to the applicant that "my conclusion is that the absence of any indication whatsoever, other than the bare statement that there is intelligence that he is a member of the IRA and that he was involved in the murder of David Black, does not satisfy the procedural protection envisaged by our court." Accordingly Judge Loughran was not satisfied about the lawfulness of the arrest of the applicant.

[27] The applicant contends that the information used by the PSNI to justify the arrest of the applicant was identical to the information used on the application for the search warrant of the applicant's home and, therefore, as the arrest was found to be unlawful, the search warrant must equally be found to be unlawful. As appears from the affidavit of DI Caldwell, there was indeed common intelligence information used in briefing DC Cross in relation to the arrest of the applicant and in briefing DC Crothers in relation to the application for a search warrant for the applicant's home. However, in the respective court proceedings it is apparent that the same use was not made of that intelligence information. In the proceedings before Judge Loughran the intelligence information was not disclosed in open session. Judge Loughran made her decision only on the basis of the information disclosed in open session. The PSNI had refused to disclose the gist of the intelligence information as required by Judge Loughran. Accordingly, the PSNI were not in a position to justify the arrest of the applicant. However, in the present proceedings that intelligence information has been disclosed to the applicant and to this Court. We are, therefore, in a position to determine whether the issue of the search warrant was justified under the statutory power, albeit a different statutory power to that relating to the arrest and detention of the applicant. The decision of Judge Loughran does not affect the exercise being conducted by this Court.

Authorisation of the application for the search warrant

[28] PACE Code B requires that an application for a search warrant must be authorised by an officer of the PSNI of at least the rank of Inspector. The standard form "Information to Obtain Warrant of Search" states that the information is that of DI Crothers and that he was satisfied as to the statutory grounds for the search warrant based on "information received". On the reverse of the form is reference to the "Authorisation to make application for search warrant" which states "I authorise ……. to apply for a warrant as set out in the attached complaint" and is then signed by Inspector McCullough at 22.15 hours on 1 November 2012. No officer of the PSNI is named as having been authorised to apply for the warrant. The applicant contends that the absence of an entry as to a specified officer is a significant failure in the

protection against arbitrariness. The failure is said to amount to a breach of PACE Code B that renders the search warrant unlawful.

[29] While paragraph 3.4 of the Code provides that an application for a search warrant under PACE must be supported by written authority from an officer of Inspector rank or above, this requirement does not appear under Schedule 5 to the Terrorism Act 2000 and nor does the Code require that a specified police officer be authorised to apply for the search warrant or that a particular police officer be named on the authorisation.

[30] The affidavit of DI Caldwell confirms that DC Crothers was tasked to make the application for the search warrant and that he was briefed by DI Caldwell. DC Crothers confirms the same. We are satisfied that the requisite authority was given for DC Crothers to make the application for the search warrant. The provision of the name of the authorised officer on the standard form is an administrative matter and is not required by the legislation or the PACE Code. Further, we are satisfied that the failure to identify the search officer on the form does not offend the requirement against arbitrariness. A specific officer was tasked to make the application for the search warrant, was briefed so as to satisfy the statutory requirements, made the application to the Lay Magistrate, had his identity recorded in the materials generated by the application and was available to answer the complaints about the process. There was no arbitrariness involved. Accordingly, we are satisfied that the absence of the name of a specified police officer on the standard form does not invalidate the search warrant.

The requirements of paragraph 1 of Schedule 5 of the 2000 Act

[31] The requirements for the issue of a search warrant include the Constable having reasonable grounds for believing that the material sought is likely to be of substantial value to a terrorist investigation and that it must be seized in order to prevent it from being concealed, lost, damaged, altered or destroyed. The Lay Magistrate must be satisfied that the warrant is sought for the purposes of a terrorist investigation and that there are reasonable grounds for believing that there is material on the premises that is likely to be of substantial value to a terrorist investigation and that the issue of a warrant is likely to be necessary in the circumstances of the case.

[32] We are satisfied that, on the information available, DC Crothers had reasonable grounds for believing that the material sought was likely to be of substantial value to a terrorist investigation and that it had to be seized to prevent it from being lost to the investigation.

[33] Further, we are satisfied that, had the Lay Magistrate been provided with an accurate account of the information available, he would have been satisfied that the warrant was sought for the purposes of a terrorist investigation and that there were reasonable grounds for believing that there was material on the premises that was

likely to be of substantial value to the terrorist investigation and that the issue of a warrant was likely to be necessary.

The safeguards against arbitrary use of search warrants

[34] The second group of the applicant's grounds concerns the impact on the process of the right to respect for private life and home under Article 8, the right to property under Article 1 Protocol 1 and the right to a fair trial under Article 6.

[35] The applicant contends that there are insufficient safeguards to protect against arbitrary interference with the applicant's rights under Article 8, Article 1 Protocol 1 and Article 6. Particular failings are, first of all, the inability of the applicant to determine the circumstances of the grant of the search warrant without an inter partes hearing, secondly, the inconsistencies between the approach to the arrest and detention of the applicant on the one hand and the search and seizure of the applicant's property on the other hand, and, thirdly, the absence of any requirement on the PSNI to explain the retention of the goods seized.

Disclosure of the information grounding the warrant

[36] The police search of the applicant's home was an interference with the right to respect for private life and home and must be justified. The interference must first of all be in accordance with law and secondly must be necessary in a democratic society for permitted purposes. Safeguards against arbitrary interference are an aspect of a measure being 'in accordance with law'. As explained by Lord Reed in R (T) v The Chief Constable of Greater Manchester [2014] UKSC 35 -

> "114. This issue may appear to overlap with the question whether the interference is "necessary in a democratic society": a question which requires an assessment of the proportionality of the interference. These two issues are indeed inter-linked, as I shall explain, but their focus is different. Determination of whether the collection and use by the state of personal data was necessary in a particular case involves an assessment of the relevancy and sufficiency of the reasons given by the national authorities. In making that assessment, in a context where the aim pursued is likely to be the protection of national security or public safety, or the prevention of disorder or crime, the court allows a margin of appreciation to the national authorities, recognising that they are often in the best position to determine the necessity for the interference. As I have explained, the court's focus tends to be upon whether there were adequate safeguards against abuse, since the existence

> of such safeguards should ensure that the national authorities have addressed the issue of the necessity for the interference in a manner which is capable of satisfying the requirements of the Convention. In other words, in order for the interference to be "in accordance with the law", there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. Whether the interference in a given case was in fact proportionate is a separate question."

[37] The applicant contends that there is an absence of a necessary safeguard by way of judicial oversight by the right to apply to a court on an inter partes hearing to obtain the information grounding the application for the search warrant. The mechanism for such an application has been developed in recent times in England and Wales. The applicant denies the existence of a similar mechanism in this jurisdiction.

[38] In Commissioner of Police for the Metropolis v Dawn Bangs [2014] EWHC 546 (Admin) the question arose on a Case Stated from the Magistrates' Court to the High Court as to whether the District Judge (Magistrates' Court) had jurisdiction to hear an application for the disclosure of the information laid before a Justice of the Peace sitting in the Magistrates' Court on an application for a search warrant of a home address under the provisions of the Misuse of Drugs Act. The Court concluded that the property owner was entitled to the disclosure of the information grounding the application for the search warrant and to any additional information provided in making the application for the search warrant, subject to any claim for public interest immunity. The property owner was entitled to apply to the Magistrates' Court for disclosure of the information. The entitlement of the property owner to see the information was the source of the jurisdiction to consider a request for disclosure of the information after the warrant had been executed. On a practical note it was stated that to require a person to issue an application for Judicial Review in order to obtain the material which would enable him or her to assess whether a challenge to the lawfulness of the warrant should be launched would encourage the making of speculative applications for Judicial Review.

[39] This approach was followed in Haralambous v St Alban's Crown Court [2016] EWHC 916 (Admin), an application for Judicial Review that concerned whether a person whose premises had been searched and properly seized under a search warrant issued by a Justice of the Peace sitting in a Magistrates' Court must be provided with enough information grounding the warrant to judge its lawfulness and the retention of the material seized. The police accepted that a person whose property had been searched and goods seized was entitled to see the information on which the application for the search warrant was based and have maximum disclosure consistent with the public interest. However, the police had made redactions to the information on public interest grounds. The applicant had applied to the Magistrates' Court for the disclosure of the unredacted information and the District Judge upheld

the public interest claim. The applicant claimed to have insufficient information to judge the lawfulness of the search warrant.

[40] The Court stated that the common law right to information after the issue of a search warrant required sufficient information to be provided to enable an assessment of legality. It was noted that under PACE an ex parte proceeding for the issue of a search warrant may entail the presentation of material that cannot be disclosed to the property owner, the subject of the warrant. It was stated that Parliament had contemplated that, in some cases, information grounding the warrant may not be disclosed if that was not in the public interest. Thus the applicant's right to disclosure was subject to the public interest. It was stated to be unnecessarily cumbersome to require the first step to be taken in the High Court rather than the Magistrates' Court which granted the warrant.

[41] The applicant contends that a similar safeguard is not available in this jurisdiction because, in the first place, it is not possible for a Lay Magistrate to conduct an inter partes hearing and, secondly, that such an application could not be made to the District Judge. The respondent contends for the same safeguard being available in this jurisdiction as applies in England and Wales, although that safeguard remains unused to date in this jurisdiction.

[42] As in England and Wales, in this jurisdiction there is no legislation and there are no court rules that relate to the hearing of such applications in the Magistrates' Court. Justices of the Peace have not sat in petty sessions in Northern Ireland since 1935. The Magistrates' Courts (NI) Order 1981 defines the Magistrates' Court as including a court of summary jurisdiction and a Resident Magistrate and a Justice of the Peace siting out of petty sessions, now renamed a District Judge and a Lay Magistrate sitting out of petty sessions. A court of summary jurisdiction comprised a Resident Magistrate sitting in petty sessions. The Lay Magistrate has limited functions but the functions of the Lay Magistrate sitting out of petty sessions are functions of the Magistrates' Court. The Justice Act (NI) 2002 provides that the functions of the Lay Magistrate include the issue of search warrants.

[43] Justices of the Peace and now Lay Magistrates were appointed to a County Court Division and were regarded as exercising their powers within a division. Sessions for the holding of courts of summary jurisdiction and districts for which such sessions were held were known as petty sessions and petty sessions districts. This is reflected in the standard form used by the constable to apply for the search warrant which is headed "Petty Sessions District of Craigavon County Court Division of Craigavon" and in the use of a different constable to apply for one of the three warrants to a different Lay Magistrate in relation to a resident in a different district. By legislative change the exercise of powers will apply across Northern Ireland.

[44] It is not relevant to the exercise of obtaining a search warrant whether the police officer makes the application at the home of the Lay Magistrate, as was the present case, or at the location of the Magistrates' Court. The issue of the warrant

remains a function of the Magistrates' Court with the Lay Magistrate sitting out of petty sessions. That function having been performed and the search warrant executed, there arises the common law right to the information on which the search warrant was issued. As stated by Beatson LJ in Dawn Bangs (above) -

> "To regard the Magistrates' Court as functus officio after the warrant was executed would negate the entitlement of a person to obtain the Information to assess whether it contains material justifying the issue of a warrant. This is because, in almost all cases, the property owner will not know about the warrant until it is executed.
>
> I also observe that to require a person to issue an application for judicial review in order to obtain the material which would enable him or her to assess whether a challenge to the lawfulness of the warrant would be launched would encourage the making of speculative applications for judicial review."

[45] We are satisfied that, as in England and Wales, there is a common law right of the person affected to obtain information justifying the issue of a search warrant. Accordingly, a person whose property has been searched on foot of a warrant is entitled, subject to public interest immunity, to the information on which the search warrant was issued. Further, we are satisfied that if there is a dispute about disclosure the Magistrates' Court has jurisdiction to determine an application for disclosure of the information. The grant of the search warrant was a function of the Magistrates' Court. The entitlement of the property owner to see the information is the source of the jurisdiction to consider an application for disclosure of the information after the warrant had been executed.

[46] The application for disclosure of the information grounding the application for the search warrant should be made to the Magistrate's Court and heard by the District Judge.

[47] There are various proceedings in which an applicant may engage. He may wish simply to know the basis on which the search warrant was issued, he may wish to have the search warrant quashed, he may wish to undertake a civil action for damages, he may wish to have the proceeds of the search excluded from evidence in criminal proceedings against him, he may wish to recover property seized. The process would require -

(1) Obtaining the information grounding the search warrant. This may be sought in the first place by an application to the PSNI for disclosure of the information provided to the Lay Magistrate. In addition, it will be necessary to obtain the notes made by the Lay Magistrate during the

application. The applicant has a common law entitlement to that information, subject to any claim for public interest immunity.

(2) Having obtained the information relied on by the police and the notes made by the Lay Magistrate, an assessment will be made on behalf of the applicant as to whether there are grounds to apply for Judicial Review to seek the quashing of the search warrant. It is the High Court that has the power to quash the search warrant.

(3) Criminal proceedings may have been commenced against such an applicant. In the application for Judicial Review the pending criminal proceedings do not provide an alternative remedy for the quashing of the search warrant. If there is a finding in the criminal proceedings of an unlawful search and seizure of property, that is a matter to be considered by the criminal court in determining whether to exclude evidence on the grounds of fairness. It may not lead to the evidence being excluded and will not lead to a quashing of the search warrant.

(4) Applications may be made for the return of the property seized on foot of the search warrant, whether in civil proceedings or under statutory powers. Such applications do not provide jurisdiction to quash the search warrant.

[48] In order to give effect to this process it is apparent that changes are required to the administration of applications for search warrants. In the first place, it would be desirable that applications for search warrants be conducted in the court building, in the absence of an emergency. Secondly, the form of written Information produced by the police should include the information that provides the basis of the application for the search warrant. Thirdly, any additional information provided to the Lay Magistrate should be noted on the Information. Fourthly, the Lay Magistrate's notes of the application should be retained with the Information, if not also recorded on the Information. This material should then be held together whether by the police and/or at the office of the Magistrates' Court. An application for disclosure will involve the police in determining whether any part of the material requires to be redacted on public interest grounds.

Inconsistency between arrest and search

[49] We have considered above the ruling of Judge Loughran refusing the application by police for extended detention of the applicant. The ruling was made on the basis that no material was presented to the Court in open session that justified the arrest of the applicant. In the present proceedings material has been put in evidence that addresses the justification for the search of the applicant's home and the seizure of goods. To the extent outlined above we are satisfied on the basis of the available material that the search and seizure were justified.

[50] Accordingly, we are not satisfied that there is any inconsistency between the approach to the arrest and the approach to the search. A different legal framework and procedure applies to the application for extended detention and to this application in relation to the search and seizure. However, the justification for the search is based on material provided to this Court that was not available to Judge Loughran in making her ruling.

The retention of material seized

[51] The applicant contends that the retention of the items seized was arbitrary. Paragraph 1(2)(c) of Schedule 5 to the 2000 Act provides that a search warrant authorises any constable "to seize and retain any relevant material which is found on a search".

[52] Property may only be retained as necessary for approved purposes. Code of Practice B provides for searches of premises by police officers and the seizure of property found by police officers on persons or premises. Under the heading "Retention" there appears:

> "7.14 Subject to paragraph 7.15, anything seized in accordance with the above provisions may be retained only for as long as it is necessary. It may be retained, among other purposes –
>
> (i) to use as evidence at a trial for an offence;
>
> (ii) to facilitate the use in any investigation or proceedings of anything to which it is inextricably linked;
>
> (iii) for forensic examination or other investigation in connection with an offence;
>
> (iv) in order to establish its lawful owner when there are reasonable grounds for believing it has been stolen or obtained by the commission of an offence.
>
> 7.15 Property shall not be retained under paragraph 7.14(i), (ii) or (iii) if a copy or image would be sufficient."

[53] An application may be made for the return of the property, whether under statutory powers or by civil proceedings.

[54] The statutory power to recover property coming into the possession of the police is contained in the Police (Northern Ireland) Act 1998 section 31 as follows:

> "(1) Where any property has come into the possession of the police in connection with their investigation of a suspected offence, a court of summary jurisdiction, on an application under this sub-section may –
>
> (a) make an order for the delivery of the property to the person appearing to the court to be the owner of the property; or
>
> (b) where the owner cannot be ascertained, make such order with respect to the property as the court thinks fit.
>
> (2) An application under sub-section (1) in relation to any property may be made –
>
> (a) by a member of the police force; or
>
> (b) by a person claiming an interest in the property."

[55] As to the scope of applications for the return of property retained by police, whether under section 31 of the 1998 Act or by a civil claim for recovery, a claim in conversion or under the Torts (Interference with Goods) Act 1977, see the recent discussion by the Court of Appeal in McCarthy v Chief Constable [2016] NICA 36.

[56] The applicant contends that the power to apply for recovery of property seized does not provide judicial oversight of a decision to retain the property but rather relates to the return or disposal of property following the completion of an investigation. Code B recognises that property may be retained in a case such as the present for use as evidence at a trial for an offence or for forensic examination or other investigation in connection with an offence. In the present case the applicant was charged on 5 February 2014 and the charges were withdrawn on 1 July 2014. The items seized were returned to the applicant over a period of time and the final item returned following withdrawal of the charges. Had there been an application for recovery of the items and had it been determined that items were not retained for a permitted purpose, then an order would have been made for the return of the items.

Conclusion

[57] We reject the claims that the application for the search warrant was unlawful, that the issue of the search warrant was unlawful and that the search of the property and seizure of the goods was unlawful.

[58] We reject the application for a Declaration of Incompatibility in relation to Schedule 5 paragraph 1 of the Terrorism Act 2000.

[59] However, this application for Judicial Review has brought into focus certain matters of concern in relation to the issue of search warrants by Lay Magistrates, namely the procedures for applications for search warrants and the disclosure of the information grounding applications for search warrants.

[60] As to the procedures, we refer to paragraph [48] above and reiterate the need for a review by police and Court Service.

[61] As to disclosure, we refer to paragraph [46] above and reiterate that an application by a property owner for the disclosure of the information grounding the issue of a search warrant by a Lay Magistrate should be made to the Magistrates' Court and heard by the District Judge.