Neutral Citation No: [2019] NIQB 75 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **COL11019** *Delivered:* ***9/8/2019***

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY AILISE NI MURCHU FOR JUDICIAL REVIEW

_____

AILISE NI MURCHU

Applicant;

-and-

PSNI

and

SECRETARY OF STATE FOR NORTHERN IRELAND

Respondents.

_____

COLTON J

Background

[1] This is another in a number of legal challenges to the lawfulness of the exercise of powers by the Police Service of Northern Ireland ("the PSNI") under sections 21 and 24 of the Justice and Security (Northern Ireland) Act 2007 ("the 2007 Act").

[2] The particular focus of this challenge relates to the exercise of the powers in relation to minors.

[3] Leave was granted in this matter by McCloskey J in respect of an incident which occurred on 12 December 2017. On that date the applicant was a minor, having been born on 9 February 2001. Since that time she has reached her majority and her anonymity in respect of these proceedings has been removed.

[4] In her affidavit supporting the application she avers that on the day in question:

> "*We were getting food from a takeaway restaurant on the Shaw's Road when the police arrived and searched my father and me and Thomas. This took around 30 minutes I would say. It was snowing at the time and very cold. There are photographs of this incident attached to this affidavit.*"

Thomas is the applicant's brother.

[5] In an affidavit filed by the applicant's father on 1 March 2018 he suggested that the incident took "*about 5-10 minutes*".

[6] Constable Eimer Phair in an affidavit sworn on 23 January 2019 gives an account of the incident as follows:

> "*(1) I am a serving constable in the Police Service of Northern Ireland.*
>
> *(2) On 12 December 2017 I conducted a search of the applicant ANM. I conducted the search mindful of the applicant's age and sex. I knew that ANM was a minor and at all times employed my training in respect of dealing with a minor. I was polite, courteous, I spoke in a soft tone of voice and tried to make her feel as comfortable as possible whilst I carried out my duty.*
>
> *(3) At the time of the stop and search the applicant had been travelling with her brother and father in a car driven by ANM's father Mr Risteard O Murchu who is known to police. At the time of the stop Constable Fivey had spoken to the persons within the car explaining that they were to be searched (along with the vehicle) under the Justice and Security Act.*
>
> *(4) The applicant was compliant throughout the search; indeed she did not say anything to me as I conducted the search, she did not protest or show any discomfort or embarrassment. If ANM had complained to me I would have noted it down in my notebook. There is no such entry.*
>
> *(5) Following the search I gave ANM a record of the search. I refer to a copy of the search record … marked … and signed by me.*

(6) I note that the applicant's assertion that the search was conducted in front of a row of shops on the Shaw's Road is incorrect. The search was actually conducted within approximately 20 metres of a junction on the Stewartstown Road on a layby/parking area in front of a row of bungalows. There were therefore not any people 'passing by the shops' as asserted by the applicant as there are no shops at the end of the Shaw's Road.

(7) The search was short in time and nothing of concern occurred or was raised during the search which would give me cause for concern."

[7] The court has seen the record of the stop and search which records the **search time** as "20:45 to 20:45". The record confirms that the power used was section 21 - "*due to the current threat and to protect public safety in this area*" and section 24 (Auth); - "*due to the current threat in the area and to protect public safety a stop and search authorisation has been granted*". The object of the search is described as "*stop and question re identity, movements, munitions and wireless apparatus*".

[8] Constable Darren Fivey describes the circumstances of the search as follows:

"*(1) I am a serving constable from the Police Service of Northern Ireland.*

(2) On 12 December 2017 I was the lead officer conducting a search of ANM's father's vehicle and persons in that vehicle.

(3) On the evening in question I, along with my colleagues Con Winters, Con Phair and Con McIleen were travelling along the Shaw's Road when I spotted ANM's father travelling in a car. The car was travelling in the direction country bound (from the city centre) and was approximately 20 metres from the junction with the Stewartstown Road and in a residential area. The car pulled over in front of a row of bungalows.

(4) In accordance with intelligence briefing information given to me in respect of ANM's father, Mr Risteard O Murchu, I took the decision that there should be a stop and search of ANM's father, the vehicle he was driving and any person in the vehicle.

(5) Mr Risteard O Murchu stopped his vehicle. I then approached the vehicle identified myself to persons in the

vehicle and explained that we were conducting a search of the vehicle and the persons within it under the Justice and Security Act.

(6) Mindful that there minors in the car, I conducted the search with Mr O Murchu first which left him free to observe the search of his children. I have had training and refresher training in respect of conducting my duties in the presence of and with minors involved.

(7) Mr Risteard O Murchu is known to me. He was compliant throughout the search. If there was anything untoward mentioned by him or had he acted aggressively or had anyone in the car protested or said anything during the search I would have noted it down in my notebook. There is no such entry in my notebook. The search proceeded without incident.

(8) I confirm I searched Mr Risteard O Murchu, his son Thomas and the vehicle they were travelling in. My colleague Constable Phair searched the applicant ANM. I provided Mr O Murchu with a copy of his search record. …

(9) I am aware that there is a video recording of the search. I note that it does not record the entirety of the search when I stopped the vehicle and explained the JSA powers to the persons in the vehicle. It largely seems to concentrate on ANM.

(10) The search was brief in its nature and there is nothing of significance that occurred during the search to give me cause for concern."

[9] In this application the court is not concerned with the manner in which the power was exercised nor is it concerned with any factual dispute about the circumstances of the search. The challenge relates solely to the lawfulness of the powers themselves insofar as they relate to the stopping and searching of minors.

[10] I am obliged to counsel who appeared in this matter before me on 25 June 2019 for their helpful and focused written and oral submissions. Mr Ronan Lavery QC led Mr Mark Bassett for the applicant. Dr Tony McGleenan QC led Ms Marie Claire McDermott on behalf of both respondents.

[11] The challenge is based on three grounds.

[12] Firstly, Mr Lavery argues that the powers exercised by the PSNI failed to meet the "quality of law" test required for the interference with the applicant's Article 8 rights under the European Convention on Human Rights ("ECHR") and are therefore contrary to section 6 of the Human Rights Act 1998 ("HRA").

[13] The second ground of challenge is based on an allegation that the respondents have acted contrary to section 6 of HRA read together with Articles 14 and 8 of ECHR on the basis of a failure to ensure different treatment for children as opposed to adults when subjected to stop and search powers under the 2007 Act.

[14] The third ground of challenge is that the respondents have failed to meet their obligations under section 53 of the Justice (Northern Ireland) Act 2002 ("the 2002 Act") to have the best interests of children as a primary consideration in the exercise of their functions in the youth justice system.

The statutory framework

[15] Section 21 of the 2007 Act provides as follows:

> ***"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)."

[16] Section 24 of the 2007 Act provides:

"Search for munitions and transmitters

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

[17] Section 26 of the 2007 Act provides that a power under section 24 to search premises shall, in its application to vehicles be taken to include the power to stop a motor vehicle.

[18] The Protection of Freedom Act 2012, Schedule 6, amended Schedule 3 to the 2007 Act. The relevant amendment for the purposes of this application introduced paragraph 4A to Schedule 3 to the 2007 Act as follows:

"4A(1) A senior officer may give an authorisation under this paragraph in relation to a specified area or place if the officer –

(a) reasonably suspects (whether in relation to a particular case, a description of case or generally) that the safety of any person might be endangered by the use of munitions or wireless apparatus, and

(b) reasonably considers that –

(i) the authorisation is necessary to prevent such danger,

(ii) the specified area or place is no greater than is necessary to prevent such danger, and

(iii) the duration of the authorisation is no longer than is necessary to prevent such danger.

(2) An authorisation under this paragraph authorises any constable to stop a person in the specified area or place and to search that person.

(3) A constable may exercise the power conferred by an authorisation under this paragraph only for the purpose of ascertaining whether the person has munitions unlawfully with that person or wireless apparatus with that person.

(4) But the power conferred by such an authorisation may be exercised whether or not the constable reasonably

suspects that there are such munitions or wireless apparatus.

(5) A constable exercising the power conferred by an authorisation under this paragraph may not require a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves.

(6) Where a constable proposes to search a person by virtue of an authorisation under this paragraph, the constable may detain the person for such time as is reasonably required to permit the search to be carried out at or near the place where the person is stopped.

(7) A senior officer who gives an authorisation under this paragraph orally must confirm it in writing as soon as reasonably practicable.

(8) In this paragraph and paragraphs 4B to 4I –

'senior officer' means an officer of the Police Service of Northern Ireland of at least the rank of assistant chief constable,

'specified' means specified in an authorisation."

For the purposes of the search in this case an appropriate authorisation was in place.

Consideration

[19] Before turning to the specific grounds of challenge in general terms the provision of powers of stop and search to police officers is capable of being lawful in principle. In the case of **R (On the Application of Roberts) (Appellant) v Commissioner of Police of the Metropolis and Another (Respondents)** [2015] UKSC 79, the Supreme Court considered the lawfulness of "suspicionless" stop and search powers.

[20] The court was considering the power of "suspicionless" stop and search provided for by section 60 of the Criminal Justice and Public Order Act 1994 in England and Wales. That particular section was directed towards the risk of violence involving knives and other offensive weapons in a particular locality at a particular time.

[21] The judgment of the court was delivered by Lady Hale and Lord Reed, with whom the other members of the court agreed. In its discussion the court said:

"41. Any random 'suspicionless' power of stop and search carries with it the risk that it will be used in an arbitrary or discriminatory manner in individual cases. There are, however, great benefits to the public in such a

power, as was pointed out both by Lord Neuberger and Lord Dyson in ***Beghal*** *and by Moses LJ in this case. It is the randomness and therefore the unpredictability of the search which has the deterrent effect and also increases the chance that weapons will be detected. The purpose of this is to reduce the risk of serious violence where knives and other offensive weapons are used, especially that associated with gangs and large crowds. It must be borne in mind that many of these gangs are largely composed of young people from black and minority ethnic groups. While there is a concern that members of these groups should not be disproportionately targeted, it is members of these groups who will benefit most from the reduction in violence, serious injury and death that may result from the use of such powers. Put bluntly, it is mostly young black lives that will be saved if there is less gang violence in London and some other cities.*

42. It cannot be too often stressed that, whatever the scope of the power in question, it must be operated in a lawful manner. It is not enough simply to look at the content of the power. It has to be read in conjunction with Section 6(1) of the Human Rights Act 1998, which makes it unlawful for a police officer to act in a manner which is incompatible with the Convention rights of any individual. It has also to be read in conjunction with the Equality Act 2010, which makes it unlawful for a police officer to discriminate on racial grounds in the exercise of his powers.

43. It might be thought that these two additional legal restraints were sufficient safeguard in themselves. The result of breaching either will be legal liability and probably disciplinary sanctions as well. It is said that, without the need to have reasonable grounds for suspecting the person or vehicle stopped to be carrying a weapon, it is hard to judge the proportionality of the stop. However, that is to leave out of account all the other features, contained in a mixture of the Act itself, PACE and the Force Standard Operating Procedures, which guard against the risk that the officer will not, in fact, have good reasons for the decision. The result of breaching those will in many cases be to render the stop and search itself unlawful and to expose the officers concerned to disciplinary action."

[22] The court went on to identify the safeguards within the regime they were considering and the court went on to say:

> *"47. All of these requirements, in particular to give reasons both for the authorisation and for the stop, should make it possible to judge whether the action was 'necessary in a democratic society … for the prevention of disorder or crime'. No system of safeguards in the world can guarantee that no-one will ever act unlawfully or contrary to orders. If they do so act, the individual will have a remedy. The law itself is not to blame for individual shortcomings which it does its best to prevent. It is not incompatible with the Convention rights."*

[23] The court therefore declined to make a declaration of incompatibility or that the guidance in force at the time was inadequate or that the particular search was not "*in accordance with the law*".

[24] Dr McGleenan points out that unlike the powers discussed by the Supreme Court the powers under consideration in this application are specifically "intelligence led" and therefore not subject to the same randomness identified by the Supreme Court.

[25] As indicated earlier the specific provisions being considered in this application have been considered in this jurisdiction.

[26] Most recently in **The Matter of an Application by Stephen Ramsey for Judicial Review ("No. 2")** Lord Justice Treacy dealt with a direct challenge to section 24 and Schedule 3 paragraph 4 of the 2007 Act. The challenge in that judicial review was a substantive challenge to the lawfulness of the Code of Practice issued under the scheme, the authorisation regime, the recording requirements and the monitoring requirements.

[27] In his judgment delivered on 1 November 2018 Treacy LJ rejected the substantive challenges to the lawfulness of the powers in question.

[28] In returning to the theme of arbitrariness he referred to the Seventh Report of the Independent Reviewer established under the scheme and he points out at paragraph [29] of his judgment that:

> *"At paragraph 7.7 of the same report he expressed himself satisfied that the PSNI used the impugned powers on an intelligence led basis and that the use of stop and search powers may be the result of specific briefing about an individual or intelligence about a specific threat within a geographic area in a given timeframe. He said that the power is used on the basis of threat and not in an arbitrary way or for no legitimate purpose."*

[29] The key authority for the assessment of this challenge is the Court of Appeal judgment in the cases of **Fox and Cannings Applications for Judicial Review** [2013] NICA 19. Those cases focused on the powers exercised under section 21 of the Act to stop and question.

[30] The court accepted that the power to openly stop and question a person adds to the potential for invasions of a person's Article 8 rights. In the course of argument in this case it was suggested that the applicant's Article 8 rights were at best "marginally engaged". Whatever would be the position with regard to stopping and questioning I am satisfied that the act of searching an individual such as occurred in this case does engage the applicant's Article 8 rights. The act of searching a person in a public space by a police officer, albeit one that does not involve the removal of clothing, is an intrusive act. The applicant's case for an alleged breach of her Article 8 rights is somewhat undermined by the very public way in which this and other searches have been highlighted by her and her father on social media. Nonetheless, I am satisfied that the applicant's Article 8 rights are engaged for the purposes of this application and that the exercise of the powers constituted an interference with those rights. Those involved in the creation and exercise of stop and search powers should not underestimate the potential for public harm in the event that the powers are used arbitrarily and excessively in respect of minors in terms of the effect it could have on confidence in and support for the PSNI.

[31] In those circumstances I consider that there is an obligation on the respondents to satisfy the "*in accordance with law*" requirements of Article 8(2) or the "*quality of law*" requirement demanded by Convention law.

[32] In considering section 21 the Court of Appeal in **Fox and Canning** accepted that it conferred a statutory power and discretion on individual police officers to stop and question and thus there was a clear domestic law basis for the exercise of the power. The same can be said of section 24.

[33] In terms of whether or not the power satisfied the "*quality of law*" requirements demanded by Convention law the court drew an analogy with the case law in the field of surveillance law.

[34] Returning to the power under section 21 the court concluded at paragraph [45]:

> *"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."*

[35] The court went on to note that section 34 of the 2007 Act enables the Secretary of State to make a Code of Practice in connection with, inter alia, the section 21 power. Such a code should contain appropriate terms and conditions relating to the exercise of the power. 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.

[36] The court went on to say:

> *"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."*

[37] At the time of the incidents giving rise to the decisions in **Fox and Canning** the second respondent, that is the Secretary of State, had not implemented a Code of Practice under section 34.

[38] At paragraph [48] therefore the Court of Appeal identified the question to be determined by the court as:

> "*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 law requirement*".

[39] The court determined that the legal framework in relation to the exercise of the section 21 power, pending the introduction of an effective code, did not contain the kind of safeguards against potential abuse or arbitrariness envisaged by the Strasbourg case law. Pending the introduction of such a code, the PSNI did not have a proper Convention law compliant basis for exercising the section 21 power. Likewise since adequate safeguards to prevent the arbitrary exercise of the power under section 24 in Schedule 3 paragraph (4) had not been put in place, the power contained therein had not been properly exercisable.

[40] Since the judgment in **Fox and Canning** the provisions of the 2007 Act have been supplemented by a Code of Practice pursuant to section 34(4) of the Act namely the **Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007** ("the Code"). The Code was issued in draft form for consultation in December 2012 and came into operation on 15 May 2013.

[41] In relation to section 24 of Schedule 3 the Code makes the following provision at paragraph 8.21.

> *"The powers should therefore not be authorised solely on the basis that there is a general endangerment from unlawfully held munitions or wireless apparatus. However, this may be taken into account when deciding whether to make an authorisation, especially where intelligence about endangerment is limited in terms of the potential target or attack method. An authorisation should not be given on the basis that the use of the powers provides public reassurance or that the powers are a useful deterrent or intelligence gathering tool."*

[42] Where an authorisation is give pursuant to paragraph 4A(1) of Schedule 3 of the 2007 Act it must be passed to the Secretary of State as soon as is reasonably practicable. The Code details the information that must be provided to the Secretary of State at paragraphs 8.30-8.41.

[43] The manner in which searches can be conducted is outlined in detail in paragraphs 8.59 et sequence. If a paragraph 4A(1) authorisation is in place a police officer does not require reasonable suspicion in order to stop and search a person within a specified place or area. Paragraph 8.61 outlines the circumstances that could provide a basis for a stop and search, short of reasonable suspicion. It states that the basis includes but is not limited to:

> *"- That something in the behaviour of a person or the way a vehicle is being driven has given cause for concern;*
> *- The terms of a briefing provided;*
> *- The answers made to questions about the person's behaviour or presence gives cause for concern."*

[44] The Code was debated and approved by both Houses of Parliament.

[45] The respondents argue that the introduction of this Code together with the other safeguards provided within the legislative scheme means that the powers now satisfy the quality of law test. In short the lacuna that was identified in the judgment in **Fox and Canning** has been addressed and there now is in place a properly formulated code which provides the additional legal underpinning envisaged by the Court of Appeal and ensures compliance with section 6 of HRA. The powers vested in the police under sections 21 and 24 can be justified as a matter of law and there are effective guarantees and safeguards in place against abuse.

[46] Mr Lavery's criticism of the scheme for the purposes of this challenge is focused on what he says is the lack of clear and proper guidance in respect of how the powers are to be exercised against children and young persons such as the applicant.

[47] In response the respondents point to the fact that at paragraph 6.11 the Code specifically deals with the issue of the use of stop and search powers in respect of children. The Code provides:

> *"6.11 Section 21(5) provides that the power to stop a person includes the power to stop a vehicle. If a vehicle is stopped officers may question the occupant or occupants separately or jointly to establish identity and movements, as set out at paragraphs 6.3–6.8. If children or young people are present officers will have due regard for their protection. Detailed guidance on the protection of children and young people is contained in PSNI Policy Directive 13/06 'Policing with Children and Young People'.*
>
> *The PSNI also carry information cards which they may give to children or young people who are stopped and searched."*

[48] In addition to the Code the PSNI Policy Directive 13/06 – "*Policing with Children and Young Children*", to which the Code refers, provides guidance on how to determine the most appropriate response in respect of children. It aims to identify children and young people at risk of becoming involved in offending and works with partner agencies in the provision of support and intervention. It contains an express commitment to adhere to ECHR rights as well as the international standards in the UNCRC and the Beijing Rules.

[49] As part of the general oversight of the exercise of these powers they are subject to an Independent Reviewer of the 2007 Act who provides an annual report to Parliament.

[50] In general terms the respondents point out that the impugned powers have been subject to searching independent scrutiny for many years. They point to the Seventh Independent Review Report dated January 2015 in which the Reviewer observed the training provided to police officers who may exercise the section 21 and section 24 powers. He noted at paragraph 5.6 that:

> **"***The standard obtained was very high. It covers in some detail the legal powers available to the police and the procedure and etiquette that must be followed on each occasion."*

[51] At paragraph 7.7 the Independent Reviewer stated:

> *"I am satisfied that the PSNI use these powers on an intelligence led basis … The use of stop and search powers may be the result of specific briefing about an individual or intelligence about a specific threat within a geographic area in a given timeframe. The power is used on the basis of threat and not in an arbitrary way or for no legitimate purpose."*

[52] At paragraph 7.15 the Independent Reviewer said:

> *"To test the need and validity of such a power by the number of arrests would be to misunderstand the purpose of the power. It is not intended primarily as a method of triggering the prosecution process – though clearly on occasions it has that effect … The power is therefore a preventative device to stop people being killed or injured by explosives."*

[53] At paragraph 9.13 he added:

> *"Some concern has been expressed about the fact that since POFA 2012 came into force, authorisations under the JSA have been in place continually … However, it has to be remembered that the security threat in Northern Ireland has been at 'severe' since 2009. There has been a constant residual DR terrorist threat from the use of munitions and wireless telegraphy apparatus that shows no signs of diminishing in the immediate future … It is clear that there is rigorous scrutiny in relation to each new authorisation. Each one is based on the latest intelligence in relation to all eight police districts and the material set out in each one is different. It is a very time consuming and laborious process which is undertaken diligently by all concerned – not least because the PSNI understand that these powers are crucial to keeping people safe and they have every incentive to ensure that the process is undertaken thoroughly and in a professional way on each separate occasion. It is clear that there is vigorous scrutiny in relation to each new authorisation."*

[54] The Independent Reviewer concluded that it was "*very important*" that the powers in the 2007 Act should be retained. He found there were appropriate safeguards in place in the 2007 Act and the Code and that there was appropriate redress available for those who wished to complain about the use of the powers.

[55] On each occasion the Independent Reviewer has recommended that the section 21 and section 24 powers be retained.

[56] The issue of searches involving or affecting children was specifically addressed in the 2017 and 2018 reports.

[57] In the Ninth Independent Review Report dated March 2017, Independent Reviewer, David Seymour CB noted:

> *"6.49 It is fair to say that the PSNI are fully aware of the sensitivities when using these powers when children are present or near schools. There are, however, no restrictions in law which prevent the searching of children and young persons. There is, however, a requirement that officers comply with the PSNI policy directive concerning policing with children and young people which specifically incorporates the requirement that the best interests of children are pursued.*
>
> *6.50 The police are required to carry out a search at or near the place where the individual is stopped. They have no powers to move an individual to a different place. This means that occasionally searches have to take place in sensitive areas e.g. outside schools. On these occasions the police can recommend to the individual that the search takes place somewhere else but they have no power to force the individual to agree to that request.*
>
> *6.51 To put this in context officers have told me of cases where (a) the individual to be searched has not stopped the car when the police vehicle flashes its lights and has driven some distance before stopping outside school gates; (b) the children in the car were invited to go into the school prior to the search but the driver told them to remain in the car; (c) the search had allegedly made the child cry but the child was already upset and crying before the individual was stopped; (d) individuals have goaded police officers to stop and search; and (e) photographs have been taken of an incident which contrive to show a police officer searching a young person even though that was not the case. In other words, there are situations where the stop has been engineered or exploited to obtain adverse publicity for the police. The use of body worn cameras may reduce this risk in future. However, whenever there is a stop and search involving children, near a school or other sensitive location the officer should report the circumstances to a supervising*

officer and the reason for that particular stop and search should be recorded."

[58] In the Independent Review Report published in April 2018 the Independent Reviewer comments on the PSNI's engagement with children and particularly the establishment of the Youth Champion Forum and the Children and Persons Forum:

> "*Children*
>
> *12.2 JSA powers are sometimes used in relation to children or where children are present. If a child (i.e. a person under the age of 18) is stopped and searched a record will be kept in the normal way. A police officer will use the scroll down facility on his Blackberry and record the name, approximate age, gender and ethnicity of the child. The officer has to complete these details before scrolling down to record other matters e.g. the address of the child, the power being used and outcome of any search. So, the record would be the same as that of an adult and the same whatever power is used (whether JSA, PACE, Misuse of Drugs Act etc). If the child is only accompanying a person who is the subject of the search (normally a parent and child situation) and that child is not searched details relating to that child will not be recorded. There is no requirement under the JSA or Code of Practice to do so. In both situations the normal police protocol relating to children will apply and if there is a need to do so, other alternative reports will be made (e.g. a Social Services referral). The PSNI have established a Youth Champion Forum in which the police discuss with members of the public various issues relating to children who have been stopped and searched. The PSNI have also established an internal group, the Children and Young Persons Forum, to monitor the PSNI's role in relation to children including the review of stop and search."*

[59] The Policy Directive 13/06 deals with cases such as the engagement by the PSNI with children and young people, children and young people as victims and witnesses, crime prevention and the safety of children and young people, crime reduction – interventions by police, and human resource development to support specialist roles and the organisation at large.

[60] Under section 32 of the Police (Northern Ireland) Act 2000 the police's general obligations are to protect life and property; to preserve order; to prevent the commission of offences and where an offence has been committed to take measures to bring the offender to justice. In carrying out these duties the directive requires police officers to "*protect human dignity and uphold the human rights of all persons as*

enshrined in the European Convention on Human Rights ("ECHR") which applies equally to children and young people as it does to adults".

[61] The Directive goes on to say under the heading **Legal Basis**:

> *"(3) In addition to these, the United Nations Convention on the Rights of the Child (UNCRC) should be applied in its entirety, but particular attention should be given to the following core principles:*
>
> *(a) The right to life (Article 6).*
>
> *(b) The best interests of the child must be paramount (Article 3).*
>
> *(c) The State has a duty to protect children from all forms of violence (Article 19).*
>
> *(d) Children have a right not to be discriminated against (Article 2).*
>
> *(e) Children have a right to a heard and to have their opinions taken into account (Articles 12 and 13).*
>
> *(4) The above principles should be considered and applied in police interactions with children and in the writing of policy and service procedures which have the potential to impact on the rights of children and young people. Summary of the UNCRC articles included in Appendix A and a more detailed version for use by policy writers can be found by following the links below …*
>
> *(5) Officers are to ensure that they have regard to the welfare of children and young people whilst exercising their core functions, Section 53(3) of the Justice (Northern Ireland) Act 2002.*
>
> *(6) The following non-binding human rights standards should also be applied to police interactions with children and young people.*
>
> *(a) UN standard minimum rules for the administration of juvenile justice; the Beijing Rules (1985);*
>
> *(b) UN minimum rules for non-custodial measures; the Tokyo Rules (1990);*

(c) UN Guidelines for the Prevention of Juvenile Delinquency; the Riyadh Guidelines (1990)."

[62] At a later stage the policy deals expressly with human rights/United Nations Convention on the Rights of the Child ("UNCRC") Equality/Code of Ethics/Freedom of Information specifically the policy says:

> *"(1) This policy potentially engages Articles 5, 6 and 8 of the ECHR. Any rights engaged under the terms of this policy will be necessary and proportionate to the prevention crime in the interests of public safety and for the protection of the rights and freedoms of others.*
>
> *(a) Article 5 the Right to Liberty.*
>
> *(b) Article 6 the Right to a Fair Hearing.*
>
> *(c) Article 8 the Right to Respect for Home and Family Life. ECHR applies equally to children and young people as it does to adults."*

[63] This section also goes on to repeat what is set out in section 3 and to which I have referred above with the additional paragraph:

> *"(8) Due to the vulnerable nature of children and young people, it is extremely important that all officers engaging with them ensure that every effort is made to inform children and young people of their rights."*

[64] Mr Lavery submits on behalf of the applicant that these provisions are inadequate to comply with what was envisaged by the Court of Appeal in **Fox and Canning**. He says that the Code is not a properly formulated one and is insufficiently clear and precise. He submits that the Code in effect resorts to generalities about the requirements of police officers to comply with the various conventions and rules relating to the rights of children and the requirements to ensure that the best interests of the child are paramount. He draws an analogy with the requirements in the context of secret surveillance law that 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."*

[65] As was pointed out in the judgment in the **Fox and Canning** case a power vested in the police to openly stop and question a person is not the exercise of a covert surveillance power, but it does partake of some of the characteristics of surveillance.

[66] Mr Lavery argues that the resort to such general assertions has two deficiencies. First it is insufficiently clear to ensure that power is not arbitrarily exercised. There is insufficient guidance to police officers in terms of the exercise of the impugned powers. Secondly, he argues that those who are subjected to the exercise of the powers should be able to refer to a clear code which explains the circumstances in which the powers will be operated and how they will be exercised.

[67] He contrasts the Code in this jurisdiction with a Code of Practice in Scotland which was adopted by the Scottish Parliament in January 2017. That Code deals with the exercise by constables of powers of stop and search of the person in Scotland. Part IV deals with how stop and search powers are to be used, recorded and monitored. Chapter 7 of Part IV specifically refers to the conduct of searches and sets out additional conditions where a child or young person is involved.

[68] Chapter 7 is designed to offer constables assistance in recognising and understanding the needs of children and young people in relation to stop and search. It acknowledges that children and young people have different requirements to adults and that may require additional support to help them comprehend and participate in the search process. It is for this reason that additional guidance is provided and the chapter sets out ways in which constables can tailor their approach towards children and young people.

[69] The chapter goes on to flesh out the type of considerations that should be taken into account by constables so as to minimise the stress to a child or young person who is stopped and searched. The Code sets out a whole series of matters that constables should take into account. By way of example constables are reminded that they should be aware that not all children of the same age are of the same level of understanding. Where practical constables should allow the time for the child or young person to ask questions before a search begins. It encourages constables that they should presume that a search should not proceed where it appears that a young person lacks the capacity to understand why a search may be necessary. The focus should be on the well-being of the child as being the primary consideration in deciding whether to proceed with a search and this also applies to young people with learning disabilities or other types of disabilities such as, for example autism. Efforts should be made to ensure that any embarrassment that a young person being searched might feel is kept to a minimum.

[70] Mr Lavery points to an interesting article by Seamus McIlroy, barrister at law, when he was Director of Legal Services for the Office of the Police Ombudsman of Northern Ireland. In the article headed "*Scots Setting the Pace? Stop and Search of Children*" Mr McIlroy draws attention to the Scottish Code and asks the question whether there are any lessons for Northern Ireland on how the PSNI use its stop and search powers under both PACE and the 2007 Act when dealing with children.

[71] He points out that the problems encountered in Scotland are not problematic under the Northern Ireland PACE regime which requires officers to have a

reasonable suspicion before stopping and searching children but he suggests that there is some "*potential learning*" for Northern Ireland from the Scottish Code.

[72] As Mr McIlroy points out the statistics show that the issues which give rise to the need for drastic changes in Scotland are not replicated here and indeed the legislation itself varies considerably.

[73] In developing his arguments Mr Lavery referred the court to authorities such as **Zoumbas v SOS Home Department** [2013] UKSC 10 and **ALJ** [2013] NIQB 88 where the respective courts considered what is meant by the best interests of the child. Z**oumbas** dealt with a decision by the Home Secretary on an asylum claim whether a child should be removed from the United Kingdom to the Congo. The Supreme Court dismissed an appeal brought by the applicant. In considering how a Secretary of State should assess the best interests of a child the court took the view that this was an integral part of the proportionality assessment under Article 8 of ECHR. It went on to set out principles which were relevant to the determination which had to be carried out by the Secretary of State. In **ALJ** Stephens J, as he then was, dealt with the decision of the UK Border Agency to remove three children to the Republic of Ireland. In assessing how the decision was made Stephens J said at paragraph [96]:

> *"I consider that logically the starting point for a decision maker is first to identify where the best interests of the children lie. Having identified where the best interests of the children lie, the decision maker then asks the question as to whether the force of any other consideration or considerations outweigh it. In approaching the facts of this case I do not seek to elevate form over substance and I bear in mind that it might be that this sequence is not followed but that the correct questions are asked and answered."*

[74] Relying on these authorities by way of analogy Mr Lavery says that the only way that the correct questions are asked and answered by a police officer making a decision to stop and search a child is to be able to refer to a detailed code which guides and directs the officer on the appropriate approach in a particular case.

[75] Mr Lavery also referred to the Court of Appeal decision in England and Wales in **R (Miranda) v Home Secretary** [2016] EWCA Civ 6 which dealt with the scope of a police officer's power to stop and search a journalist at an airport and who retained computer drives found in the journalist's luggage.

[76] In that case the Court of Appeal said that the possibility of judicial review proceedings alone was insufficient to provide the degree of protection required against an abuse of the relevant powers. The Act under consideration namely the Terrorism Act 2000 did not in the court's view contain adequate legal safeguards

relating to journalistic material simpliciter or to journalisic material the disclosure of which may identify a confidential source.

[77] All of these cases have to be seen in their particular context. The exercise of the section 21 and section 24 powers obviously differ from the powers considered in the cases to which Mr Lavery refers. In relation to the Scottish scheme the Code to which Mr Lavery refers excludes provisions in relation to stop and search in the context of terrorism. It may well be that the authorities in this jurisdiction could provide a more prescriptive code along the lines adopted in Scotland but that does not make the approach adopted in this jurisdiction unlawful.

[78] In terms of the quality of law test for the legality of these powers the issue in this case turns on whether or not the Code, so far as it relates to children such as the applicant, is a properly formulated code qualifying and guiding the exercise of the impugned powers.

[79] In assessing the merits of this case the starting point in assessing the lawfulness of the impugned powers is that sections 21 and 24 when read with section 34 contain a framework which is capable of being compliant with the Article 8 rights of the applicant.

[80] As was said by Treacy LJ in the **Ramsey ("No. 2")** case at paragraph [47]:

> *"However, the authorisation process, police training, the control and restriction on the use of the impugned powers by the Code of Practice, complaints procedures, disciplinary restraint on police officers including the requirement to act, inter alia, in accordance with the Code, the risk of civil action and/or judicial review together with the independent oversight by various bodies previously detailed in my view constitute effective safeguards against the risk of abuse. The system appears to be carefully designed to structurally ensure that the power is not exercised arbitrarily and it is kept constantly under review at least on an annual basis by the Independent Reviewer whose annual reports are publicly accessible."*

[81] Children under the age of 18 enjoy all of the safeguards identified by Lord Justice Treacy. In addition it is clear that the Code expressly requires officers to have due regard for the protection of children with specific reference to the detailed guidance on the protection of children and young people as set out in the Policy Directive 13/06. Both of these documents are publicly available. The policy directive specifically incorporates the requirement that the best interests of children are pursued and provides guidance on how to determine the most appropriate response in respect of children. It aims to identify children and young people at risk of becoming involved in offending and works with other agencies in the provision of

support and intervention. It contains an express commitment to adhere to ECHR rights as well as the international standards in the UNCRC and the Beijing Rules.

[82] This has to be seen in the context of training provided to police officers. It is clear from the affidavits of Constables Phair and Fivey that both constables were alive to the sensitivities involved in searching children. Indeed, Constable Fivey specifically refers to his training and refresher training in respect of conducting his duties in the presence of and with minors involved. I consider that the reference in the Code to the Policy Directive together with the training provided to police officers in respect of minors in addition to the safeguards referred to by Treacy LJ in **Ramsey** is sufficient to ensure that the quality of law test is met in the circumstances in which these powers are exercised in respect of minors.

[83] In respect of the allegation based on discrimination as a result of the combination of Article 8 and Article 14 of ECHR, leaving aside the potential intricacies involved in establishing appropriate comparators it seems to me that ultimately this again reduces to an assertion that there is a failure to make adequate provision for children in respect of how the impugned powers are exercised. As has been made clear in consideration of the applicant's first ground, specific provision for children has been made in the codes and policy directives which guide police officers in their interaction with young people. Police officers are expressly required to have consideration of these matters when exercising their powers under section 21 and section 24. In those circumstances I do not consider that an argument based on discrimination is made out.

[84] Mr Lavery's third ground relates to an alleged failure to comply with the obligations placed on persons and bodies exercising functions in relation to the youth justice system as required by section 53 of the 2002 Act. The 2002 Act compels such persons and bodies to:

> *"(a) Have the best interests of children as a primary consideration;*
>
> *(b) Have regard to the welfare of children affected by the exercise of their functions (and to the general principle with any delay in dealing with children is likely to prejudice their welfare) with a view (in particular) for furthering their personal, social and educational development."*

[85] Having regard to the matters I have set out above when considering the first ground I do not consider that this ground is made out. Indeed, section 53 is specifically referenced at section 5(6) of the Code to which I have already referred.

[86] I therefore conclude that sections 21 and 24 meet the quality of law test and are compliant with the Article 8 entitlements of the applicant in this case. I do not

consider that there has been discrimination under Articles 8 and 14, nor has there been a breach of section 53 of the 2002 Act and the application for judicial review is therefore dismissed.