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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Ramsey's (Steven) Application [2014] NIQB 59

IN THE MATTER OF AN APPLICATION BY STEVEN RAMSEY FOR JUDICIAL REVIEW

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TREACY J

Introduction

[1] This is an application for judicial review by Steven Ramsey in which he challenges the legality of the powers in s24 and Sch 3 para 4(1) of the Justice and Security Act (NI) 2007 ("the JSA"). The applicant contends that he has been subjected to a series of stops and searches using these powers by the Police Service of Northern Ireland ("PSNI"). He seeks a Declaration that s24 and para 4(1) of Sch 3 are incompatible with Art 8 of the European Convention on Human Rights. Primarily this is a policy challenge to the power principally on the basis that it fails the quality of law test in that it is said there are insufficient safeguards against arbitrariness to render the power compatible with the Convention.

Background

[2] The applicant's long and documented history of repeated and significant use of the powers of stop and search/stop and question against him were set out in his affidavits and he states that although the searches prior to 15 May 2013 are not the focus of this application they do provide relevant background.

[3] The applicant's first affidavit notes that he was searched on 35 occasions in 2009, 37 occasions in 2010, 23 occasions in 2011 and 31 occasions in 2012. The position in relation to the number of searches of the applicant from 1 January 2013 is agreed between the parties. He was stopped on 26 occasions between 1 January and 21 June 2013 pursuant to s24/Sch 3. It was agreed that he was stopped on 4 further occasions between that date and 3 August 2013.

[4] Because of the change to the law and the introduction of the Code of Practice (following the Court of Appeal decision in Re Canning & Ors [2013] NICA 19) the current application is focussed on the 7 searches between 15 May and 3 August 2013. The details of these searches are set out in the applicant's skeleton argument.

[5] The applicant submitted that the only information available as to why he was stopped was from the officers involved in the searches. In relation to what these officers said, as set out below, their names are referred to by the letters V, W, X, Y and Z:

(a) Officer V (**A, p38, para 4**) "suspected dissident republican links"

(b) Officer W (**A, p41, para 3**) "As a result of confidential briefings"

(c) Officer X (**A, p43, paras 3, 6, 9**) "as a result of confidential briefings" ("from Security Branch" – para 9)

(d) Officer Y (**A, p47, para 2**) "As a result of confidential briefings"

(e) Officer Z (**A, p50, para 3**) "I recognised him as being a person of interest to police as a result of a confidential briefing"

Legislative Framework

[6] The applicant argued that the power at issue in this case is an amended version of the power that was successfully challenged in the joined cases of Re Canning, Fox & McNulty [2013] NICA 19 in which the Court of Appeal concluded that, in the absence of a Code of Practice, the relevant power was not sufficiently clear and precise to comply with Art 8 ECHR (at paras 45-50 and 58-59). The Court said that the broad powers in sections 21 and 24 of the Act:

> "…require justification and which provides 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." at para [45]

[7] The amendment of the law by the Protection of Freedoms Act 2012 ("the 2012 Act") has changed the s24/Sch 3 power in the following ways:

> (i) There is no longer a power for a constable to stop and search for munitions etc. without reasonable suspicion at any time.

(ii) Such a power is now available to military personnel.

(iii) A constable can stop and search for munitions etc. at any time if s/he has a reasonable suspicion that an individual has munitions etc. unlawfully with him.

(iv) The power for a constable to stop and search for munitions etc. without reasonable suspicion is retained where an authorisation is in place covering the area and time of the search.

[8] This new version of the power has been in force since 10 July 2012. The applicant submitted that it has not been suggested that the power to stop and search the applicant has ever been exercised on the basis of reasonable suspicion but rather the power used has been the power to stop without reasonable suspicion where an authorisation is in place (see para 4A(4) in Sch 3, below). This is a power which is unique to Northern Ireland.

[9] A Code of Practice Governing the use of the power has been in place since 15 May 2013. The "authorisation regime" is governed by the new para 4A of Sch 3 to the JSA which states:

"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 <u>any</u> constable to stop a person in the specified area or place and to*

search that person. [nb there is no requirement in the statute that the constable actually exercising the power have any suspicion].

(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.

[10] The new paras 4B and 4C state:

4B(1) An authorisation under paragraph 4A has effect during the period—

(a) beginning at the time when the authorisation is given, and

(b) ending with the specified date or at the specified time.

(2) This paragraph is subject as follows.

4C The specified date or time must not occur after the end of the period of 14 days beginning with the day on which the authorisation is given.

[11] The applicant submitted that the Hansard debates on the Protection of Freedoms Bill reveal no specific debate on the proposed amendment of the JSA or the s24/Sch 3 stop and search powers. A written ministerial statement of 9 February 2011 from the Secretary of State for Northern Ireland indicated that the powers would be changed in line with the changes that were being made to s44 of the Terrorism Act 2000 (following the case of Gillan & Quinton v UK [2010] 50 EHRR 45 to produce a more "tightly circumscribed power".

[12] Information about the authorisations under para 4A of Sch 3 to the JSA is not immediately publicly available. However, there is some consideration of them and the use of the revised s24/Sch3 power in the 5th and 6th reports of the Independent Reviewer of (Robert Whalley).

[13] The power came into force on 10 July 2012. According to Mr Whalley's 5th report authorisations were continuously in force for the whole of Northern Ireland for the period 10 July 2012 – 16 August 2012. His 6th report reviews all the authorisations made from 16 August 2012 and concluding on 6 August 2013. It is now clear that such authorisations have been *continuously* in operation for *the whole of Northern Ireland* since the relevant provision came into force.

[14] The applicant submitted that there is a clear concern that the requirement for an authorisation does not operate as a curb on the power and that these authorisations have been made on a continuous or "rolling" basis since the coming into force of the power on 10 July 2012. Further, it was submitted that the lack of publicly available information concerning the authorisations is a matter of some concern and is relevant to the question as to whether the revised power is "in accordance with law" for the purposes of justification under Art 8(2) ECHR.

[15] The applicant also submitted that it appears from the report that authorisations were in place for all of Northern Ireland meaning, effectively, that the "old" power is back in force. The applicant asked the question whether the authorisation regime provided by para 4A of the amended Sch 3 to the JSA and the Code of Practice now in place are sufficient to render the power compatible with the Convention.

Article 8 ECHR

[16] Art ECHR provides:

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

[17] In Gillan & Quinton v UK the Court found that:

> "As the Court has had previous occasion to remark, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. The notion of personal autonomy is an important principle underlying the interpretation of its guarantees. The article also protects a right to identity and personal development, and the right to establish relationships with other human beings and the outside world ... There is, therefore, a zone of interaction of persons with others, even in a public context, which may fall outside the scope of "private life". There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. In this connection, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive, factor. In Foka at [85], where the applicant was subjected to a forced search of her bag by border guards, the Court held that "any search effected by the authorities on a person interferes with his or her private life." [61]

[18] The Government had argued that:

> "...in certain circumstances a particularly intrusive search may amount to an interference with an individual's Art 8 rights, as may a search which involves perusing an address book or diary or correspondence, but that a superficial search which does not involve the discovery of such items does not do so." [63].

[19] The Court rejected that view concluding that:

> "...the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life. Although the search takes place in a public place, this does not mean that Art 8 is inapplicable. Indeed, in the Court's view, the public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment. Items such as bags, wallets, notebooks and diaries may, moreover, contain certain information which the owner may feel uncomfortable about having exposed to the view of his companions or the wider public." [63]

[20] Thus it is clear that the exercise of the impugned powers constitutes an interference within the meaning of Art 8 ECHR that must be justified Art 8(1). As with a search under s44 of the Terrorism Act:

> "The individual can be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search." (Gillan [64]).

[21] In this case the applicant has been stopped on numerous occasions in public by police officers and obliged to submit to a search of both his person and the vehicle in which he was travelling. He was detained for various periods of time ranging from 2 minutes. I accept that the impugned stop and searches constituted an interference with the right guaranteed in Art 8(1). That such searches do amount to an interference with the Art 8(1) right was accepted by the High Court and Court of Appeal in the Canning, Fox & McNulty cases.

Article 8(2)

In accordance with the law

[22] Once an interference with Art 8(1) has been established the court must then consider whether that breach can be justified by the state under Art 8(2). It must be established in the first instance that the impugned measure is "in accordance with law" in as much as it must have both a basis in domestic law and compatibility with the rule of law.

> "The law must thus be adequately accessible and foreseeable, that is formulated with sufficient precision to enable the individual – if need be with appropriate legal advice – to regulate his conduct." (Gillan [76]).

[23] The power to stop and search exercised in this case has a basis in domestic law as outlined in s24 and sch 3 of the JSA. However, the applicant submitted that the power does not meet the "quality of law" test because the Court in Gillan said:

> "[77]...domestic law...must afford *a measure of legal protection against arbitrary interferences* by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights *it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power.* Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed." (my emphasis)

[24] As the applicant set out in the skeleton argument the Court was expressly critical of the following aspects of the s44 regime:

> (a) At the level of authorisation, the senior officer empowered to authorise an officer to stop and search a pedestrian in any area specified by him, could grant such an authorisation if he considered it "expedient". The Court expressly criticised the absence of a requirement that an authorisation must be demonstrably "necessary". §80
>
> (b) The failure of the temporal and geographical restrictions provided by Parliament to act as any real check to the issuing of authorisations in circumstances where some police districts had a "rolling programme" of renewals. §81
>
> (c) The independent reviewer's powers were confined to reporting on the general operation of the statutory provisions, and he had no right to cancel or alter authorisations. §82
>
> "[*T]he breadth of the discretion conferred on the individual officer. . . Not only is it unnecessary for him to demonstrate the existence of any reasonable suspicion; he is not required even*

subjectively to suspect anything about the person stopped and searched. The sole proviso is that the search must be for the purpose of looking for articles which could be used in connection with terrorism. . . . Provided the person concerned is stopped for the purpose of searching for such articles, the police officer does not even have to have grounds for suspecting the presence of such articles." §83

(d) The statistical evidence showing the extent to which resort was had by police officers to the powers. §84

(e) The *risk* of arbitrariness in according such a broad discretion to the police officer, and the risk that it could be used in a discriminatory fashion. §85

(f) The limitations on domestic law challenges, including civil actions to the use of such powers given the broad nature of the individual officer's discretion. §86

[25] Equally, the applicant submitted that, the powers relevant to this case do not meet the requirement and set out the following reasons:

(a) Authorisations are made by a senior officer of the PSNI (ACC level or above). The authorisation must be confirmed by the Secretary of State within 48 hours of it being made. There is no effective independent oversight of this process;

(b) It is clear from the Independent Reviewer's 6th report that the Secretary of State has never refused to confirm an authorisation (p408, para 252). There is no indication that she has ever made any amendments to an authorisation to shorten the duration or narrow the geographic extent;

(c) In contrast to section 47A of the Terrorism Act (which replaced section 44) the authorisation does not have to be directed towards a specific act of terrorism but rather can be made on the basis of a more general threat. Indeed the Independent Reviewer of the Justice and Security Act, Mr Whalley notes that the JSA powers are more appropriate to the Northern Ireland context for this reason "It is less likely to be the case that the police will have the degree of specific intelligence which would justify a section 47A authorisation." (paras 223-226 at 226);

(d) It appears that since the amendment came into force there have been *rolling authorisations meaning that the entire jurisdiction of Northern Ireland has been covered by an authorisation since 10 July 2012;*

(e) This, in effect, means that *the power to stop and search for munitions etc. without reasonable suspicion has been in force continuously since then throughout the entire jurisdiction;*

(f) The potential geographical and/or temporal safeguards are therefore rendered effectively meaningless (§81 of Gillan v UK);

(g) This is particularly important when the statistics relating to the numbers of stops are noted. It is clear that the power is more frequently used in some areas than in others (see e.g B p791);

(h) Information is not made available to the public about the temporal or geographic limits of authorisations in force. The Policing Board's Thematic Review recommends that "all information which can be put into the public domain to better explain the authorisation process and the related national security arrangements should be put into the public domain to assist the community in understanding those arrangements" (p 737);

(i) The authorising officer need only have a "reasonable suspicion" that the safety of a person might be endangered and "reasonably consider" that an authorisation is necessary. These are both relatively low thresholds and very difficult to challenge (see e.g. O'Hara v Chief Constable [1997] AC 286 re reasonable suspicion). This is particularly so given the complete absence of publicly available information;

(j) The breadth of the power given to individual officers is therefore the same as previously and is the same as that deprecated by the ECtHR in Gillan. It is a broad, unfettered power, and the Courts criticisms at §83 are equally applicable as there is no requirement that the search be considered necessary, the individual police officer need not have formed any view about the likelihood of the detainee actually being in possession of the equipment being searched for, and s/he is not

required "even subjectively to suspect anything about the person stopped and searched"; §83

(k) These factors make it unlikely that there could be a successful challenge to a decision to stop and search in a particular case; §86

(l) The power is a power to stop and search for munitions and wireless apparatus. The Code of Practice now in force (since 15 May 2013) makes it clear (p160, para8.2) that *"wireless apparatus" includes mobile phones,* something that the overwhelming majority of the population now carry with them at all times;

(m) The applicant's evidence, it was submitted, gives rise to serious concerns that recording of the instances of stop and search may not be complete and that police are taking steps to interfere with the detainee making his own record;

(n) This concern is exacerbated by the change in policy (which, the court was informed, "was of some interest to the Court of Appeal in the Fox & McNulty case") that means a detained person is no longer provided with a record of the search on the spot but rather the details are entered into a blackberry and electronically submitted to a central office from where the detainee is told s/he can obtain the details with the use of a reference number. *Provision of full details on the spot is a safeguard against arbitrariness as it provides a clear record that the search took place and where and when it took place, the details can be challenged at the time and it does not allow for denial of the search at a later time.* This matter is before the court in separate judicial review proceedings;

(o) Information available suggests that details are not always provided or not always properly recorded;

(p) It is further exacerbated by the fact that material available from the Fox & McNulty case suggests that while *recording* appears to include ethnicity it *does not include religion and/or political opinion – traditionally the area where the arbitrary nature of the powers could be most open to abuse. This was a matter of concern to the Committee on the Administration of Justice (at p34 and following) and to the Policing Board (p750 and following).*
[courts emphasis].

[26] In Gillan the European Court said:

> "86. The Government argues that safeguards against abuse are provided by the right of an individual to challenge a stop and search by way of judicial review or an action in damages. But the limitations of both actions are clearly demonstrated by the present case. *In particular, in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised."*

[27] At para 82 the court noted that the independent reviewer is "confined to reporting on the general operation of the statutory provisions and he has no right to cancel or alter authorisations, despite the fact that in every report from May 2006 onwards he has expressed the clear view that, 'section 44 could be used less and I expect it to be used less'".

[28] The Independent Reviewer is clear that he has no role to play in the authorisation process, that he merely examines the authorisations after the fact. He has no power in respect of the authorisations or the authorisation process (p408, para 286). The Policing Board is similarly limited to ex post facto comment.

[29] It is still an offence for an individual not to stop when required to do so under para 4 or 4A of Sch 3 to the amended JSA.

The Authorisation Regime

[30] The applicant submitted that the authorisation regime is "reminiscent" of the regime under s44 of the Terrorism Act 2000 impugned in Gillan in which a violation of Art 8 was found. The use of that power was discontinued after the judgment of the European Court and has now been replaced by s47A of the Terrorism Act (as amended by the Protection of Freedoms Act 2012). As appears from its terms including the italicised portions below the replacement authorisation regime is different and more circumscribed than that under the JSA powers impugned in the present application. To enable some comparison of the respective provisions I set out the principal provisions in the next paragraph.

[31] S44 of the Terrorism Act provided as follows:

> "44 Authorisations
>
> (1) An authorisation under this subsection authorises any constable in uniform to stop a vehicle *in an area or at a place specified* in the authorisation and to search—

(a) the vehicle;

(b) the driver of the vehicle;

(c) a passenger in the vehicle;

(d) anything in or on the vehicle or carried by the driver or a passenger.

(2) An authorisation under this subsection authorises any constable in uniform to stop a pedestrian *in an area or at a place specified* in the authorisation and to search—

(a) the pedestrian;

(b) anything carried by him.

(3) An authorisation under subsection (1) or (2) may be given *only* if the person giving it considers it expedient for the prevention of acts of terrorism.

(4) An authorisation may be given—
....

(b) where the specified area or place is the whole or part of the metropolitan police district, by a police officer for the district who is of at least the rank of commander of the metropolitan police;

(c) where the specified area or place is the whole or part of the City of London, by a police officer for the City who is of at least the rank of commander in the City of London police force;

[32] S47A of the Terrorism Act states:

"47A Searches in specified areas or places

(1) A senior police officer may give an authorisation under subsection (2) or (3) in relation to a specified area or place if the officer—

(a) reasonably suspects that *an act of terrorism* <u>*will*</u> take place; and

(b) reasonably considers that—

(i) the authorisation is necessary *to prevent such an act*;

(ii) *the specified area or place is no greater than is necessary to prevent such an act*; and

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

(2) An authorisation under this subsection authorises any constable in uniform to stop a vehicle in the specified area or place and to search—

(a) the vehicle;

(b) the driver of the vehicle;

(c) a passenger in the vehicle;

(d) anything in or on the vehicle or carried by the driver or a passenger.

(3) An authorisation under this subsection authorises any constable in uniform to stop a pedestrian in the specified area or place and to search—

(a) the pedestrian;

(b) anything carried by the pedestrian.

(4) A constable in uniform may exercise the power conferred by an authorisation under subsection (2) or (3) *only for the purpose of discovering whether there is anything which may constitute evidence that the vehicle concerned is being used for the purposes of terrorism or (as the case may be) that the person concerned is a person falling within section 40(1)(b).*

(5) But the power conferred by such an authorisation may be exercised whether or not the constable reasonably suspects that there is such evidence.

(6) A constable may seize and retain anything which the constable—

(a) discovers in the course of a search under such an authorisation; and

(b) reasonably suspects may constitute evidence that the vehicle concerned is being used for the purposes of terrorism or (as the case may be) that the person concerned is a person falling within section 40(1)(b).

(7) Schedule 6B (which makes supplementary provision about authorisations under this section) has effect.

(8) In this section—

- "driver" has the meaning given by section 43A(5);
- "senior police officer" has the same meaning as in Schedule 6B (see paragraph 14(1) and (2) of that Schedule);
- "specified" means specified in an authorisation."

(2) Schedule 5 (which inserts a new Schedule making supplementary provision about powers to stop and search in specified locations into the Terrorism Act 2000) has effect.

The Code of Practice

[33] The Code of Practice enacted following Canning & Ors is issued under Section 34(1)(a) and 34(2) of the 2007 Act. The Code applies to police powers in the 2007 Act, which are specific to Northern Ireland. The effect of the Code is set out in Section 35(1) and 35(3): it is admissible as evidence in criminal or civil proceedings and shall be taken into account in any case where it appears relevant. However, failure by a police officer to comply with a provision does not of itself make that officer liable to criminal or civil proceedings.

[34] The Code contains two sections relevant to the exercise of the power to stop and search for munitions pursuant to section 24 and schedule 3. The first is the "General Principles" section and the second is directed specifically to the stop and search of persons pursuant to section 24. The "General Principles" section contains mainly a recitation of legislation and other documents such as the PSNI Code of

Ethics which apply to the PSNI. At paras 5.6-5.8 officers are urged to avoid racial or religious profiling. At para 5.9 supervising officers are urged to monitor the use of the stop and search power, including consideration of records to see if they reveal any trends or patterns which give cause for concern. Para 5.11 provides that supervision and monitoring must be supported by "the compilation of comprehensive statistical records of stops and searches at service, area and local level. Any apparently disproportionate use of the powers by particular officers or groups of officers or in relation to any specific sections of the community should be identified and investigated". The applicant submitted that such monitoring must be severely limited, if not impossible in relation to certain categories, since perceived religion/political opinion are not included in the stop and search forms. The exercise of the impugned powers would be even more intrusive if it were to be suggested that questions be directed by the police on these issues to the subject. But there is no reason why, if there is to be effective monitoring, details of the *perceived* religion/political opinion should be omitted/not recorded. This is especially so since in many cases the exercise of powers will be intelligence driven and the perceived religion/political opinion is likely to be known by police.

[35] Para 8.23 provides that when giving an authorisation, the officer must specify the geographical area in which the power may be used, and the time and date that the authorisation ends "up to a maximum of 14 days from the time when the authorisation was given". The authorisation ceases to have effect at the end of 48 hours unless confirmed by the Secretary of State. Both the duration and the geographical extent of an authorisation "must be no greater than is necessary to prevent endangerment to the public caused by the use of munitions or wireless apparatus and based on an assessment of the available information. Para 8.24 provides that in determining what is necessary in terms of duration and geography that the senior police officer should make an assessment of what is the most appropriate operational response taking into account all relevant factors. Para 8.25 states that an authorisation can be granted to apply to all or part of NI "but only if the endangerment from munitions or wireless apparatus makes it necessary". Para 8.21 states with emphasis that the powers should "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 is limited in terms of the potential target or attack method. Para 8.26 says that "in principle" paragraph 4A(1) of the schedule enables an authorisation to cover the whole of NI "and to last for a maximum of 14 days". Endangerment of the public, based on a number of threats, may not in itself be sufficient to justify extension throughout NI". The same para goes on to state "however, where an authorisation responds to multiple threats in different places across a period of time it is more likely that an authorisation for the maximum area and period of time would meet the necessity test." So far as authorisations are concerned the Code therefore envisages the authorisation of the maximum period of time (14 days) and the maximum possible geographical extent as a last resort stating that such an authorisation is available "in principle". As already noted rolling authorisations have meant that the entire jurisdiction of

Northern Ireland has been covered by an authorisation since 10 July 2012. Thus the power to stop and search for munitions etc without any reasonable suspicion has been in force continuously since then throughout the entire jurisdiction.

[36] Ms Quinlivan submitted that the evidence before the court suggests that the provisions in the Code of Practice are not being complied with in respect of section 24/Schedule 3 searches. In as much as the Code is being complied with the evidence from Mr Ramsey and Mr Gallagher suggests, she submits, that the Code of Practice is ineffective to prevent the power being used disproportionately and indeed abused.

[37] Having regard to the foregoing it was therefore submitted on the applicants behalf that the power is not "in accordance with law" and therefore in breach of the applicant's Art 8 rights.

Necessary in a Democratic Society

[38] The applicant further submitted that the power, and its use in this particular case, could not be said to be necessary in a democratic society. In considering this aspect of Art 8(2) the applicant submitted that the Court must assess:

> "whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued, whether the reasons given by the national authorities to justify it are relevant and sufficient" (Sunday Times v United Kingdom (1979) 2 EHRR 245, [62])

[39] It is not in dispute that the aims pursued by the enactment and use of this power are legitimate for the purposes of the assessment of what is necessary in a democratic society. However, the applicant submitted that the power and its use are not proportionate. The first issue arising is whether there is a need for the power to stop and search without reasonable suspicion at all given the averments made that:

> "the power to stop and search pursuant to section 24 is not exercised on a purely random basis. The use of the power is frequently intelligence-driven" (Jackson p67, para 12)

> "the intent is that the power is not used on either a purely random or blanket basis but rather on the basis of threat. It is unlikely that an individual will be subject of a section 24 stop and search unless there is an intelligence-led basis for the use of the power in the prevailing circumstances" (Jackson p69, para 19)

[40] If these averments are correct the applicant submits that the objective of the s24 stop and search power could be achieved by a less invasive power – a clear indicator that the power is not proportionate. In this regard Ms Quinlivan argued that the example given by Girvan LJ in his judgment in Fox & McNulty must be analysed. In upholding the power to stop and search without reasonable suspicion he said:

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

[41] The applicant submitted that the scenario outlined by Girvan LJ as providing justification for a power to stop and search without reasonable suspicion would, in fact, only be properly covered by exercising the power to search a vehicle (see para 2 of Sch 3 and s42). In the scenario outlined it is submitted that reasonable suspicion would exist and the power to search without reasonable suspicion would not be required.

[42] The second issue raised by the applicant relates to the actual outcomes of s24 stops. The statistical material provided by police does not show the rate of arrests following the use of the stop and search power under s24 JSA. The overall rate of arrest for all powers following stop and search/question between 1 April and 30 June 2013 was approximately 6% (524 arrests from 8763 stops, at p791). However, the Policing Board Thematic Report provides more specific information which indicates that the rate of arrest following s24 stops in 2012/2013 was 1.28% (p758).

[43] The material provided in the statistics does not include the background to the arrest numbers to show what the arrests were for e.g. failure to co-operate or find of

munitions/wireless apparatus/transmitter. Provision of such material it was said would allow the court to consider whether the same number of arrests/recoveries could have been made with the use of the reasonable suspicion power alone (as to which the court was directed to the already low threshold required to establish "reasonable suspicion" referred to in O'Hara v Chief Constable) or with the other statutory powers available.

[44] It is in any event submitted that the low rate of arrests recorded against the s24 power is indicative of its disproportionate use.

Discussion

[45] I note at the outset this applicant is not pursuing the Art 5 point on the basis of the absence of a requirement of reasonable suspicion. This is because, *inter alia*, the decision of the Court of Appeal as it currently stands is an insuperable obstacle to the successful pursuit thereof.

[46] The principle issue before me was the quality of law point. The applicant also argued that the powers were disproportionate.

[47] The impugned statutory regime has changed significantly from the decision of the Court of Appeal in Fox. It must be borne in mind that the sole basis on which the Court of Appeal found a breach of Art 8 was because the impugned provisions failed the quality of law test because of the absence of an enforceable Code of Practice. That complaint has now been remedied since a Code, debated and approved by both Houses of Parliament, was approved in May 2013. Although the Order 53 Statement makes no reference to the Code of Practice the applicant's attack was, in large measure, based on an attack upon the alleged deficiencies of the Code.

[48] The Court of Appeal in Fox had before it a draft Code and this Court was informed by Ms Quinlivan QC, on behalf of the applicant, that there was no material difference between the draft Code and the promulgated Code. The Court of Appeal, certainly in its written decision, expressed no criticism of the adequacy of the draft Code nor does it appear that any submissions were advanced as to the adequacy of the draft. I understand that that may have been because of the nature of the attack in ***Fox*** – namely the fact no *enforceable* Code had yet been promulgated and did not therefore necessitate any attack on the draft provisions.

[49] The argument regarding the Code assumed a prominence in the Court of Appeal in Fox which I do not recall it bearing in the original High Court proceedings. In any event, in the present case, the substance of the Code and the attack upon it has assumed a significance which does not even merit a bare mention in the Order 53 Statement. Be that as it may the defect identified by the Court in Fox has now been remedied by both Houses of Parliament who have debated the Code of Practice, approved it and promulgated it.

[50] It is common case that the stop and searches complained of in the present case constituted an interference with Art 8 and accordingly that the interference requires to be justified. That kind of approach is similar to the law of trespass. Any admitted or approved trespass must be justified in order to be lawful. Ordinarily the discharge (or not) of that onus takes place in a concrete factual situation. In the present case the applicant makes the case that he has been subjected to harassment by the repeated use of the impugned power to stop and search him. If so, I would ordinarily expect such a case to be made in civil proceedings where each of the fact scenarios relevant to the deployment of the impugned power and the serious allegation of harassment could be thoroughly and properly examined. The Code and any alleged breaches could be relied upon in civil proceedings. No such steps have been taken in respect of the stop and searches, the subject of the current proceedings. I was informed that no civil proceedings were or have been taken.

[51] The purpose of the quality of law test was explained in the section of the judgement in Gillan which I have set out above at para 26. Domestic law must afford a measure of legal protection against arbitrary interference by the state with rights safeguarded by the Convention. In matters affecting fundamental rights it would in the words of the ECHR in Gillan "be contrary to the rule of law … for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion … and the manner of its exercise."

[52] The promulgation of the Code and the introduction of the authorisation regime are relied upon by the respondent as important safeguards which rescue the impugned powers from being condemned as violating Art 8. The central question is whether these features mean that there is now in place, post Fox, sufficient safeguards to render the impugned power compatible with the Convention. These safeguards were absent from the statutory regime under consideration in *Fox*. The respondent invites the court to conclude that the impugned powers, peculiar to NI, are Art 8 compliant because they offer sufficient safeguards to protect against arbitrariness because of the twin features of the authorisation regime together with the added safeguard of a detailed and enforceable code approved by both houses of parliament.

[53] The basis of the Court of Appeal finding in Fox was that a properly formulated *code* "qualifying and guiding" the exercise of the power when read together with the relevant section "could provide a legal framework that would satisfy the "quality of law" test" [see para 46 -50 and 59]. In the present case the Code does purport to qualify and guide the exercise of the impugned power. On its face the Code seeks to ensure proportionality in the exercise of the impugned power and specifies the circumstances which justify its exercise emphasising [see the detailed provisions of section 8 of the Code including paras 8.49-8.58 entitled "Briefing of officers; 8.59-8.68 entitled "Conduct of searches" which deals, inter alia, with the basis for searches; paras 8.69-8.72 entitled "Steps to be taken prior to a search" and 8.73-8.78 entitled "Stopping and searching persons: Records"]. In light

of the Court of Appeal finding this Code would appear to plug the gap identified by the court in that case. In addition there is also the new authorisation regime which offers additional safeguards including some oversight by the Secretary of State, the oversight by the Independent reviewer and scrutiny by the Policing Board. I am satisfied that there are now sufficient safeguards against arbitrariness to render the power compatible with the Convention. I reject the submission that the powers are disproportionate. The impugned power, underscored by the Code of Practice and within the framework of the authorisation regime, does not fall into the category of arbitrariness. (See to similar effect the judgement of the Court of Appeal in *R (Roberts) v Commissioner of Police of the Metropolis & Ors* [2014] EWCA Civ 69 at para 26).

[54] Accordingly, the judicial review is dismissed.