Judicial Communications Office

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COURT DELIVERS JUDGMENT ON STOP AND SEARCH POWERS

Summary of Judgment

The Court of Appeal[1] today concluded that the PSNI's failure to record at the time the basis of its decisions to stop and search under the Justice and Security (Northern Ireland) Act 2007 was a breach of Article 8 ECHR.

Steven Ramsey ("the appellant") appealed against an earlier decision refusing an application for judicial review of the decisions to stop and search him pursuant to section 24 of, and Schedule 3 to, the Justice and Security (Northern Ireland) Act 2007 ("the 2007 Act") on a range of dates in 2013. The appellant contended that:

- the authorisation regime of the 2007 Act did not satisfy the quality of law test;
- the legislative scheme of the 2007 Act including the Code of Practice did not contain adequate safeguards to prevent abuse/the arbitrary exercise of power and failed the quality of law test;
- the failure to monitor the use of the power under the 2007 Act to stop and search on the basis of perceived religious or political opinion was in breach of the Code of Practice and contrary to Article 8 ECHR in that it failed to prevent arbitrariness, failed the quality of law test and was disproportionate; and
- the failure to record the basis of the search was contrary to the Code of Practice and was in breach of the appellant's Article 8 rights.

Legislative History

As part of its response to the terrorist threat in Northern Ireland the government introduced powers for police officers to stop and search without a requirement for reasonable suspicion in the Terrorism Act 2000. The legislation was challenged[2] on the basis that it did not give adequate protection against arbitrary interference by public authorities. It was submitted that the law must be accessible, foreseeable and compatible with the rule of law, giving an adequate indication of the circumstances in which a power may be exercised and thereby enabling members of the public to regulate their conduct and foresee the consequences of their actions. The House of Lords accepted the principles advanced but considered that the legislation could not realistically be interpreted as a warrant to stop and search people who were obviously not terror suspects. It held that the 2000 Act was designed to ensure that a constable was not deterred from stopping and searching a person whom he did suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion. It accordingly dismissed the appeal.

The appellant in *Gillan* pursued an application to the European Court of Human Rights (ECtHR). Judgment was given on 12 January 2010. The ECtHR noted that the concept of private life under Article 8 was broad and was satisfied that the use of coercive powers to require an individual to submit to a detailed search amounted to a clear interference with the right to respect for private life.

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[1] Morgan LCJ, Stephens LJ and Maguire J. Morgan LCJ delivered the judgment of the Court.

[2] *R (Gillan) v Commissioner of Police of Metropolis* [2006] 2 AC 307

It followed that the power to search had to be in accordance with the law and therefore had to be adequately accessible and foreseeable so as to enable individuals to regulate their conduct. It had to offer a measure of protection against arbitrary interference by public authorities. The ECtHR concluded that the powers had been neither sufficiently circumscribed nor subject to adequate safeguards against abuse. Accordingly the powers had not been in accordance with law and there had been a violation of Article 8.

The 2007 Act made particular provision conferring powers to stop and question and stop and search for munitions and transmitters which extended only to Northern Ireland. The Court discussed the relevant provisions in paragraphs [6] – [9] of its judgment. In light of the decision of the ECtHR in *Gillan* a new regime for stop and search was introduced in section 47A of the 2007 Act[3]. The features of that regime included:

- An authorisation permitting a stop and search for munitions or wireless apparatus can only be made by an officer of at least the rank of Assistant Chief Constable;
- If no authorisation is in place a constable may not stop and search a person in the absence of reasonable suspicion;
- In order to give the authorisation the officer must reasonably suspect that the safety of any person might be endangered by the use of munitions or wireless apparatus and reasonably consider that the authorisation is necessary to prevent such danger and that the specified place in respect of the authorisation and the duration of the authorisation are both no longer than is necessary to prevent such danger;
- Any authorisation can be limited both temporally and geographically but must end on a specified date or time no greater than 14 days beginning with the day on which the authorisation was given;
- The authorising officer must inform the Secretary of State as soon as reasonably practicable;
- The authorisation ceases to have effect at the end of the period of 48 hours beginning with the time when it is given unless it is confirmed by the Secretary of State before the end of that period;
- When confirming an authorisation the Secretary of State may limit it temporally or geographically;
- The Secretary of State or a senior officer may cancel the authorisation with effect from the time identified by him and a senior officer can also limit the authorisation temporally or geographically.

Independent Reviewer

Section 40 of the 2007 Act requires the Independent Reviewer to prepare an annual report on the operation of the Act. The Court referred to seven annual reports covering the period from 1 August 2011 until 31 July 2018. In each case it was confirmed that the Independent Reviewer had availed of briefings from the police and military authorities about the security situation and reviewed sample documentation in respect of the making of authorisations. Throughout the period from 2011 to 2018 the reports from the Independent Reviewer indicated that the principal threat came from Dissident Republicans ("DRs"). Since 2015 the Independent Reviewer has recommended that the authorisation process should take place on a three-month basis rather than being reviewed every 14 days. This reflected the ongoing security issues in Northern Ireland and disclosed an informed inference that there was no immediate prospect of a change in the security picture.

[3] Introduced by the Protection of Freedoms Act 2012.

The Trial Judge's Conclusion

The trial judge concluded that the stop and search powers under the 2007 Act had been subject to detailed independent scrutiny for many years. On each occasion the Independent Reviewer had addressed the very complaints that the appellant made in the judicial review and had recommended the retention of the impugned powers. The trial judge noted that, in light of the nature of the threat from DRs, it would come as no surprise to anyone in Northern Ireland that the impact on exercise of this power was more likely to be felt by the perceived catholic and/or nationalist community. His overall conclusion was that 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 in accordance with the Code, the risk of civil action and/or judicial review together with independent oversight constituted effective safeguards against the risk of abuse.

The PSNI accepted that they did not record the grounds for the exercise of the power to stop and search. This issue was raised in a number of complaints to the Police Ombudsman's office who considered that a proper system of recording the rationale for the search would assist officers in countering claims of harassment. The Independent Reviewer noted that the PSNI took the view that they were not required to provide any grounds reasonable or otherwise for exercise of the power as the power could be exercised without reasonable suspicion. The trial judge took the view that the PSNI analysis on this point was sound. He considered it sufficient that the individual was told that due to a current threat in the area and to protect public safety stop and search authorisation had been granted. That was included in the printed record relating to the stop and search available at a police station.

The trial judge rejected the distinction drawn by the PSNI between the basis for a search and the grounds for a search. The authorisation was the legal foundation for the officer's power to stop and search but the basis for the use of the power will vary from case to case. He held that the Code plainly envisaged a process where the basis for the use or exercise of the power would be recorded. He said this was intended to address and to mitigate the risk of improper use of the power of stop and search by enabling greater transparency and accountability in respect of its exercise.

Despite finding that the failure to record the basis for the search was not consistent with the Code the trial judge concluded that the failure did not automatically render the exercise of the power in any of these cases unlawful or in breach of Article 8. He said the evidence in the case established that there was a basis for each of the impugned searches. Both parties agreed that in light of his finding that the basis for the search was required and had not been recorded there had been a breach of the Code which constituted a breach of Article 8 of the Convention. The appellant submitted that the trial judge should have so found whereas the PSNI submitted that the judge erred in finding that a record of the basis was required.

Discussion

In this case there was a difference of view about the proper interpretation of the provisions concerning the obligation to record the grounds for the conduct of the search and the obligation to maintain and monitor the community background of those who had been searched. Paragraph 8.61 of the Code demonstrates that there are two broad circumstances in which the power to stop and search without reasonable suspicion may be exercised:

- Where the officer considers that there is something about the conduct of the individual which gives rise to a suspicion that the individual may have munitions or wireless apparatus;
- Where the officer has been briefed with information as a result of which he exercises the power. The obvious circumstance in which this arises is where there is some basis for thinking that there might be a terrorist attack such as a bombing but there is no information as to the vehicle that may be involved or the means by which it may be carried out. In those circumstances checkpoints may be set up which will randomly stop vehicles to carry out checks with a view to disrupting the terrorist activity.

The Independent Reviewer is the principal check on the prevention of any abuse of the briefing power. The Court said it was clear from all the reports that having both attended briefings and reviewed the paperwork the Independent Review was satisfied with the application of these arrangements since the implementation of the Code: "It goes without saying that if there is reliable intelligence which enables the officers to identify a vehicle suspected of carrying munitions or wireless apparatus any search in those circumstances would be based on reasonable suspicion".

The first issue in this case was the information which must be included in the record of the search. The Code provides that the record must include the basis for the use of the power and any necessary authorisation that has been given. The authorisation is a condition precedent to the use of the power. The reference to the basis for the use of the power is wider. The Court was satisfied that the trial judge was correct to reject the submission that it was only the fact of authorisation that needed to be recorded. It considered there are two further reasons which point in that direction:

- The requirement for the officer to record the basis for the search is itself a discipline in ensuring that the officer acts in accordance with the requirements of the Code. The record need not be extensive comprising at most a sentence or two but providing sufficient information to explain why there was a basis;
- The requirements to monitor and supervise. The Code 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 and that the power should be used only if it is proportionate and necessary: "Proportionality requires the powers to be used only where justified by the particular situation. Effective monitoring and supervision can only be achieved if there is a record for the basis of the search".

The second issue in dispute in this case was the requirement in the Code to monitor community background. There is a particular focus on the risk of profiling people from certain ethnicities or religious backgrounds and consequently losing the confidence of communities. The Code does not specify any particular methodology by which the monitoring or supervision of the exercise of the power is to be carried out in order to guard against the risk of discrimination. It does, however, require that supervising officers must ensure in the use of stop and search powers that there is no evidence of them being exercised on the basis of stereotyped images or inappropriate generalisations. Supervising officers can only carry out that task if they have the information which enables them to make a judgement about the manner in which the powers are exercised.

The Court accepted that, although there is no specific methodology required under the Code for the monitoring of community background, the monitoring and supervision requirements establish a duty on the PSNI to devise a methodology of enabling such monitoring and supervision. The Court said there was evidence that such work has been undertaken by the PSNI. It noted that the Code does not impose any requirement on a member of the public to indicate anything about community

background and said it was not, therefore, possible to establish such background by means of questioning. The Court noted that there had been initial reluctance by the PSNI to leave it to individual officers to make an assessment of the community background of the individual stopped. In some cases that might be informed by previous experience with an individual but in others there may be little basis for making any determination. The evaluation of the pilot tended to suggest that the best option may be assessment of community background by the individual police officers. The Court noted that this option has not yet been implemented. It was satisfied, however, that the requirements of the Code are that some proportionate measure is put in place in order to ensure that there can be adequate monitoring and supervision of the community background of those being stopped and searched.

The arguments in respect of the foreseeability of the provisions of the 2007 Act were principally directed towards the risk of arbitrary use of the power. The Court noted that there has been an authorisation for the whole of Northern Ireland since the implementation of the Code in May 2013 because of the terrorist threat. It said the role of the Independent Reviewer in monitoring and reporting upon the authorisation process is critical:

> "Throughout the period the Independent Reviewer has been satisfied that in each authorisation period the authorising officer had a basis for reasonably suspecting that the safety of any person might be endangered by the use of munitions or wireless apparatus and reasonably considered that the authorisation was necessary to prevent such danger both as to geographic extent and duration. The Independent Reviewer has also confirmed that the confirmation by the Secretary of State is a properly challenging exercise."

The recommendations about the authorisation process made by the Independent Reviewer have been directed mainly towards consideration of the extension of the review period to 3 months which would then allow for some element of judicial supervision. The Court said it must therefore follow that the Independent Reviewer recognised the ongoing terrorist threat and the absence of any material suggesting that it is likely to recede. The Court accepted that the authorisation process is a necessary element in the safeguards against arbitrary use of the power to stop and search but said that because of the ongoing threat to the public from terrorist violence in this jurisdiction the duration and geographical extent of the use of the power is wide. The Court noted:

- The ECtHR recognised the object of the exercise of the power is to assess whether the scheme as a whole contains sufficient safeguards to protect the individual against arbitrary interference;
- It was important to understand the area of discretion afforded to the authorities in deciding whether or not to exercise it. The proper interpretation of the Code requires that the basis be recorded and thereby provides a proper means of carrying out effective monitoring and supervision of the exercise of the power.
- The nature of the power and the extent of the interference is clearly important. The period in question may be anything from a couple of minutes to perhaps up to 30 minutes but is sufficient to constitute an interference with the Article 8 rights of those who are stopped. The extent of the interference is quite different from those circumstances where individuals can be held for a period of hours and questioned on a wide-ranging basis.
- The scope of the exercise in this case was concerned with possession of munitions and wireless apparatus. This narrow focus on the exercise of the power is a further safeguard against abuse and the extent of interference is modest.

- The report of the Independent Reviewer confirms that the use of the powers is largely on foot of appropriate briefings from relevant officers. There is, therefore, a high degree of confidence that such briefings are well-founded and the directions associated with them are necessary.
- The availability of a record of the basis for the search is material to the power of the individual to challenge the lawfulness of the conduct of the relevant police officer. Although there may be some issues around the dissemination of sensitive information the broad basis for any briefing leading to the exercise of the powers should be capable of interrogation by the court. Where the police officer's exercise of the power is by reason of a suspicion generated as a result of the conduct of the person searched the nature of that conduct should also be recorded. That will enable the court to review any suggestion of bad faith or issues around disputed conduct. The PSNI have already put in place a mechanism for searching the database against the name of the person searched and also against individual police officers. That is a tool which should assist where the complaint is one of harassment. All of those features are, of course, in addition to the requirement upon police officers to act in accordance with the Convention and not to commit disciplinary offences.
- There is the independent oversight by the Independent Reviewer who has had the benefit of also engaging with the interested organisations such as the Committee on the Administration of Justice who prepared a report in 2012 which was critical of the use of the power.

The Court said the Code requires that the basis for the search should be included in the information recorded on each occasion and includes significant provisions in relation to monitoring and supervising in respect of community background. It noted that the role of the Independent Reviewer is not limited simply to reporting on the operation of the scheme and said that the consideration given by the relevant authorities to the recommendations of the Independent Reviewer is itself part of the safeguards:

> "There is no obligation to accept every recommendation but if the scheme is to operate lawfully it must follow that timely and serious consideration is given to those recommendations and a reasoned response as to whether or not to accept them is provided."

Conclusion

The Court was satisfied, looking at the scheme as a whole, that it contains sufficient safeguards to protect the individual against arbitrary interference. It agreed with the trial judge that the PSNI are required to identify the basis for the exercise of the power in the information recorded as a result of the search. It said it was satisfied that this is an important aspect of the process of supervision and monitoring of the exercise of the power. It therefore concluded that there was a breach of Article 8 in respect of the searches carried out in relation to the applicant by reason of the failure to record the basis for the search in the record prepared at the time of the search or shortly thereafter.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

Judicial Communications Office

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