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

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY STEVEN RAMSEY
FOR JUDICIAL REVIEW (No 2)

Before: Morgan LCJ, Stephens LJ and Maguire J

MORGAN LCJ delivering the judgment of the court)

[1] This is an appeal from a decision of Treacy LJ refusing an application for judicial review of the decisions to stop and search the appellant pursuant to section 24 and Schedule 3 of the Justice and Security (NI) Act 2007 ("the 2007 Act") on various dates between 15 May 2013 and 3 August 2013. The appellant contended that:

(i) the authorisation regime of the 2007 Act did not satisfy the quality of law test,

(ii) 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,

(iii) 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;

(iv) 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.

Ms Quinlivan QC and Ms Doherty QC appeared for the appellant and Mr McGleenan QC and Ms Maguire for the PSNI and Secretary of State for

Northern Ireland respondents. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] Despite a considerable improvement in the security situation in Northern Ireland subsequent to the Belfast/Good Friday Agreement in April 1998 it remains the case that there is a considerable element of residual terrorist activity principally emanating from Dissident Republican groups ("DRs"). The Independent Reviewer of the 2007 Act in his 6th Report helpfully identified specific major incidents in the reporting year from 1 August 2012 to 31 July 2013 which provides an example of the range and extent of activity:

> "***August 2012 to October 2012***
>
> Two pipe bombs, one concealed inside a bicycle, found in Strand Road in Londonderry on 20 September;
>
> A mortar-type device found in Ardoyne in Belfast on 4 October;
>
> A bomb found near a Catholic church in Dunloy on 9 October;
>
> A pipe bomb thrown at a police patrol responding to a call from a member of the public in Poleglass, Belfast, on 25 October
>
> ***November 2012 to January 2013***
>
> - The murder of David Black, a prison officer, when shots were fired at his car on the M1 motorway on 1 November
> - Three pipe bombs found in West Belfast on 9 November
> - A device found in West Belfast on 12 November which might have been intended for use as an under-car bomb
> - A pipe bomb thrown at a police vehicle responding to a call about a burglary in West Belfast on 26 November
> - Discovery of a rocket-type device (an Explosively Formed Projectile, known as an EFP) in Londonderry on 6 December, following the stopping and search of a car

- Discovery of two firearms and a partially constructed under-car bomb near Lurgan on 9 December
- A pipe bomb left outside the front door of a private house near Newry on 14 December
- Discovery of a firearm and grenade during the search of a house in Londonderry on 20 December
- An under car bomb discovered attached to the car of a police officer in Belfast on 30 December
- A pipe bomb discovered near Tandragee police station on 31 December
- A bomb thrown at a house in West Belfast on 31 December
- A pipe bomb handed in to the offices of a community justice group in West Belfast on 8 January
- A pipe bomb left outside a community centre in North Belfast on 29 January
- A pipe bomb thrown at a police vehicle in North Belfast on 30 January

February 2013 to April 2013

- Two pipe bomb devices found by a nun outside the Sacred Heart chapel in Ballyclare on 1 February
- A pipe bomb found outside a residential property in Carryduff on 2 February
- Four crude improvised devices found in South Belfast on 7 February
- A small explosion in the doorway of a house in Greencastle on 24 February
- A Rocket Propelled Grenade (RPG) and launcher discovered during a search of a property in West Belfast on 26 February
- A crude but viable bomb found outside a house in Londonderry on 2 March

- A crude but viable bomb found outside a Catholic church in Glengormley on 2 March
- Four live mortar bombs discovered in a van in Londonderry on 3 March (see Case Study below)
- Discovery of a firearm and an explosion when police were deployed in Newtownabbey on 9 March
- Two viable pipe bombs found during a search in West Belfast on 9 March
- A viable mortar bomb, which had been primed to explode, found near New Barnsley police station on 15 March
- A beer keg bomb containing 60 kg of explosive found in an abandoned car near Enniskillen on 22 March
- An explosion in a waste bin near a static police patrol in Lurgan on 30 March
- An explosion of a pipe bomb in a letterbox outside a house in Londonderry on 3 April
- Weapons, ammunition and a suspected pipe bomb found after police stopped two cars in Londonderry on 12 April

May 2013 to July 2013

- A pipe bomb partially exploded under a car in Cookstown on 11 May
- Six shots fired at three police officers as they got out of their car at Foxes Glen near Belfast on 16 May
- A partially exploded pipe bomb device in South Belfast on 24 May
- Two pipe bombs thrown at police officers in Twinbrook, Belfast on 28 May
- A bomb found in a house in Alliance Avenue in Belfast on 10 July

302. Further incidents occurred beyond the reporting period. The most significant was the finding of two mortar type rocket devices near Cullyhanna on

27 August, which were assessed to be viable. Other incidents have occurred in Armagh, Belfast, Londonderry, Lurgan and Strabane and there have been letter bomb attacks on senior political leaders and police officers. On 25 November a car bomb partially exploded at the entrance to an underground car park at Victoria Square shopping centre in Belfast.

303. These bomb and shooting incidents have varied greatly in sophistication and intensity, but every one of them had the potential to kill. In the case of David Black, this was the tragic outcome. The main targets have been police officers, both while on duty and at their homes, and police stations, notably Strand Road police station in Londonderry. Other targets have included homes and churches. In many cases, people have been evacuated from their homes. In addition to these actual bomb and shooting incidents, hoax incidents have caused further disruption."

Since 2009 the threat level in Northern Ireland has been SEVERE meaning that an attack is highly likely. The most likely source of such an attack is from the DRs. The SEVERE threat level continues today with little obvious likelihood of a change.

Legislative history

[3] As part of its response to the terrorist threat the government introduced powers for police officers to stop and search without a requirement for reasonable suspicion in the Terrorism Act 2000 ("the 2000 Act"). The operation of these powers was helpfully set out by Lord Bingham in R (Gillan) v Commissioner of Police of Metropolis [2006] 2 AC 307 at 333:

"6. The first stage is that of authorisation, which is governed by section 44 . Omitting amendments made in 2001 which do not bear on the issue before the House, the section provides (as amended by section 78(2)(c) of the Police (Northern Ireland) Act 2000):

"(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—

(a) where the specified area or place is the whole or part of a police area outside Northern Ireland other than one mentioned in paragraph (b) or (c), by a police officer for the area who is of at least the rank of assistant chief constable;

(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;

(d) where the specified area or place is the whole or part of Northern Ireland, by a member of the Police Service of Northern Ireland who is of at least the rank of assistant chief constable.

(5) If an authorisation is given orally, the person giving it shall confirm it in writing as soon as is reasonably practicable."

By section 46(1) and (2) , an authorisation takes effect when given and expires when it is expressed to expire, but may not be for longer than 28 days.

7. The second stage is confirmation, governed by section 46(3) to (7) . The giver of an authorisation must

inform the Secretary of State as soon as is reasonably practicable. If the Secretary of State does not confirm the authorisation within 48 hours of the time when it was given, it then ceases to have effect (without invalidating anything done during the 48-hour period). When confirming an authorisation the Secretary of State may substitute an earlier, but not a later, time of expiry. He may cancel an authorisation with effect from a specified time. Where an authorisation is duly renewed, the same confirmation procedure applies. The Secretary of State may not alter the geographical coverage of an authorisation, but may no doubt withhold his confirmation if he considers the area covered to be too wide.

8. The third stage involves the exercise of the stop and search power, which is governed by section 45 . This provides:

"(1) The power conferred by an authorisation under section 44(1) or (2) —

(a) may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and

(b) may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind.

(2) A constable may seize and retain an article which he discovers in the course of a search by virtue of section 44(1) or (2) and which he reasonably suspects is intended to be used in connection with terrorism.

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

(4) Where a constable proposes to search a person or vehicle by virtue of section 44(1) or (2) he may detain the person or vehicle for such time as is reasonably required to permit the search to be carried out at or near the place where the person or vehicle is stopped.

(5) Where—

(a) a vehicle or pedestrian is stopped by virtue of section 44(1) or (2) , and (b) the driver of the vehicle or the pedestrian applies for a written statement that the vehicle was stopped, or that he was stopped, by virtue of section 44(1) or (2) , the written statement shall be provided.

(6) An application under subsection (5) must be made within the period of 12 months beginning with the date on which the vehicle or pedestrian was stopped.

These powers are additional to the other powers conferred on a constable by law: section 114 . Section 44 makes it an offence punishable by imprisonment or fine or both to fail to stop when required to do so by a constable, or wilfully to obstruct a constable in the exercise of the power conferred by an authorisation under section 44(1) or (2) ."

An authorisation was in place in respect of the whole of Northern Ireland shortly after the commencement of the 2000 Act and was continuously renewed thereafter until March 2011 when these provisions were repealed and replaced by section 47A of the said Act.

[4] In Gillan the legislation was challenged on the basis that it did not give adequate protection against arbitrary interference by public authorities. It was submitted that law includes written and unwritten domestic law, but must be more than mere administrative practice. 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 scope of any discretion conferred on the executive, which may not be unfettered, must be defined with such precision, appropriate to the subject matter, as to make clear the conditions in which a power may be exercised. There must be legal safeguards against abuse.

[5] 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 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.

[6] The 2007 Act made particular provision conferring powers to stop and question and stop and search for munitions and transmitters. Those powers extended only to Northern Ireland. By virtue of paragraph 4(1) of Schedule 3 of the 2007 Act a police officer was entitled to stop a person in a public place and search him for the purpose of ascertaining whether he had munitions unlawfully with him or wireless apparatus with him.

[7] Section 34 of the 2007 Act provided that the Secretary of State may make codes of practice in connection with the exercise by police officers of powers conferred by the Act and the seizure and retention of property found by police officers when exercising powers of search conferred by the Act. Where the Secretary of State proposed to issue a code of practice ("the Code") he was required to publish a draft and consider any representations made to him about the draft. Before it could come into effect the draft had to be laid before Parliament. Section 35 provided that a failure by a police officer to comply with a provision of the Code would not of itself make the officer liable to criminal or civil proceedings but the Code would be admissible in evidence in criminal or civil proceedings and should be taken into account by a court or tribunal in any case in which it appeared to the court or tribunal to be relevant.

[8] It seems clear that the provisions in respect of the codes of practice were designed to provide safeguards against the arbitrary use of the power to stop and search. It is not clear why no steps were taken until some years later to consider the implementation of a code. The bare power was breathtakingly wide. Any citizen in Northern Ireland in a public place could be stopped and searched by a police officer for munitions or wireless apparatus despite the absence of any suspicion by the police officer that the person stopped had such materials.

[9] Section 40 of the 2007 Act provided that the Secretary of State should appoint a person to review the operation of the relevant sections. That review was to be carried out on an annual basis. The reviewer was required to send the Secretary of State a report of each review a copy of which then had to be laid before Parliament. Although the reviewer was entitled to receive and investigate any representations about the procedures for receiving, investigating and responding to complaints about army behaviour he had no such powers in relation to police officers. Complaints about misconduct by police officers fell within the jurisdiction of the Police Ombudsman for Northern Ireland by virtue of section 52 of the Police (Northern Ireland) Act 1998. The evidence indicated that very few such complaints were made and fewer still succeeded.

[10] The disappointed appellant in Gillan pursued an application to the European Court of Human Rights ("the ECtHR"). Judgment was given on 12 January 2010. The court 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. It followed that the power to search had to be in accordance with the law.

[11] A law 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 court noted that there was no requirement that the use of the stop and search powers had to be considered necessary by a senior police officer and therefore no requirement that the proportionality of an authorisation had to be assessed.

[12] The temporal and geographical restrictions in the 2000 legislation had failed to act as a real check as demonstrated by the rolling renewal of authorisations for the entire Metropolitan Police District. The powers of the Independent Reviewer were limited. The breadth of the discretion conferred on individual police officers was of particular concern. The condition for the validity of the search included a very wide category of articles. The statistical evidence indicated that although there had been a number of arrests following searches since the entry into force of the relevant provisions it appeared that not one of them had related to terrorism offences. The Independent Reviewer had noted multiple instances of unnecessary uses of the powers. The court 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.

[13] The provisions of the 2007 Act dealing with the power to stop and search were considered by this court in Re Fox's Application [2013] NICA 19. The search in question occurred in March 2011. The court rejected the submission that the power in section 24 could never have been validly exercised in the absence of a reasonable suspicion that the appellants had munitions or wireless equipment unlawfully with them. 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.

[14] This court followed the approach of the ECtHR in Gillan to the question of whether Article 8 was engaged so that any interference had to be justified. The power in the 2007 Act was a broad discretionary power which did not of itself provide guarantees or safeguards against abuse. It was widely framed and did not contain any rules designed to ensure that the power was not arbitrarily exercised. In the absence of a suitably framed code of practice the court concluded that the quality of law test was not satisfied.

[15] In light of the decision of the ECtHR in Gillan the Protection of Freedoms Act 2012 substituted a new regime for stop and search by police officers in section 47A of the 2007 Act. The features of that regime were as follows:

(i) An authorisation permitting a constable to stop and search a person to ascertain whether he has munitions or wireless apparatus unlawfully with him whether or not the constable reasonably suspects that the person has either can only be made by an officer of the PSNI of at least the rank of Assistant Chief Constable.

(ii) If no authorisation is in place a constable may not stop and search a person to ascertain whether he has munitions unlawfully or wireless apparatus in the absence of reasonable suspicion.

(iii) 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 area or place in respect of the authorisation and the duration of the authorisation are both no longer than is necessary to prevent such danger.

(iv) Any authorisation has effect beginning with the time when the authorisation is given.

(v) It 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.

(vi) The authorising officer must inform the Secretary of State as soon as reasonably practicable.

(vii) 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.

(viii) When confirming an authorisation the Secretary of State may limit it temporally or geographically.

(ix) 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.

The Code of Practice

[16] The judgment in Fox was given on 9 May 2013. By that stage the Secretary of State had consulted on a proposed code of practice. The Code was laid before Parliament and came into operation on 13 May 2013. The purpose of the Code is to set out how the powers of stop and search should be exercised by the PSNI. The Code emphasises that great care should be taken to ensure that the selection of people is not based solely on ethnic background or perceived religious or other

protected characteristic and that individual behaviour or specific intelligence should be the basis for making operational or investigative decisions about who may be involved in criminal activity.

[17] Chapter 5 of the Code sets out the general principles governing the exercise of police powers under section 24/Schedule 3 of the 2007 Act. That includes the requirement that the powers must be exercised in accordance with the obligations of public authorities under the Human Rights Act 1998. Paragraphs 5.6 to 5.8 deal with avoiding discrimination. Officers are warned to take care to avoid any form of racial or religious profiling when exercising their powers as this may amount to an act of unlawful discrimination on the grounds of protected characteristics. Paragraph 5.8 provides that great care should be taken to ensure that the selection of people is not based solely on ethnic background, perceived religion or other protected characteristic. Such behaviour is unlawful and may also lose the confidence of communities.

[18] Paragraphs 5.9 to 5.14 of the Code deal with monitoring and accountability. Supervising officers have to satisfy themselves that the practice of officers under their supervision in stopping, searching and recording is fully in accordance with the Code. Supervision and monitoring must be supported by the compilation of comprehensive statistical records of stops and searches at service, area and local level. Apparently disproportionate use of the power by particular officers or groups of officers or in relation to specific sections of the community should be identified and investigated. The power should be used only if it is proportionate and necessary and that requires that the power be used only where justified by the particular situation and on the basis provided for in the 2007 Act. It is the responsibility of senior officers to take action if they do not feel that the power is being used appropriately.

[19] Chapter 8 deals with stopping and searching persons beginning at paragraph 8.16. The Code provides at 8.22 that the authorising police officer must be satisfied that the powers are necessary to prevent endangerment and that the use of these powers is required to help deal with the perceived threat. Consideration should also be given to whether the power to stop and search is the most appropriate power to use in the circumstances. In determining whether the use of the power is necessary the senior police officer must take into account the proportionality of the use of without reasonable suspicion search powers, that authorised searches may be exercised only for the purpose of discovering unlawfully held munitions or wireless apparatus, the suitability of other search powers including those that require reasonable suspicion and the safety of the public and the safety of officers.

[20] Paragraph 8.26 provides that 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. In other cases, separate and tailored authorisations will be more appropriate.

[21] When the authorisation is passed to the Secretary of State he should be provided with a detailed account of the intelligence which has given rise to reasonable suspicion that the safety of any person may be endangered by munitions or wireless apparatus. Detailed information should also be provided on the geographical extent and duration of the authorisation. Information should also be provided to the Secretary of State which demonstrates that all officers involved in exercising stop and search powers receive appropriate briefing on the use of the powers. The authorising officer must consider afresh the justification for the authorisation of stop and search powers each time that he or she authorises their use.

[22] Paragraph 8.50 provides that powers of search should only be used by officers who have been briefed about the powers. The briefing should make officers aware of relevant current information and intelligence, including current threats. They should be as comprehensive as possible in order to ensure officers understand the nature and justification of the operation. Officers should use the information provided in a briefing to influence their decision to stop and search an individual. The approach which officers should take is set out at paragraph 8.61:

> "8.61 Where a person or vehicle is being searched without reasonable suspicion by an officer (but with an authorisation from a senior officer under paragraph 4A(1)) there must be a basis for that person being subject to search. The basis could include 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 that give cause for concern."

Both parties are agreed that the reference to "cause for concern" in this paragraph must mean concern about possession of munitions or wireless apparatus.

[23] The Code provides at paragraph 8.75 the information that must always be included in a record of the search even if the person does not wish to provide any personal details:

> "8.75 The following information must always be included in the record of a search even if the person does not wish to provide any personal details:

(i) the name of the person searched, or (if it is withheld) a description;

(ii) the date, time, and place that the person was first detained;

(iii) the date, time and place the person was searched (if different from (ii) above);

(iv) the purpose of the search;

(v) the basis for the use of the power, including any necessary authorisation that has been given;

(vi) the outcome of the search (e.g. arrest, seizure or no further action);

(vii) a note of any injury or damage to property resulting from it; and

(viii) the officer's identification number and the name of the police station to which the officer is attached."

Independent Reviewer

[24] As required by section 40 the Independent Reviewer has prepared annual reports on the operation of the 2007 Act. We have been provided with seven reports covering the period from 1 August 2011 until 31 July 2018. The earlier reports were prepared by Mr Whalley and the later reports by Mr Seymour. In each case it was confirmed that the Independent Reviewer had received full cooperation from the relevant government agencies including access to documentation. He availed of briefings from the police and military authorities about the security situation and reviewed sample documentation in respect of the making of authorisations. In each of the reports it was concluded that the basis for the authorisations was established in terms of reasonable suspicion of endangerment. The reviewer also examined the issues of geographical extent and duration. In each case the reviewer was satisfied that the manner of operation of the terrorist groups upon which he had been briefed together with the porous nature of boundaries within Northern Ireland established the necessity for authorisations for the 14 day period throughout Northern Ireland.

[25] The reviewer also had full access to the documentation in respect of the role of the Secretary of State. That documentation included the detailed account of the intelligence picture including classified material. Each authorisation had to be based on a fresh assessment of the available information. Detailed information was provided in relation to the geographical extent and duration. The reviewer was also in a position to judge the extent to which there was challenge and was satisfied that the process was carried out to a high standard.

[26] Throughout the period from 2011 to 2018 the reports from the Independent Reviewer indicated that the principal threat came from the DRs. By way of example in the seventh report dealing with the period from 1 August 2013 to 31 July 2014 the Independent Reviewer noted that 81% of the stop and searches on multiple occasions were of individuals suspected to be DRs or their associates. The remaining 19% of the searches included 7% who had significant criminal association, 3% who had loyalist association, 1% were firearms related, 1% were related to interface disorder and 8% were of unspecified background.

[27] The same report noted that there had always been sufficient material to justify the Northern Ireland wide geographic application. Careful consideration was given to districts where there was no particular intelligence for the next period combined with there being no reported incidents in the previous period. It was plain, however, from past experience that concrete examples indicated that things could change very quickly.

[28] In the ninth report the reviewer set out the figures for arrest showing that less than 1% of those stopped under the section 24 power were arrested. It is clear, however, that the use of the power is principally as a preventative or disruptive measure on foot of intelligence. An example within the same report referred to the increasing risk of terrorist activity in the run-up to the centenary of the Easter rising in Dublin in 1916. Other examples through the reports refer to intelligence in respect of bombing campaigns in about Christmas which led to increased use of the power as a preventative and disruptive measure. Overall, however, it is clear from the reports through to 2018 that the use of the power is on a downward trend indicating a more focused approach with the passage of time and the gaining of experience.

[29] 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 reflects the ongoing security issues in Northern Ireland and discloses an informed inference that there is no immediate prospect of a change in the security picture.

[30] There is there is no real dispute that the proper exercise of the power having regard to paragraph 8.61 of the Code was set out by the Independent Reviewer in his eighth report as follows:

> "7.9 So the power should not be exercised wholly at random but on the basis of intelligence or other factors that might indicate the presence of munitions or wireless apparatus. The power should be targeted at the threat based on informed considerations (which can include the officer's training, briefing and experience). If the power is properly exercised therefore it will be used against known DRs and others otherwise involved in munitions.

7.10 However –

(a) the power to stop and search without reasonable suspicion under section 24/Schedule 3 does not give the police an unfettered discretion to stop a known DR at any time or place. There needs to be a basis for the use of the power and the purpose must always be to search for munitions or wireless apparatus – so where there is no basis a person cannot be stopped and searched simply because of his known DR profile;

(b) the purpose of the search can never be to put pressure on an individual, to remind him that the police are monitoring him, to disrupt his activities or to get intelligence – the sole statutory purpose is to search for munitions et cetera. If as a result of a legitimate search these collateral benefits accrue then that does not render the use of the power unlawful;

(c) if the circumstances are such that the police officer has a reasonable suspicion that the individual is carrying munitions then the officer should exercise the JSA powers which require reasonable suspicion."

Learned Trial Judge Conclusions

[31] The learned trial judge concluded that the materials before the court demonstrated that the impugned powers 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. He 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.

[32] His overall conclusion was set out at paragraph [47]. The authorisation process, police training, the control and restriction on the use of the impugned powers by the Code, 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.

[33] The PSNI submitted that the requirement at paragraph 8.61 of the Code that there should be a record of the basis for the exercise of the power simply required a record of the fact that an authorisation was in place. 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. Mr Whalley in his sixth report commented that it was important that the PSNI consider the Ombudsman's recommendation carefully.

[34] Mr Seymour noted that the PSNI took the view that they were not required to provide any grounds reasonable or otherwise for exercise of the power. That was a reflection of the fact that the power could be exercised without reasonable suspicion. He 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.

[35] The learned 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. Paragraphs 8.61 and 8.75 of the Code plainly envisaged a process where the basis for the use or exercise of the power would be recorded. The mischief which this safeguard was intended to address and to mitigate was the risk of improper use of the power of stop and search by enabling greater transparency and accountability in respect of its exercise.

[36] Despite finding that the failure to record the basis for the search was not consistent with the Code the learned 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 noted that the affidavit evidence 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.

Recent relevant case law

[37] The Supreme Court recently considered whether legislation was in accordance with law within Article 8 (2) of the European Convention on Human Rights ("the Convention") in <u>Re Gallagher</u> [2019] 2 WLR 509. Lord Sumption

delivered the judgment of the majority and approved the principle of legality stated in Christian Institute v Lord Advocate 2017 SC (UKSC) 29.

> "79. In order to be in accordance with the law under article 8.2 of the [Human Rights Convention], the measure must not only have some basis in domestic law which it has in the provisions of the Act of the Scottish Parliament but also be accessible to the person concerned and foreseeable as to its effects. These qualitative requirements of accessibility and foreseeability have two elements. First, a rule must be formulated with sufficient precision to enable any individual if need be with appropriate advice to regulate his or her conduct (The Sunday Times v United Kingdom, para 49; Gillan v United Kingdom, para 76). Secondly, it must be sufficiently precise to give legal protection against arbitrariness: [It] 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 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 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: Gillan, para 77; Peruzzo v Germany, para 35.
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> 80. Recently, in R (T) v Chief Constable, Greater Manchester Police, this court has explained that the obligation to give protection against arbitrary interference requires that there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. This is an issue of the rule of law and is not a matter on which national authorities are given a margin of appreciation."

[38] There are two earlier relevant decisions of the Supreme Court delivered on the same date dealing with the nature of the safeguards which are required to enable

the proportionality of the interference to be established in cases involving detention in the absence of reasonable suspicion. In Beghal v DPP [2016] AC 88 the appellant, a French national resident in the United Kingdom, went to visit her husband who was in custody in France in relation to terrorist offences. On her return she was stopped at an airport and questioned by police officers under powers conferred by section 53(1) of and Schedule 7 to the 2000 Act, which allowed nominated officers, without the need for reasonable suspicion, to stop, to question and if necessary to detain for up to nine hours, later reduced to six hours, persons passing through ports or borders in order to see whether they appeared to be someone who was or had been concerned in the commission, preparation or instigation of acts of terrorism. During a process which lasted, from her being stopped until being told that she was free to go, for one and three-quarter hours, the officers asked the appellant a number of questions regarding her family, her financial circumstances and her recent visit to France, most of which she did not answer. She was cautioned and charged with wilfully failing to comply with a duty imposed under or by virtue of Schedule 7, contrary to paragraph 18(1)(a) of that Schedule.

[39] She was convicted but appealed, inter alia, on the basis that the detention interfered with her Article 8 rights and the safeguards did not satisfy the quality of law test. The Supreme Court rejected that submission. Lords Hughes and Hodge noted that the exercise of the powers was restricted to those passing into and out of the country, that there were restrictions on the duration of questioning and the type of search, the powers could only be used for the statutory purpose by trained and accredited officers, there was a requirement to provide explanatory notice, the opportunity to consult a solicitor, the requirement for records, the availability of judicial review and the continuous supervision of the Independent Reviewer. Lords Neuberger and Dyson identified the impressive supervision by the Independent Reviewer, the prosecutions and intelligence gathered as a result of the exercise of the powers, the deterrent effect noted by the Independent Reviewer on terrorist activity at the ports and the slight interference. No equally effective but less intrusive proposal was forthcoming. Lord Kerr dissented noting that a criminal sanction including imprisonment for failing to answer questions constituted a significant interference with Article 8 rights and he considered that there was no articulated reason why a suspicion-less power was required to stop and detain.

[40] The second case was R (Roberts) v Commissioner of Police for the Metropolis [2016] 1 WLR 210. A police superintendent of the Metropolitan Police made an authorisation under section 60 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") authorising police officers to exercise the powers conferred by that section for a period of 17 hours in certain wards within a London borough. The authorisation was made because during the previous weeks there had been an escalation in gang violence in the area. The appellant, who was of African-Caribbean heritage, travelled on a bus without paying her fare and gave a false name

and address to a ticket inspector. A police officer was called and, because the appellant appeared nervous and was keeping a tight hold on her bag, the officer considered that she might have an offensive weapon inside it. She was searched by the police officer pursuant to section 60 , which permitted an officer to stop and search any person for offensive weapons whether or not he had any grounds for suspecting that the person was carrying such a weapon. No offensive weapons were found. The claimant sought judicial review of the decision to stop and search her on the ground, inter alia, that section 60 of the 1994 Act was incompatible with the right to respect for private life under Article 8 of the Convention since authority given under it was arbitrary and so not "in accordance with the law".

[41] The Supreme Court unanimously rejected the appeal. The court noted that in Gillan the ECtHR was above all concerned that the breadth of the discretion given to the individual police officer, the lack of any need to show reasonable suspicion, or even subjectively to suspect anything about the person stopped and searched, and the risks of discriminatory use and of misuse against demonstrators and protesters in breach of Article 10 or 11 of the Convention. In such circumstances it was likely to be difficult if not impossible to prove that the power was properly exercised.

[42] The court noted, however, that in Colon v The Netherlands (2012) 55 EHRR SE55 Strasbourg declared inadmissible a complaint about a Dutch power under a byelaw designating most of the old centre of Amsterdam as a security risk area for a period of six months and again for a period of 12 months. That enabled the public prosecutor to order that, for a randomly selected period of 12 hours, any person within the designated area might be searched for the presence of weapons. The prosecutor had to give reasons for the order by reference to recent reports. The applicant in that case refused to submit to a search when stopped and was arrested and prosecuted. The complaint concerned the ineffectiveness of the judicial remedies available and in particular the absence of prior judicial authorisation. The ECtHR pointed out that the authorisation was subject to an objection and appeal mechanism and that the criminal courts could examine the lawfulness of the use made of it. The intended effect of helping to reduce violent crime in Amsterdam was sufficient to justify the inconvenience to the applicant.

[43] In Roberts the Supreme Court noted the limited scope of the power in section 60 itself. It noted that any abuse of the power would give rise to a judicial remedy under section 8 of the Human Rights Act 1998. It considered the codes of practice under PACE which contained similar provisions to the Code under the 2007 Act. In particular the Code stressed the importance of explaining and recording the reasons for and the monitoring of stop and search powers to guard against evidence that they were being exercised on the basis of stereotyped images or inappropriate generalisations.

[44] The Supreme Court noted that the authorisation had to be necessary rather than merely expedient, could only be for a very limited period of time, could only be reviewed once for a further limited period and could only cover a limited geographical area. Prior briefing of those involved in the operation should be given if possible. The officer had to explain to the detained individual the power under which he was acting, the object of the search and why he was doing it. That had to be recorded in writing. The person searched was entitled to a copy of the form and the purpose of the search was limited. The court considered that in particular the obligation to give reasons both for the authorisation and for the stop should make it possible to judge whether the action was necessary for the prevention of disorder or crime.

[45] The disappointed appellant in Beghal pursued an application to the ECtHR. The court examined whether the scheme as a whole contained sufficient safeguards to protect the individual against arbitrary interference. It noted that the powers were wide in scope as a result of their permanent application at all ports and border controls but in light of the very real threat of international terrorism acknowledged that this did not run counter to the principle of legality. The discretion afforded to examining officers was broad since terrorism was widely defined but the court accepted that its jurisprudence did not suggest that the existence of reasonable suspicion is in itself necessary to avoid arbitrariness. In that case the Independent Reviewer had identified the use of these powers to secure convictions and gain intelligence. The basis for the use of the powers was centred on evidence about terrorist activity. The Independent Reviewer also supported the contention that the powers were not being abused.

[46] The ECtHR concluded, however, that the power to stop and examine persons was neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. It noted that the power could result in detention for a period of up to 9 hours during which time the person could be compelled to answer questions without any right to have a lawyer present. It also considered that the possibility of judicially reviewing the exercise of the power would be limited. Those factors together with the absence of a requirement for suspicion which the Independent Reviewer had recommended in relation to the power to detain led to its conclusion.

Discussion

[47] As the case law demonstrates the principle of legality is focused on the accessibility of the material constituting the law and the foreseeability of its application to those affected. In this case the accessible elements of the law are the relevant provisions of the 2007 Act, the Code and the applicable case law. There was before this court some difference of view about the proper interpretation of these 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.

[48] We have set out at paragraph [22] the terms of paragraph 8.61 of the Code. That demonstrates that there are two broad circumstances in which the power to stop and search without reasonable suspicion may be exercised. The first is 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. This circumstance is, therefore, different from the operation of the provisions in Beghal where the powers could be exercised on a random basis and it was in part the unpredictability of the exercise of the powers which created the deterrent effect.

[49] The second broad circumstance is 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 in this jurisdiction checkpoints may be set up which will randomly stop vehicles to carry out checks with a view to disrupting the terrorist activity.

[50] That, of course, is a random exercise of the power in those circumstances but the exercise is dependent upon the receipt of reliable information that the exercise is necessary. The Independent Reviewer is the principal check on the prevention of any abuse of the briefing power but it is clear from all the reports that having both attended briefings and reviewed the paperwork both reviewers have been 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.

[51] None of that is in dispute. The issue arises in relation to the information which must be included in the record of the search. The Code provides for the information which must be included in the record of the search at paragraph 8.75 set out at paragraph [23] above. That paragraph provides at (v) that the basis for the use of the power including any necessary authorisation that has been given must be recorded. The authorisation is of course a condition precedent to the use of the power. The reference to the basis for the use of the power is plainly wider. The context refers back to paragraph 8.61 which addresses the need for a basis beyond the mere authorisation.

[52] We are satisfied that the learned trial judge was correct to reject the submission that it was only the fact of authorisation that needed to be recorded. We consider that there are two further reasons which point in that direction. First, 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.

[53] Leading on from that the second reason relates to the requirement to monitor and supervise set out between paragraphs 5.9 and 5.13 of the Code. Paragraph 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. Paragraph 5.12 provides that the powers 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.

[54] The second issue in dispute is the requirement to monitor community background. Paragraphs 5.6 to 5.8 of the Code are entitled "Avoiding Discrimination". Those paragraphs incorporate by reference the types of discrimination set out in sections 75 and 76 of the Northern Ireland Act 1998. There is a particular focus on the risk of profiling people from certain ethnicities or religious backgrounds and consequently losing the confidence of communities.

[55] 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. Paragraph 5.9 of the Code requires, however, 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.

[56] Although there is no specific methodology required under the Code for the monitoring of community background we accept that the monitoring and supervision requirements of the Code establish a duty on the part of the PSNI to devise a methodology of enabling such monitoring and supervision. There is evidence that such work has been undertaken by the PSNI. The Code does not impose any requirement on a member of the public to indicate anything about community background. It is not, therefore, possible to establish such background by means of questioning. There was initial reluctance on the part of 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.

[57] The PSNI did conduct a pilot exercise in 2015 where they noted the postcode of the location in which the person stopped resided. An exercise was then carried out on the basis of census returns indicating the percentage community background

in each postcode. An assessment was then made on the basis of those percentages of the community background of those stopped. That exercise demonstrated that a significant preponderance of those stopped came from a perceived Catholic background but that was not necessarily surprising since the DRs constitute the principal threat and are most active in those communities.

[58] The evaluation of the pilot by the PSNI has tended to suggest that the best option may be assessment by the individual police officers of community background. We understand that such an option has not yet been implemented but we are satisfied 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.

[59] The arguments in respect of the foreseeability of the provisions were principally directed towards the risk of arbitrary use of the power. It is striking that there has been an authorisation under the 2007 Act for the whole of Northern Ireland since the implementation of the Code in May 2013 and indeed for the period before that. The driving force behind the authorisations has, of course, been the terrorist threat. 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 media munitions or wireless apparatus and reasonably considered that the authorisation was necessary to prevent such danger both as to geographic extent and duration.

[60] The Independent Reviewer has also confirmed that the confirmation by the Secretary of State is a properly challenging exercise. Insofar as the Independent Reviewer has made recommendations about the authorisation process those have been directed towards consideration of the extension of the review period to 3 months which would then allow for some element of judicial supervision. It must follow from that recommendation that the Independent Reviewer on the basis of the material available recognises the ongoing terrorist threat and the absence of any material suggesting that it is likely to recede. We accept, therefore, that the authorisation process is a necessary element in the safeguards against arbitrary use of the power to stop and search but 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. As the ECtHR recognised at paragraph [92] of Beghal that does not in itself run contrary to the principle of legality as the object of the exercise is to assess whether the scheme as a whole contains sufficient safeguards to protect the individual against arbitrary interference.

[61] Secondly, we have spent some time setting out the basis for the exercise of the power since it is important to understand the area of discretion afforded to the

authorities in deciding whether or not to exercise it. This is not a random or suspicion-less power. The requirement for a basis is absolutely critical. 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. We note in passing that this is another significant difference from Beghal.

[62] Thirdly, 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. That is certainly sufficient to constitute an interference with the Article 8 rights of those who are stopped but 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.

[63] Fourthly, the scope of the exercise in this case is relatively narrow. It is concerned with possession of munitions and wireless apparatus. This narrow focus on the exercise of the power is again a further safeguard against abuse and the extent of interference is modest.

[64] Fifth, the report of the Independent Reviewer confirms that the use of the powers is largely on foot of appropriate briefings from relevant officers. The Independent Reviewer has attended briefings and reviewed the paperwork in relation to others. There is, therefore, a high degree of confidence that such briefings are well-founded and the directions associated with them are necessary.

[65] Sixth, the availability of a record of the basis for the search is also 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 was implemented as a result of a recommendation from the Independent Reviewer. That again 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.

[66] Finally, 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. That was, of course, prior to the adoption of the Code.

[67] We attach to this judgment a useful analysis of the recommendations made by the Independent Reviewer and the responses of the PSNI. That demonstrates a high rate of acceptance of those recommendations. In this judgment we have confirmed that the Code requires that the basis for the search should be included in the information recorded on each occasion and also pointed out the significant provisions in relation to monitoring and supervising in respect of community background. The role of the Independent Reviewer is not limited simply to reporting on the operation of the scheme. 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

[68] Looking at the scheme as a whole we are satisfied that it contains sufficient safeguards to protect the individual against arbitrary interference. We agree with the learned 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. We are satisfied that this is an important aspect of the process of supervision and monitoring of the exercise of the power. We, therefore, conclude 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.

REPORT	RECOMMENDATIONS	PSNI RESPONSE	APPELLANT COMMENTS
Fifth Report (1.8.201-31.7.2012) **Whalley**			
1.	Draft Code of Practice should be completed as soon as possible (para 167)	Accepted	
2.	PSNI should then complete their work to incorporate the completed Code in operational orders concerning the powers in the Justice and Security Act to meet the requirements of paragraph 8.37 of the current draft of the Code and reflect it in training (paragraph 211)	All officers are made aware of a new authorisation via internal email with attachments to include the JSA Code of Practice.	
3.	Now that PSNI have moved to full electronic capture of record keeping under the JSA, **the menu of actions to be completed by officers undertaking stops should reflect the basis given by the authorising officer when making the application** (paragraph 297)		Not done – resisted until judgment Treacy LJ
4.	**In each record, the officer should state the basis for the stop separately from the statement of the power used** (paragraph 298)		Not done – resisted until judgment Treacy LJ
5.	Authorising officers should consider as a matter of good practice initialling in manuscript each page of an authorisation application to the Secretary of State as a record of their review of the documentation (paragraphs 226)	The authorising officer initials each page of the application.	
6.	The authorisation process should continue as operationally required and should follow the format described in this report in no less detail than at present (paragraph 247)	The authorisation process continues in the format described.	

7.	Authorisations should continue to extend to the whole of Northern Ireland if necessary, but where this is done the record should show that each District Commander has been specifically asked whether he wishes the authorisation to apply to his District (paragraph 235)	District Commanders are consulted prior to each authorisation.	Understood from subsequent reports that this was complied with – possibly following observations by NIPB
8.	Subject only to further judicial intervention, the powers in sections 21 to 32 of the Justice and Security Act should be continued for a further full year (paragraph 637)	Accepted	
Sixth Report (1.8.2012-31.7.2013) **Whalley**	**No recommendations made but this report adopted the 11 recommendations of the NIPB Thematic Report (2013) which are as follows;**		
9.	The PSNI should develop a mechanism which enables supervising officers and senior officers to undertake reliable examinations of the records of the use of powers to stop and search under section 43, 43A and 47A of the Terrorism Act 2000 according to the name and number of the police officer and according to the name of the person searched.	Accepted	Understood technical aspect complied with in February 2014, ongoing issues remain, see for ex. 8th Report
10.	The PSNI should amend its Aide Memoire and include within its new policy (to be developed as per Recommendation 11 of this thematic review) clear instruction that the power to stop and question under section 21(1) of the Justice and Security (Northern Ireland) Act 2007 may not be used to require a person to confirm identity where identity is already known and may not be used to require a person to produce identification for the purpose of confirming identity.	Accepted Aide Memoire was updated on 28th September 2015 to state *"identity may not be asked where identity is already known"*.	

11.	The PSNI should include within its new policy on the use of powers to stop and search and question under the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007 (to be developed as per Recommendation 11 of this thematic review) a requirement that the relevant District Commander(s) should be consulted before an authorisation is given and he or she should have an opportunity to influence the authorisation.	Accepted	
12.	The PSNI should develop a mechanism which enables supervising officers and senior officers to undertake reliable examinations of the records of the use of powers to stop and search and questions under sections 21, 23 and 24 of the Justice and Security (Northern Ireland) Act 2007 according to the name and number of the police officer and according to the name of the person searched.	Accepted	Understood technical aspect complied with in February 2014, ongoing issues remain, see for ex. 8th Report
13.	The PSNI should develop guidance, in consultation with relevant stakeholders, on the conduct of searches under the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007, which sets out in sufficient detail the range of cultural and religious issues that may arise during a search and which addresses specifically what an officer should do when presented with language barriers or sensory impairment.	Accepted Guidance was issued in December 2015 to all officers during terrorism and security powers training.	
14.	The PSNI should conduct a review, at least annually, of the ambit and use of the powers to stop, search and question	Accepted The use of the	

	contained within the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007 during the previous 12 months to ensure that the powers are being used in accordance with law and not disproportionately. Thereafter, the Chief Officer responsible for stop and search powers should provide a briefing to the Performance Committee of the Northern Ireland Policing Board. The first review should be completed within 12 months of the publication of this thematic review.	powers is reviewed quarterly by tactical assessment governed through the Police Powers Delivery Group chaired at ACC level. NIPB Performance committee is briefed (most recently 27th November 2019)	
15.	The PSNI should as soon as reasonably practicable but in any event within 3 months of the publication of this thematic review consider how to include within its recording form the community background of all persons stopped and searched under sections 43, 43A or 47A of the Terrorism Act 2000 and all persons stopped and searched or questioned under section 21 and 24 of the Justice and Security (Northern Ireland) Act 2007. As soon as that has been completed the PSNI should present to the Performance Committee, for discussion, its proposal for monitoring community background. At the conclusion of the first 12 months of recording community background, the statistics should be analysed. Within 3 months of that analysis the PSNI should present its analysis of the statistics to the Performance Committee and thereafter publish the statistics in its statistical reports.	Work in Progress	It appears that there are ongoing issues, see 11th Report
16.	The PSNI should develop and	Accepted	

	thereafter issue guidance to all police officers in Northern Ireland on stopping and searching children. That guidance should draw upon the guidance already produced and issued in G District.	The PSNI search manual was updated in November 2015 to include guidance on stopping and searching children and young people.	
17.	Each District Commander should, in consultation with District Policing and Community Safety Partnerships, Independent Advisory Groups, Reference Groups (where applicable) and the Performance Committee, devise a strategy for improved consultation, communication and community engagement in respect of its use of stop and search powers under both the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007. That strategy should include an agreed mechanism by which the PSNI will explain the use of powers to the community and will answer any issues of concern.	A stakeholder group was established in October 2014 and any issues of concern are raised through Policing Community Safety Partnership meetings	Unknown
18.	The PSNI should introduce into officers' performance reviews, where relevant, the use of Terrorism Act 2000 and Justice and Security (Northern Ireland) Act 2007 powers to stop and search and question. During such a review any substantiated complaint made about an officer's use of the powers should be considered.	Accepted Introduced in a wider context to include all officer conduct and their compliance with the Code of Ethics and complaints	Unknown – although some suggestion in 8th Report that this has been complied with
19.	The PSNI should conduct a review of policy and produce a stand-alone policy document setting out the framework within which powers to stop and search and question under the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007 must be	Accepted PSNI Senior Executive Team agreed 21 key policy areas at a meeting on 18th May 2016; one of these areas was search which was governed by a single service policy. It was	It seems apparent that this recommendation was not acted upon for some time and has not completely been accepted.

	exercised. The policy should contain clear guidance on the PSNI's strategic and policy goals and on the individual exercise of the powers, the conduct of searches, record-keeping and the responsibility of each officer to ensure compliance. The policy should incorporate reference to the statutory Codes of Practice and relevant human rights principles.	agreed a stand-alone policy on counter terror stop and search would not be completed.	
Seventh Report (1.8.2013-31.7.2014) **Seymour**	No specific recommendations, comments to improvements in the following areas;		
20.	Greater transparency (7.22-7.23)	Work in Progress Dedicated stop and search page available on PSNI internet page which details use and statistics around use of JSA powers.	
21.	Introduction of Body Worn Cameras (7.26-7.29)	Accepted Fully rolled out across PSNI July 2017	
22.	Strong arguments in favour of recording community background (para 8.4)	Work in Progress	Despite recommendation in 2013 – pilot project not launched until end of December 2015 & this issue has still not been properly addressed.
23.	PSNI relationship with young people could be improved (para 13.7)	Work in Progress Ongoing engagement through various youth groups and through Children & Young Persons Forum – Joint public PSNI meeting to discuss issues on	It is clear that persistent issues continue on this issue as reflected in subsequent reports.

		stop and search.	
Eighth Report (1.8.2014-31.7.2015) **Seymour**			
24.	Reporting period for review should be changed to the calendar year (para 3.10)	Requires a change to primary legislation	
25.	Duration of the authorisation allowing and search without reasonable suspicion should continue for 3 months rather than 14 days once confirmed by the SOS (para 11.9)	Requires change to primary legislation PSNI view is 28 days would be appropriate	
26.	Powers in JSA should be retained so long as the current security situation in NI continues (paras 4.6 and 12.2)	Accepted	
27.	Use of BW cameras should be rolled out as soon as possible and PSNI should publish an annual assessment of impact and benefits. It will be important to monitor the benefits and challenges. (paras 6.13-6.16)	Accepted	
28.	PSNI should place as much information as possible in the public domain about the use of JSA powers including (i) explanation why arrest rates are low following stop and search; (ii) statistics about how often munitions are found; (iii) how frequently use of powers is monitored; (iv) an explanation of how and how frequently individual officers use of the JSA powers is monitored using the PUMA system and the outcome of such monitoring paragraph 8.7 (v) an analysis of Equality monitoring Stop and Search project (paragraph 9.4) The use of body worn cameras, as finances permit and PSNI should publish on an annual basis an assessment of the impact and	Work in progress Dedicated stop and search page on PSNI website provides detailed information to include statistics. Stop and search supervision assessment completed in October 2018 highlighting outcomes of stop and search supervision and how often it is done.	According to the Independent Reviewer. "There has been a reasonable response from the PSNI but it is work in progress. **There was an initial reluctance to provide statistics about how often munitions were found following a search.** **It is not clear what the supervision of the use of the powers amounts to in practice or what the outcomes of that supervision**

	benefits (paragraphs 6.13 – 6.16) A review of the use of repeat stops and searches; Statistics about how many persons stopped collect a copy of stop/search record (para 15.4)	Accepted	**have been.** Only a small percentage of individuals who are stopped appear to be going to a local police station to collect a copy of their search record. **Little progress has been made on community monitoring**….” (para 12.6 9th report).
Ninth Report (1.8.2015-31.7.2016) **Seymour**			
29.	The PSNI should post a website dedicated to stop and search. It should regularly updated and used in particular, to correct inaccurate reporting of the use of JSA and TACT powers	Ongoing The stop and search page is available on the PSNI website	
30.	All supervising officers should check the use of these powers every month to make sure that the powers are exercised not only legally but also fairly and in the most appropriate manner (para 12.7(b))	Supervision takes the form of examining the record, corresponding with BWV footage and interview with the officer where necessary.	
31.	Consideration should be given to keeping an internal written record should of what triggered any decision to stop and search in all cases where an individual has been repeatedly stopped and searched and in all cases involving a stop and near a school or when the individual is accompanied by a child or young person at the time he is stopped and those records should be made available to the Independent Reviewer (paras	The PSNI has considered this recommendation carefully and has concluded that it is not feasible to accept it. Stop and search powers under JSA are without reasonable suspicion powers, accordingly it would not be feasible for a police officer to be required to articulate the	**This has been resisted**

	6.18, 6.25 & 6.51)	reasons why a particular individual had been stopped and searched. It is sufficient under the legislation and code of practice that an individual is told that due to the current threat in the area, and to protect public safety, a stop and search authorisation has been granted. Authorisations are only made after detailed consideration of all the available information and the submission of an application to the Secretary of State, the entire application process is heavily scrutinised. (See response in 7th Report)	
32.	in the cases referred to above, the supervising officer should personally satisfy himself that the power was used appropriately (if necessary after interview with the officer concerned) (para 12.7(d)).	Supervising officers are already required to satisfy themselves that all powers in relation to stop and search are used appropriately	The reports from the Independent Reviewer suggest that the approach of supervisors do not fully interrogate the system and clearly the specific recommendations in relation to young people and searches near schools are being resisted.
33.	the annual assessment of the use of body worn cameras should address, amongst others, the issues set out in paragraph 6.31 (para 12.7(f)	Assessment complete and presented to the Independent Reviewer	
34.	as soon as the PUMA system has been updated to record the reason why a stop and search record has been printed the PSNI should use that	This information is published on the PSNI stop and search webpage	

	information to publish how many times these records are collected at police stations (paragraph 7.2)		
35.	the PSNI should continue to work on an effective narrative about the disparity in the use of the powers as between different paramilitary groups (paragraphs 6.44 to 6.46)	The PSNI have provided a response to the Independent Reviewer on the use of powers against individual groups which provides an effective narrative around the use of the powers.	
Tenth Report (1.8.2016-31.7.2017)			
A Recommendation Repeated	Reporting period for review should be changed to the calendar year (para 3.8)	Requires change to primary legislation	Would require primary legislation (para 15.2 11th report)
	Amending Search power to allow a police officer to search also "to deter, prevent or disrupt their transportation or use" (para 6.8)	Requires change to primary legislation	
A Recommendation Repeated	Duration of the authorisation allowing and search without reasonable suspicion should continue for 3 months rather than 14 days once confirmed by the SOS (paras 10.1-10.4)	Requires change to primary legislation PSNI view is 28 days would be appropriate	
36.	PSNI should monitor impact which improved supervision has had on the use of JSA powers and provide an assessment for the next reporting period (paras 6.9-6.10)	Accepted Stop and search supervision assessment completed and provided to the Independent reviewer in October 2018.	According to the Independent Reviewer - Officers of rank of sergeant or above conduct regular checks on all stop and search powers. 10.4% of stops and search/question were examined. NFA in vast majority of cases but those findings not consistent with Dr Topping's research and

			supervision has not led to any thematic or strategic conclusions, which would be expected in the long term. (para 15.3(a) 11th report)
37.	Annual assessment of impact of BWV should be provided (para 6.16-6.18)	Accepted Internal assessment complete and briefed to Independent Reviewer	According to the Independent Reviewer – this is a work in progress but PSNI do not propose to produce an annual assessment as such (para 15.3(b) 11th report)
38.	Moving automated records on use of JSA powers onto main intelligence base (paras 8.3-8.5)	Work in progress	According to the Independent Reviewer - this should be complete by March 2020 (para 15.3(b) 11th report)
39.	Powers in JSA should be retained so long as the current security situation in NI continues (paras 6.30-6.34) Also made in previous report	Accepted	
40.	Internal record should be kept of any stop and search under JSA involving children or where an unexpected incident has occurred which might prove controversial (para 6.13)	Not accepted. This is a repeated recommendation.	According to the Independent Reviewer this recommendation has not been accepted. PSNI consider it is not feasible. These are "without reasonable suspicion" powers and police officers should not be required to articulate reasons why a particular person should be stopped and searched. (para 15.5 11th

			report)
Eleventh Report (1.8.2017-31.7.2018)	BWV should always be used where JSA powers are used in a case involving a child (para 8.5)	Accepted Detailed in 12th Report to be published in February 2020	
41.	Where it is not used this must be reported to a supervising officer (para 8.5)	Accepted	
42.	A record should be kept of all computers and laptops seized and retained under JSA powers together with the duration of the retention (para 8.11)	Accepted	
43.	Senior Management in PSNI should consider whether community monitoring could be done on the basis of officer perception (paras 10.1-10.6)	Under consideration.	Again despite recommendations from NIPB in 2013 this still has not been implemented.