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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM BELFAST CROWN COURT AT LAGANSIDE

THE KING

v

FIONNGHUALE MARY THERESA DYMPHA MARIE NUALA PERRY

Before: McCloskey LJ, Colton J and Fowler J

Mr D Hutton KC and Ms A Macauley (instructed by Phoenix Law) for the Appellant
Mr Robin Steer, (instructed by the Public Prosecution Service) for the Respondent

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APPEAL AGAINST CONVICTION

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McCLOSKEY LJ (*delivering the judgment of the court*)

Introduction

[1] On 15 March 2023 Nuala Perry, ("whom we shall describe as "the appellant"), following a non-jury trial, was convicted of a single count of collecting or making a record of information likely to be useful to a terrorist, contrary to section 58(1)(a) of the Terrorism Act 2000 (the "Terrorism Act"). On 17 May 2023 she was punished by a sentence of four years imprisonment.

[2] Section 58(1) of the Terrorism Act provides:

> "58 Collection of information.
>
> (1) A person commits an offence if—
>
> (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, ...
>
> (b) he possesses a document or record containing information of that kind , or
>
> (c) the person views, or otherwise accesses, by means of the internet a document or record containing information of that kind."

The particulars of the first count of the indictment were formulated thus:

> "[The defendant], on a date unknown between 16 September 2015 and 21 February 2018, collected or made a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, namely a security debrief regarding the police recovery of firearms, ammunition and explosives."

The indictment contained a second count namely possession of the same information. The trial judge dealt with this in a particular way (infra).

Grounds of Appeal

[3] There are in substance four grounds of appeal. It is contended that the appellant's conviction is unsafe because:

(i) The trial judge erred in concluding that the relevant search of the appellant's home, giving rise to the discovery of the offending material, was lawful and

should, rather, have found the search to be unlawful, thereby requiring an exercise of discretion whether to exclude the material.

(ii) The trial judge erred in dismissing the appellant's application for a direction of no case to answer.

(iii) The trial judge erroneously relied, heavily so, on a finding that the appellant's evidence had departed from the account given in her defence statement in making the further finding that her evidence was untruthful.

(iv) For the same reason the trial judge erred in making an inference adverse to the appellant arising out of her failure during police interviews to make the case which she later made in her defence statement and under oath at the trial.

Section 58 Analysed

[4] In *R v G* [2009] UKHL 13 the United Kingdom Supreme Court, at paras [39]-[50], considered the elements of the two offences specified in section 58 of the 2000 Act. In summary, as regards s 58(1), the prosecution must prove beyond reasonable doubt that:

(a) The defendant had collected, or made a record containing, information that was likely to provide practical assistance to a person committing or preparing an act of terrorism.

(b) The defendant was aware of having the document or record.

(c) The defendant had control of the document or record.

(d) The defendant knew the kind of information, to be contrasted with the full details thereof, contained in the record.

Elaborating, the court explained that section 58 is directed to information which would typically be of use to terrorists. It is not necessary, however, that the information be useful only to someone committing or preparing an act of terrorism. Furthermore, evidence of the true meaning of content superficially innocuous but said by the prosecution to be sinister could be adduced.

[5] By section 58(3) it is a defence where the defendant proves that they had a reasonable excuse for their action or possession. Section 58(3A) provides that a reasonable excuse may include, but is not limited to, the defendant's action or possession of the material record for the purpose of (a) carrying out work as a journalist or (b) academic research. The effect of section 118(1) – (4) is that where the defendant adduces sufficient evidence to raise an issue in respect of the statutory defence, the court shall treat the defence as satisfied unless the prosecution disproves the matter beyond a reasonable doubt.

Prosecution and Defence

[6] The prosecution case had the following interlocking components:

(a) The offending "record" consisted of manuscript notes of which the appellant was the author.

(b) The content of the notes was designed to provide practical assistance to a person committing or preparing an act of terrorism in the future.

(c) The requisite practical assistance would be derived from the information that munitions and explosives had been recovered from "KN's" house, there had been associated surveillance by MI5 and MI5 agents who had been positioned at a specified location. This information was capable of providing practical assistance to terrorists in making decisions about where to store munitions or explosives in the future, which persons should be selected for this purpose, whether any person had previously provided information to the security forces, whether surveillance had played any role in previous detections and whether the accounts provided by persons interviewed by the police in consequence were reliable.

(d) The notes were effectively compiled in a form of code in an attempt to obscure their meaning and enhance their future utility.

(e) The defendant's awareness of having (i.e. possessing) the notes was admitted by her in both her defence statement and a statement of agreed facts.

At the conclusion of the trial, the defendant having given evidence under oath, the prosecution was able to add the following component:

(f) This awareness was also established by the defendant's evidence.

[7] In substance and summary, the prosecution case was that the notes constituted a debriefing by dissident Republicans of certain persons who were arrested and interviewed by the police following a significant arms discovery in September 2015 in the Ballymurphy area of Belfast. This discovery generated a prosecution of one "KN" who was later (in July 2017) sentenced to seven years imprisonment for the offence of possession of firearms.

[8] The essence of the defence case is discernible from the following passages in her Defence Statement ("DS"):

> "The defendant is a writer, commentator, journalist, political campaigner and activist …

She has been a member of the political party Saoradh since its inception in 2016. She was on the original national organising committee of the party and was appointed its Vice-Chair. She played a prominent role in the party's public press launch in September 2016 …

Saoradh and the defendant engage in political discussion and activism in the context of the current political climate and draw attention to political developments with which the party and/or the defendant disagree …

The defendant's political outlook include that … the Good Friday Agreement (and kindred arrangements) ... are politically contrary to traditional Republican outlooks and ideals …

She moreover considers that MI5 engage in nefarious activities in Northern Ireland, including the harassment and intimidation of private citizens …

The defendant writes widely on such issues ... in furtherance of her political activities and beliefs. They more over constitute journalism in the sense of disclosure to the public of information, opinions or ideas …

The defendant's writings, work and research were stored at her home, either on electronic computer or in hard copy and generally were situated at a workstation she uses in a spare bedroom at the home …

She has on occasions been provided by third parties with details of various approaches to/harassments of private citizens by MI5 officials …

The information the subject of these proceedings, came to the defendant in this fashion via an anonymous third party or parties. The information contained in the notes were [sic] dropped through the defendant's letter box anonymously one night, sometime after [KN] …. had been sentenced. The defendant believes that these notes were forwarded to her due to their having recorded approaches to individuals …. from [MI5] …

The notes received by the defendant were written in the hand of the author or authors of those notes …"

Paragraph 4(n) of the DS states:

> "These original notes were forwarded to the defendant some considerable time after the events giving rise to Kevin Nolan's conviction and were forwarded after Kevin Nolan was sentenced.
>
> Any currency in the information contained in the notes was considered by the defendant to have long since dissipated. The defendant did not think that the information in the notes, at the time at which she received them, would be of any future use to anyone in any sinister way "

The final passages of note in the DS are these:

> "The defendant considered that the manner of the delivery of the notes and the anonymous nature of same indicated that the materials were forwarded in a confidential manner in furtherance of her political and journalistic activities.
>
> In seeking to maintain the confidential nature of the information and the source of the information she copied the notes provided in her own hand and retained her copy. The original notes were then disposed of ...
>
> The defendant accepts that the copied record or documents were as described in the Crown papers … stored in a perfume box on a shelf in the spare bedroom where the defendant's workstation was located … The exhibit was not carefully hidden in the manner that a security conscious person might have secreted it. This was due in part to the defendant's view that the information in the documents had lost its currency and due in part to the fact that the documents were research material that would be used by the defendant in the course of her writings."

Giving rise to the following contention:

> "As a result of the foregoing the defendant had a reasonable excuse or excuses for having her copied version of the notes/those documents and the information contained within them in her possession."

The assertion that the information in the notes had no 'currency' was repeated a second time. Finally, the DS questioned the lawfulness of the search of her home yielding the materials in question, in the following terms:

> "… the defendant questions the lawfulness of the search of her home which was designed, at least in part, to investigate her journalistic and political writings and work.
>
> … and, hence, was unlawful."

The judgment under appeal

[9] The search of the defendant's home and discovery of the offending material occurred on 20 February 2018. The judgment rehearses the background to these events as follows. A police search of a house in Ballymurphy, West Belfast on 17 September 2015 detected semtex explosives, two improvised detonators, a revolver and silencer, a semi-automatic pistol and a substantial quantity of ammunition. KN, who lived there, was arrested and (as noted above) prosecuted and convicted. Five other persons were arrested and interviewed.

[10] Next the judge addressed, and rejected, the defendant's contention that the search of her home was unlawful. There followed a finding that the offending notes were "a record of individuals being asked about their knowledge of the events leading up to the [September 2015] find because the dissidents who had lost the weapons wanted to explore what, from their perspective, had gone wrong." The judgment then notes that during her interviews the defendant was almost entirely silent. She made no response to the suggestion that she was the author of the notes. This was not admitted by her until around one year later following her committal for trial, in the Defence Statement. Some of the journalistic pieces invoked by the defendant in support of her Section 58(3) offence were then noted, followed by a summary of the analysis of some 224 files in the defendant's computer. The judge noted the twofold Crown contention that (a) the offending notes were "entirely different" in nature and content from the aforementioned computer files and (b) they could only be read and interpreted as a debrief or review of the events leading to the seizure of the weapons in September 2015 and, further, a debrief or review of those who were arrested in consequence and what they said during police interviews.

[11] The judgment next outlines certain aspects of the defendant's evidence at the trial. This is followed by an overarching conclusion of untruthfulness, based on specific findings, at para [43]:

> "For a number of reasons I do not believe the defendant's account. I do not believe that it might even possibly be a truthful account. In my judgment it is directly contradicted by all of the evidence including the following:
>
> (i) In her defence statement at para (n) cited above, she stated she believed that any relevance or currency in the information contained in the notes had long since

dissipated. The obvious meaning of that portion of the defence statement is that she knew well that the notes related to the arms find in 2015 and the conviction of Mr Nolan in 2017 but thought that the information was no longer of use or value. That is definitively not the case which she made in her oral evidence during which she said that she made "a bit of sense" of parts like "Big Eyes" but that it was otherwise meaningless.

(ii) Her description of rewriting the notes in the way and manner she claimed is simply not credible. That explanation is further undermined by her decision to keep the notes, a decision which makes no sense at all. It is also worthy of mention that none of this information was stored on her laptop unlike other pieces referred to above.

(iii) The notes were secreted in her home. It may be that the notes were not very well hidden, but it is undeniable that they were hidden.

(iv) She claimed in cross-examination that she made lots of other notes on tobacco paper, but none was found during the police search, nor were any produced in evidence at the trial.

(v) If the defendant had given oral evidence along the lines previewed in her defence statement, she would inevitably have been questioned about knowing a lot about the Kevin Nolan matters and why she thought there was no longer any value in the notes. It seems to me that those questions would have been exceptionally difficult for her to answer. In my judgement, she gave a new and different account in order to avoid such questions. The new account is simply false."

As is apparent, subparagraphs (i) and (v) are linked.

[12] The judgment then records that in her evidence the defendant did not contest that the offending notes had the meaning attributed to them by the prosecution. This was followed by a further significant finding:

> "I do not believe that the notes were left anonymously in her home. On the contrary, I am satisfied beyond a

> reasonable doubt that the notes are in her handwriting because she made them as others spoke, discussed and reviewed how the weapons came to be found, whether someone was at fault, who might be a security risk, how individuals responded during police questioning etc."

Notably, the grounds of appeal do not challenge this discrete finding per se. Rather the overarching finding of guilt is said to be infected in other ways.

[13] In the next ensuing section of the judgment the elements of the s 58 offence are addressed, at paras [44]–[46]:

> "[44] At no point in the trial was it suggested on behalf of the defendant that the notes do not carry the meaning attributed to them by the prosecution. The police were speaking from an informed position. In my judgement, the defendant was equally well informed. I do not believe that the notes were left anonymously in her home. On the contrary, I am satisfied beyond a reasonable doubt that the notes are in her handwriting because she made them as others spoke, discussed and reviewed how the weapons came to be found, whether someone was at fault, who might be a security risk, how individuals responded during police questioning etc.
>
> [45] From this sort of record and scrutiny, people who continue to be committed to terrorism are assisted in committing or preparing further acts. For instance, they form a view or impression of who can be trusted in future planned activities. Alternatively, they can form a view on whether anyone should be punished for the loss of the weapons. Of course, any punishment would be an act of terrorism if it involved murder or a punishment beating/shooting or even a threat. In addition, terrorists could use the information gathered in order to develop a better understanding of how the security forces operate. That, in itself, contributes to further terrorist acts.
>
> [46] When a direction of no case to answer was made, Mr Hutton submitted that the information contained in the notes lacked an essential ingredient because in 2018 when they were found it could not possibly be said that they might be useful to anyone planning or committing future acts of terrorism. And he emphasised that in this context section 1 of the Terrorism Act 2000 requires that the act must involve serious violence or damage to property rather

> than lesser acts such as fundraising or publicity. In my judgement the hidden notes kept by the defendant comfortably satisfy that test. To take just one example, terrorists need to know where they can store weapons safely before they are next used in an attack on so called legitimate targets. That is part of planning such attacks. Exploring the question of who can be trusted is an essential part of that planning."

Again, as appears from para [3] above, the grounds of appeal do not challenge anything in these passages per se.

[14] There are two final noteworthy features of the judgment. First the judge, unhesitatingly, drew an inference adverse to the defendant under Article 3 of the Criminal Evidence (NI) Order 1988, with accompanying reasons (see the fourth ground of appeal). Having done so, he explained that he was not proposing to rely on this because the prosecution had established the defendant's guilt beyond reasonable doubt independently. Second, the defence under section 58(3) was "entirely" rejected. The judge stated, finally, that if it had been necessary to do so he would have made a guilty verdict in respect of the second count.

First ground of appeal: Unlawful search

[15] The evidence before the court of trial included several completed pro-forma records generated by the police search of the appellant's home. It would appear that each of the individual records - primarily the authorisation, the search log and the "Premises Search Record" - forms part of a generic pro-forma record identified as "PB10/15" (or "Form 29"). The search authorisation was completed and signed by an identified detective inspector. Under the rubric "Police Officers Authorised" 12 officers, identified by their police service numbers, were named. One of these was Constable 20575. This is the officer who discovered the offending notes during the ensuing search.

[16] Within Form PB10/15 there is a component entitled "Premises Search Record." It is clear from layout, structure and completed content that this discrete record is designed to be – and was - completed after the event. One of the headings in this record is "Officers/Authorised Persons Involved in Search." As completed this identifies eight officers, again by their individual service numbers. Constable 20575 is not one of them. This omission, however, did not form the basis of the contention that the search was unlawful. This contention had two pillars, to which we now turn.

[17] There are two particularly important documents in the search matrix, namely the judicial search warrant and the search record (Form PB10/15). Prior to the execution of the search and the completion of the various elements of Form PB10/15 the police had procured from a Lay Magistrate a warrant to enter and search the appellant's home. The warrant records that the application had been made on oath by

a detective constable identified by their Police Service number only. By virtue of the documentary structure the application for the warrant and the warrant itself (where granted) merge into a single document, as in this instance. The Lay Magistrate acceded to the application. The warrant by its terms authorised "you and your assistants" to enter the premises and search for specified materials, the Magistrate being satisfied that these were:

> "… sought in connection with and likely to be of substantial value to their terrorist investigations and it is likely to prevent them being concealed, lost, damaged, altered or destroyed [and] are on the premises [where the appellant resides]."

The absence of the detective constable's name formed the first basis upon which it was contended at the trial and on appeal that the search was unlawful.

[18] At the conclusion of the prosecution case it was submitted on behalf of the appellant that there was no case to answer. The written submission compiled for this purpose includes a section addressing the search issue incorporating the contention that the search of her premises was unlawful with the result that the offending notes recovered should be excluded. This contention had two components. The first was that by virtue of Article 17(1) of PACE 1989 the search was unlawful on the ground that the Lay Magistrate's warrant did not specify the "name" of the applying officer, the inclusion of this officer's service number being insufficient. The second contention was that none of the members of the police search team was an "authorised officer" because the requisite authority had not been provided by an officer of at least the rank of inspector, in contravention of paragraphs 1 and 2 of Schedule 3 to the Justice and Security (NI) Act 2007 (infra).

[19] The first contention is based on two interconnected provisions of the Police and Criminal Evidence (NI) Order 1989 ("PACE 1989"), namely Article 17(1) and (6). The context to which these two provisions belongs requires Article 17 to be considered in full:

> "17.—(1) This Article and Article 18 have effect in relation to the issue to constables under any statutory provision, including a statutory provision passed or made after the making of this Order, of warrants to enter and search premises; and an entry on or search of premises under a warrant is unlawful unless the warrant complies with this Article and is executed in accordance with Article 18.
>
> (2) Where a constable applies for any such warrant, it shall be his duty—
>
> (a) to state—

(i) the ground on which he makes the application; . . .

(ii) the statutory provision under which the warrant would be issued; [and]

[F3(iii)if the application is for a warrant authorising entry and search on more than one occasion, the ground on which he applies for such a warrant, and whether he seeks a warrant authorising an unlimited number of entries, or (if not) the maximum number of entries desired;]

[F4(b)to specify the matters set out in paragraph (2A); and]

(c) to identify, so far as is practicable, the articles or persons to be sought.

[(2A) The matters which must be specified pursuant to paragraph (2)(b) are—

(a) if the application relates to one or more sets of premises specified in the application, each set of premises which it is desired to enter and search;

(b) if the application relates to any premises occupied or controlled by a person specified in the application,—

(i) as many sets of premises which it is desired to enter and search as it is reasonably practicable to specify;

(ii) the person who is in occupation or control of those premises and any others which it is desired to enter and search;

(iii) why it is necessary to search more premises than those specified under head (i); and

(iv) why it is not reasonably practicable to specify all the premises which it is desired to enter and search.]

(3) An application for such a warrant shall be supported by a complaint in writing and substantiated on oath.

(4) The constable shall answer any question that the justice of the peace or judge hearing the application asks him.

(5) A warrant shall authorise an entry on one occasion only [unless it specifies that it authorises multiple entries].

[(5A) If it specifies that it authorises multiple entries, it must also specify whether the number of entries authorised is unlimited, or limited to a specified maximum.]

(6) A warrant—

(a) shall specify—

(i) the name of the person who applies for it;

(ii) the date on which it is issued;

(iii) the statutory provision under which it is issued; and

[(iv) each set of premises to be searched, or (in the case of an all premises warrant) the person who is in occupation or control of premises to be searched, together with any premises under his occupation or control which can be specified and which are to be searched; and]

(b) shall identify, so far as is practicable, the articles or persons to be sought.

[(7) Two copies shall be made of a warrant which specifies only one set of premises and does not authorise multiple entries; and as many copies as are reasonably required may be made of any other kind of warrant.]

(8) The copies shall be clearly certified as copies by the justice of the peace or judge who issues the warrant."
[emphasis added]

[20] This discrete statutory matrix has certain further elements. The search warrant granted by the Lay Magistrate was made under paragraph 1(2) of Schedule 5 to the Terrorism Act 2000 (the "2000 Act"). This provides:

> "1(1) A constable may apply to a justice of the peace for the issue of a warrant under this paragraph for the purposes of a terrorist investigation.
>
> (2) A warrant under this paragraph shall authorise any constable—
>
> (a) to enter [premises mentioned in sub-paragraph (2A)] ,
>
> (b) to search the premises and any person found there, and
>
> (c) to seize and retain any relevant material which is found on a search under paragraph (b)."

Paragraphs 1 (1) and (5) provide:

> "(1) A constable may apply to a justice of the peace for the issue of a warrant under this paragraph for the purposes of a terrorist investigation.
>
> …
>
> (5) Subject to paragraph 2*, a justice may grant an application under this paragraph if satisfied—
>
> (a) that the warrant is sought for the purposes of a terrorist investigation,
>
> (b) that there are reasonable grounds for believing that there is material on [premises to which the application relates] which is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation and which does not consist of or include excepted material (within the meaning of paragraph 4 below), and
>
> (c) that the issue of a warrant is likely to be necessary in the circumstances of the case … "

[*In passing, paragraph 2 did not apply to the search warrant application under scrutiny in this appeal]

While the Code of Practice for the Exercise of Powers in the Justice and Security (NI) Act 2007 (the "COP") featured in prosecuting counsel's submissions, none of its provisions has any evident bearing on this ground of appeal.

[21] PACE Code of Practice B ("PACE COP B") must also be considered. This states at paragraph 2.9:

> "Nothing in this Code requires the identity of officers, or anyone accompanying them during a search of premises, to be recorded or disclosed:
> (a) In the case of enquiries linked to the investigation of terrorism; or
>
> (b) ….
>
> In these cases police officers should use their police service number and the name of their police station. Police staff should use any identification number provided to them by the Police Service."

It is necessary to provide the statutory context. First, the genesis of all PACE codes of practice is Article 65(1) of PACE 1989:

> "(1) The Secretary of State shall issue codes of practice in connection with—
>
> (a) the exercise by police officers of statutory powers—
>
> (i) to search a person without first arresting him; …
>
> (ii) to search a vehicle without making an arrest;[or
>
> (iii)
>
> (iii)to arrest a person;]
>
> (b) the detention, treatment, questioning and identification of persons by police officers;
>
> (c) searches of premises by police officers; and
>
> (d) the seizure of property found by police officers on persons or premises."

(In passing, with reference to paragraph 2.9 of PACE COP B, Constable 21174 (Lynch) was both the applying officer and a member of the police search team: thus no issue of non-compliance with this discrete provision arose)

Article 66(10) provides:

> "In all criminal and civil proceedings any such code shall be admissible in evidence; and if any provision of such a code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question."

[22] The sole basis on which this first contention was rejected by the trial judge was that in "… interpreting and applying Article 17(6) the Code is a matter to be taken into account." This reasoning is in our view problematic, firstly on account of the relative hierarchical status of the two measures in question. PACE COP B (like all kindred instruments) is subordinate to the parent legislation. Furthermore, it did not exist when the parent legislation was enacted and, hence, did not form part of the relevant pre-enacting history. The proposition that in any given instance the interpretation of the Code is to be informed by the provisions of the parent measure (PACE 1989) is doctrinally valid. However, we consider that the converse proposition is unsustainable absent either (a) some binding or, as a minimum, persuasive judicial authority or (b) a legislative provision to this effect. This is the first element of our analysis.

[23] As regards (a), no judicial decision supportive of the approach adopted by the trial judge has been brought to the attention of this court. Turning to (b), it seems that the trial judge probably had in mind Article 66(10) of PACE 1989 (supra). The wording of this provision requires careful examination. In the specific context of this ground of appeal, it requires the following question to be posed and answered: is paragraph 2.9 of PACE COP B "relevant to" the "question" of the correct interpretation of Article 17(6)(a)(i) of PACE? The "question" must be a "question arising in the proceedings." Article 66(10) does <u>not</u> provide "... any question arising in the proceedings, to include any question relating to the construction of PACE 1989." This in our view must be a material factor in the interpretation of paragraph (10). The second material factor is that the dominant provision in paragraph (10) is that expressed in the first clause, namely the statement that all PACE Codes shall be admissible in all criminal and civil proceedings. We consider that the issue of the admissibility in evidence of PACE Codes in proceedings is remote from any issue of construction of the parent legislation. These are two very different things. We acknowledge the breadth of the second part of paragraph (10). However, the context to which it belongs is that of the admissibility of PACE Codes in evidence. Properly analysed, we consider that the second part of paragraph (10) is directed to the out-workings of the immediately preceding clause. This is the second part of our analysis.

[24] The third element of our analysis focuses on the language of the enabling power, namely Article 65(1) of PACE. Each of the Codes of Practice made by the Secretary of State in the exercise of this power is designed to be an instrument "in connection with" each of the subject matters which follows. In the particular case of PACE COP B the subject matter is "searches of premises by police officers." We consider that the language of Article 65(1) militates strongly against the suggestion that any element of a COP made thereunder can legitimately inform an exercise in construing any provision of the parent legislation.

[25] The fourth element of our analysis is the following. Paragraph 2.9 of PACE COP B is not merely inconsistent with Article 17(6)(a)(i) of PACE. It positively contradicts it. Furthermore, the latter formulates a requirement in presumptively mandatory language ("shall specify …."). Applying orthodox principles COP B is subordinate to Article 17(6). In short, a measure of legislation which makes provision for a code of practice to be made thereunder must, in hierarchical terms, take priority over the ensuing code. Article 17(6) is the product of a legislative process. It expresses a specific requirement in unambiguous terms. We consider the suggestion that a contradictory requirement in the subordinate COP, made by a Minister of the executive with no involvement of the legislature, should take precedence over the parent legislative provision to be startling on its face, unsupported by authority and inimical to orthodox principles.

[26] For the combination of reasons elaborated, we are unable to agree with the trial judge's reasoning, which the prosecution espoused before this court. This, however, is not dispositive of the first component of this ground of appeal.

[27] There is a further exercise of some importance to be undertaken. This entails determining the following question: did the legislature intend that a warrant specifying the service number (rather than the name) of the constable applying for it would be non-compliant with Article 17(6)(a)(i) of PACE 1989, with the result that the "is unlawful" sanction of Art 17(1) would apply to the ensuing "entry on" and "search" of the relevant premises? This raises an issue of statutory construction. In order to answer this question it is necessary to address the purpose of this requirement. In considering this question alertness to the overlay of legal principle is essential.

[28] In *Re Hughes* [2021] NIQB 113 a divisional court of the Northern Ireland High Court, in the context of considering certain questions relating to search warrants made by a Lay Magistrate (under Article 10 PACE 1989), drew together the main governing principles at paras [32]–[33]:

> "[32] … there is a plethora of reported cases bearing on the main issue before this court. It will suffice in the present context to draw attention to what Lord Hoffmann stated in

Attorney General of Jamacia v Williams [1998] AC 351 at 358, delivering the unanimous judgment of the House of Lords:

> 'The purpose of the requirement that a warrant be issued by a justice is to interpose the protection of a judicial decision between the citizen and the power of the state. If the legislature has decided in the public interest that in particular circumstances it is right to authorise a police man or other executive officer of the state to enter on a person's premises, search his belongings and seize his goods, the function of the justice is to satisfy himself that the prescribed circumstances exist. This is a duty of high constitutional importance. The law relies on the independent scrutiny of the judiciary to protect the citizen against the excesses which would inevitably flow from allowing an executive officer to decide for himself whether the conditions under which he is permitted to enter on private property have been met.'"

[emphasis added.]

From the decided cases emerges the clear theme that Article 10 PACE enshrines a draconian power not to be exercised casually or lightly. In *G v Commissioner of the Police for the Metropolis* [2011] EWHC Admin at [17] the English Divisional Court, considering the equivalent English statutory provision - section 8 PACE 1984 - stated:

> "There is a large body of authority which establishes three important propositions: (1) the issue of a search warrant or a warrant for seizure is a very serious interference with the liberty of the subject. (2) The officer applying for such a warrant must give full, complete and frank disclosure to the magistrate so as to enable the latter to base his decision on the fullest possible information. (3) The court itself must give the most mature and careful consideration to all the facts of the case."

[29] These principles are amplified in [17] of *Re O'Neill*:

> "(i) All the material necessary to justify the grant of a warrant should be contained in the information provided on the application form which must identify which of the conditions specified in Article 10(3) is being relied on by the applicant.

(ii) If the LM requires any further information in order to be satisfied that the issue of a warrant is justified, a note should be made of the additional information provided orally so that this exists as a proper record of the full basis on which the warrant has been granted.

(iii) It is of the greatest importance that a judge granting a warrant must give reasons …."

Elaborating on the third of these principles, another consistent theme of the jurisprudence is that the judicial officer concerned should ensure that reasons for their decisions are recorded in writing at the time. See for example *R (Glenn) v Revenue and Customs Commissions* [2011] EWHC 2998 (Admin) and *R (Tchengutz) v Director of Serious Fraud Office* [2012] EWHC 2154 (Admin) at [89]. This requirement will be less onerous in cases where the application for the warrant contains all of the material necessary to address the statutory requirements: see for example *R (Cronin) v Sheffield Magistrates' Court* [2002] EWHC 2568 (Admin) and *R (Newcastle United Football Club) v Commissioner for HM Revenue and Customs* [2017] EWHC 2402 (Admin)."

[30] *Hughes* was concerned with Article 17(2) of PACE, which provides:

"(2) Where a constable applies for any such warrant, it shall be his duty-

(a) to state-

(i) the ground on which he makes the application;

(ii) the statutory provision under which the warrant would be issued; and

(iii) if the application is for a warrant authorising entry and search on more than one occasion, the ground on which he applies for such a warrant, and whether he seeks a warrant authorising an unlimited number of entries,

> or (if not) the maximum number of entries desired;
>
> (b) to specify the matters set out in paragraph (2A); and
>
> (c) to identify, so far as is practicable, the articles or persons to be sought."

As *Hughes* and the several judicial decisions which it considers demonstrate, a failure by the constable concerned to comply with the Art 17(2) requirements was not considered to automatically either invalidate the warrant procured or to render the fruits of the ensuing search inadmissible in evidence. Neither the inclusion of misinformation nor the omission of material information automatically triggered the unlawful search consequence specified in Article 17(1) in those cases. Rather the test which has been devised is whether the information omitted might reasonably have resulted in the judicial officer refusing to grant the warrant: see *Hughes*, para [36].

[31] Bearing in mind the passage in *Attorney General of Jamaica v Williams* reproduced in para [32] of *Hughes* (*supra*), among the legal principles which fall to be considered are the ranking of the judicial officer's duty as one of "high constitutional importance" and the importance of the "independent scrutiny" of the judicial officer to protect the citizen against any misuse of power by the executive, in this instance the police organisation concerned. This has given rise to the judicial formulation of a principle that the officer concerned must make full and frank disclosure of all material information in applying for the warrant: see *G v Commissioner of the Police for the Metropolis* [2011] EWHC Admin at para [17]. It may be plausibly contended that the safeguard which this principle affords the occupier of premises is of evidently greater strength than the provision of the relevant police officer's name, rather than their service number, in the search warrant application. Substance is clearly distinguishable from, and often eclipses, form in many legal contexts.

[32] The appellant relies on *Ex parte G* for one particular reason. The provisions of the Police and Criminal Evidence Act 1984 ("PACE 1984") – sections 8 and 15 – which featured in that case are the equivalents of Articles 10 and 17 of PACE 1989. Section 15(6)(a) of PACE 1984 replicates precisely Article 17(6)(a) of PACE 1989. As para [15] of the judgment of Laws LJ makes clear, the police application for the impugned search warrant in that case suffered from multiple shortcomings. There had been a serious failure to provide the Magistrates' Court with full and accurate information. This was the first judicial review ground of challenge and it succeeded. The second ground, based on Article 8 ECHR, was considered to add nothing. The judgment then addresses the third and final ground, at para [23]:

> "The third and last ground is that the warrant does not name the person who applied for it and that is in breach of the section 15(6)A(1) of the Police and Criminal Evidence Act 1984. Nor does it specify the enactment under which it

> was to be issued as required by section 15(6)A(2). The warrant referred to SCD51 Paedophile Intelligence Unit; that is proper information to be given, but does not in my judgment strictly comply with the statute and as I see the matter, this is a context in which the statute must be complied with to the letter."

This is the passage upon which the appellant relies.

[33] *Ex parte G* is a decision of a division of the English High Court. It is not, as a matter of precedent, binding on this court. That does not preclude this court from considering whether we should follow it by reason of its persuasive quality. Having done so we are of the view that it is a decision of limited value, for three main reasons. First, the judgment makes no mention of the 'unlawful search consequence' provision in section 15(1) of PACE 1984 (the analogue of Article 17(1) of PACE 1989). Second, the conclusion expressed in para [23] is unreasoned and identifies no legal principle or judicial authority. While there is a formulation of "three important propositions" in para [17] of the judgment, the later passage in para [23] does not attempt to explain how (if at all) any of these propositions informs the conclusion expressed. Third, absent from the judgment is the exercise we have begun in para [27] above. There are two further considerations. On the face of the report the judgment is an ex tempore one. Finally, the single frailty under scrutiny in this part of the appellant's case contrasts sharply with the egregious defects in *Ex Parte G* and other cases.

[34] We resume the task of identifying the purpose of the Article 17(6) (a) (i) of PACE 1989. In doing so we have regard to the broader statutory context to which PACE 1989 belongs. Section 32 of the Police (NI) Act 2000 provides:

> "**General functions of the police**
>
> (1) It shall be the general duty of police officers—
>
> (a) to protect life and property;
>
> (b) to preserve order;
>
> (c) to prevent the commission of offences;
>
> (d) where an offence has been committed, to take measures to bring the offender to justice.
>
> (2) A police officer shall have all the powers and privileges of a constable throughout Northern Ireland and the adjacent United Kingdom waters.
>
> (3) In subsection (2)—

(a) the reference to the powers and privileges of a constable is a reference to all the powers and privileges for the time being exercisable by a constable whether at common law or under any statutory provision,

(b) "United Kingdom waters" means the sea and other waters within the seaward limits of the territorial sea,

and that subsection, so far as it relates to the powers under any statutory provision, makes them exercisable throughout the adjacent United Kingdom waters whether or not the statutory provision applies to those waters apart from that subsection."

Section 32 expresses the long-established public interest in the detection and prevention of crime and the prosecution and punishment of offenders. This public interest is of some longevity, initially enshrined in the common law and later expressed for the first time in statute in section 11 of the Constabulary (Ireland) Act 1836. The promotion and protection of this public interest gives rise to a series of duties on the part of police officers. Nowadays these are found, if inexhaustively, in the constable's statutory attestation of office (s 38) and related instruments such as the PSNI Code of Ethics. The notional scales, however, are not one sided. In the interface with the public which the performance of these duties entails there is, on the other side, a series of individual rights of the citizen. On a daily basis and in myriad situations a balance must frequently be struck. The striking of this balance also informs the exercise of statutory construction confronting this court.

[35] Also resonant in this context is Lord Steyn's memorable formulation of the "triangulation of interests", with its emphasis on the public interest, in *Attorney General's Reference No 3/1999* [2001] 1 Cr App R 34. In that case the defendant was prosecuted for raping an elderly woman on the basis of DNA evidence which, on an earlier date and in an unrelated investigation, had been retained by the police in contravention of s 63 (3B) (b) of PACE 1984. The evidence was ruled inadmissible, with an ensuing acquittal. Lord Steyn, with whom all members of the House concurred, stated at para [20]:

"The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the

> victim and his or her family, and the public. In my view the austere interpretation which the Court of Appeal adopted is not only in conflict with the plain words of the statute but also produces results which are contrary to good sense. A consideration of the public interest reinforces the interpretation which I have adopted."

The statutory provision in play (supra) was to be construed so that the exclusion of the DNA evidence was held to be erroneous.

[36] The overarching aims and purposes relating to the discharge of the functions and duties of police officers are identified in *Re AS1* [2021] NICA 55 at para [35] especially and, given the present context, more specifically subparagraphs [iv] and [v]:

> "(iv) All police powers relating to any search of premises under the aforementioned statutory provisions would have to be exercised for the purpose of fulfilling the relevant objectives enshrined in section 32(1) of the 2000 Act and in furtherance of the local community aims enshrined in section 31A; such officers would also be obliged to adhere to the PSNI Code of Ethics and, in particular, safeguard the rule of law, protect human dignity and conduct themselves in an accountable and responsible manner; the exercise of powers would have to be proportionate and necessary; officers should exercise their powers courteously and with respect for persons within the premises; records must be made and given as soon as reasonably practicable to appropriate persons; and any search of premises will be for no longer than necessary (2007 Act Code of Practice).
>
> (v) The generation of photographic and video evidence by police had to be undertaken for legitimate police purposes, carried out in an appropriate manner and pursue a recognised and documented policing purpose (PB8/14. Appendix K5)."

[37] Having raised the following issue with counsel and having considered their further submissions, we propose to take judicial notice of certain aspects of the office of constable. As a matter of obligation constables carry 'warrant cards', which are primarily designed to be proof of identity. These contain the holder's name, rank, photograph, service number and a holographic element establishing authenticity. The warrant card is also proof of a constable's sworn attestation. The constable's service number is displayed externally, on their uniform (though probably not in the case of a detective constable). Furthermore, it is a well-established feature of the training of Lay Magistrates in this jurisdiction that evidence of the applying police officer's

identity is required. The foregoing considerations also inform the construction of the statutory language under scrutiny.

[38] The following passage in the speech of Viscount Simonds in *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436, 461 is especially apposite in the present context:

> "...words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense which I have already indicated as including not only other enacting provisions of the same statue, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."

[39] We consider that, fundamentally, Article 17(6)(a)(i) of PACE 1989 is designed to ensure a procedurally proper search warrant process which is invested with the degree of formality and solemnity appropriate to the subject matter, the judicial nature of the procedure and the rights of occupiers of premises. It also caters for the possibility that some imposter or miscreant might present a search warrant application to a Lay Magistrate, which is not an entirely fanciful one (and is expressly recognised in the published materials of the English College of Policing). It operates as a safeguard for the occupier of premises. We pose the question of whether any of these purposes is frustrated by specifying in the search warrant application the service number, and not the name, of the police constable concerned. We consider that this question invites a negative answer. The name of the applying police officer is but one means of identifying them in furtherance of the overarching aims of procedural propriety and formality and affording the occupier of premises adequate safeguards. The police officer's service number, an identifying mechanism which can be readily verified by the Lay Magistrate or District Judge concerned, together with the officer's warrant card, is equally capable of furthering these purposes. They are not diminished or compromised in any discernible way by the use of this mechanism. The absence of any statutory requirement that the applying officer possess any particular expertise or qualifications or elevated rank is another material factor.

[40] Our conclusion is that in devising Art 17(6)(a)(i) of PACE 1989 the legislature did not intend to visit a search of premises with the draconian condemnation of illegality on account of the police officer concerned having applied to the judicial officer for a search warrant utilising their service number rather than their name. This construction provides an adequate safeguard for the occupier of premises, gives rise to no discernible incongruity (much less an absurdity), is compatible with good sense and pragmatism, respects the values of formality and solemnity identified above, does not compromise any discernible safeguard for the occupier of premises and results in

no impermissible imbalance in the triangulation of interests in play. It follows that we reject the first limb of the unlawful search ground of appeal.

[41] The second limb of this ground of appeal engages section 24 of and Schedule 3 to the Justice and Security (NI) Act 2007 (the "2007 Act"). Section 24 provides:

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

The material provisions of Schedule 3 are these:

> "**SCHEDULE 3 MUNITIONS AND TRANSMITTERS: SEARCH AND SEIZURE**
>
> **Interpretation**
>
> 1(1) In this Schedule "officer" means—
>
> (a) a member of Her Majesty's forces on duty, and
>
> (b) a constable.
>
> (2) In this Schedule "authorised officer" means—
>
> (a) a member of Her Majesty's forces who is on duty and is authorised by a commissioned officer of those forces, and
>
> (b) a constable who is authorised by an officer of the Police Service of Northern Ireland of at least the rank of inspector.
>
> 2.(1) An officer may enter and search any premises for the purpose of ascertaining—
>
> (a) whether there are any munitions unlawfully on the premises, or
>
> (b) whether there is any wireless apparatus on the premises.
>
> (2) An officer may not enter a dwelling under this paragraph unless he is an authorised officer and he reasonably suspects that the dwelling—

(a) unlawfully contains munitions, or

(b) contains wireless apparatus.

(3) A constable exercising the power under sub-paragraph (1) may, if necessary, be accompanied by other persons."
[emphasis added]

In summary, a police officer may not enter a dwelling unless he is an "authorised officer" (holding the requisite suspicion), the definition being a "constable who is authorised by an officer … of at least the rank of inspector."

[42] We turn to examine the relevant factual matrix. The police application for and procurement of the judicial warrant to enter and search the appellant's home was the first material event in the process. This was followed by certain operational, administrative, preparatory steps which inter alia involved completion of appropriate sections of Form PB10/15 (the search record). The search itself ensued, commencing at 20.45 hours and ending at 01.25 hours the following day. According to Form PACE 1A eight officers, identified by their service numbers, were involved in the operation.

[43] Before commencing the search, the discrete section of Form PB10/15 entitled "Authority to Search a Dwelling House" was completed. This documents that this "written authorisation" was given at 17.20 hours on 20 February. The signature of the detective inspector concerned appears in three places. In the immediately preceding section entitled "Police Officers Authorised", the service numbers of 12 police officers are specified. The name of the detective inspector precedes this component. His signature – twice – follows it and is accompanied by a completed time and date of the "written authorisation." As previously noted, the officer who inserted the 12 service numbers was not the detective inspector.

[44] The argument developed at the trial had two components, namely (a) as a matter of fact the members of the search team had not been authorised by a police inspector and (b) as a matter of law the search and its fruits were unlawful in consequence by virtue of non-compliance with para 2(2) of Schedule 3 to the 2007 Act. This argument was rejected by the trial judge in the following terms, at para [17]:

"[17] I do not accept that submission. In my judgment [sic], the critical fact is that the search of the home was authorised by an inspector. It requires little imagination or understanding to envisage a scenario where the availability of the officers who can take part in the search changes after the search has been authorised, so that some are diverted to another incident and others are detailed to take their

> place. To my mind, none of this affects the lawfulness of the search. It is not, and should not be, necessary in such circumstances to have to go back, or keep going back, to the inspector."

The appellant renews the same argument before this court.

[45] As regards the factual dimension of this challenge, from a detailed examination of the relevant transcripts of the trial the precise sequence of events and the associated conduct of the detective inspector and police constable concerned do not emerge with absolute clarity. Certain pertinent questions were not actually answered by the key prosecution witness, Detective Constable Lynch, his answers to others were incomplete and, further, he speculated about the state of mind and knowledge of the inspector. The persistent and confusing use of the present tense in the questioning undoubtedly contributed to this. However this court is bound to recognise that, albeit not in the language of making a specific finding, the trial judge stated at para [15] of his judgment that the requisite authorisation had not been provided by the detective inspector. Furthermore, this was conceded before this court by prosecuting counsel.

[46] Accordingly, the search of the appellant's home was not in compliance with the specific requirements of paragraphs 1 and 2 of Schedule 3 to the 2007 Act that the search officers be authorised by an officer of at least the rank of inspector, the construction of these statutory provisions being uncontentious. The question to be determined is whether this failure either rendered the search unlawful or had the consequence that its fruits (the offending notes) were inadmissible in evidence subject to the judicial discretion enshrined in Art 76 of PACE 1989.

[47] This discrete challenge to the search cannot invoke the 'unlawful entry/search' consequence of Article 17(1) of PACE 1989 because the failure identified above did not entail non-compliance with any provision of Article 17 or Article 18 or any cognate statutory provision. This is the first consideration to be reckoned in evaluating this ground. The second consideration is that there is no provision in the 2007 Act to the effect that the consequence of this failure is to render the search unlawful or render its fruits inadmissible in evidence in any ensuing criminal trial. We note the characterisation of paragraph 2(2) of Schedule 3 as a "consequence" in the submissions of Mr Hutton KC. This submission, however, does not engage with the immediately preceding analysis and does not advance this ground of appeal.

[48] This analysis engages a cohort of well settled principles. These principles were rehearsed in extenso in the recent decision of this court in *Re Duffy and Others* [2022] NICA 34, at paras [30]–[40]:

> "[30] First there is the decision of the House of Lords in *Wang v IRC* [1994] 1WLR 1286. There Lord Slynn, delivering the unanimous decision of the House, formulated the following approach at 1294:

> 'The distinction between "mandatory" and "directory" or between "imperative" and "mandatory" the latter in that context being the same as "directory" has a long history and has led to much litigation and on occasion to somewhat refined distinctions.'"

Following consideration of the relevant case law, his Lordship formulated the following approach, at 1296:

> "Having reviewed the authorities cited by the taxpayer in this appeal, not all of which are referred to in this opinion, their Lordships consider that when a question like the present one arises — an alleged failure to comply with a time provision — it is simpler and better to avoid these two words "mandatory" and "directory" and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?"

> [31] This is precisely the situation which arose in Robinson v Secretary of State for Northern Ireland [2002] UKHL 32. There the statutory provisions in play were section 16(1) and (8) and section 32E of the Northern Ireland Act 1998. In accordance with these provisions the Northern Ireland Assembly was required to elect persons to the offices of First Minister and Deputy First Minister within six weeks of the vacancies arising, while the Secretary of State was required to propose a date for a new Assembly election in the event of the six week period elapsing without the vacancies having been filled. These provisions did not spell out in detail all of the consequences to flow from the latter situation. Nor did they require the Secretary of State to act within a specified period. The issue which arose was the legality of the election to the two offices two days following expiry of the six week statutory period. By a majority the House held

that these posts had been lawfully filled. As appears particularly from para [13]ff of the opinion of Lord Bingham of Cornhill, the resolution of the issue was undertaken by applying the test of the consequences which the legislature had by implication intended to follow from non-election within the six week period. Notably the exercise undertaken entailed consideration of the key provisions in their full statutory context, to include the Belfast Agreement.

[32] The central tenets of the exercise carried out are particularly clear in para [30] of the opinion of Lord Hoffmann, rejecting the narrower construction advanced by the appellants:

> "In my opinion the rigidity of the first alternative is contrary to the Agreement's most fundamental purpose, namely to create the most favourable constitutional environment for cross-community government. This must have been foreseen as requiring the flexibility which could allow scope for political judgement in dealing with the dead locks and crises which were bound to occur."

In thus deciding the House cited with approval the approach espoused in *Wang*.

"[33] The doctrinal approach emerging so clearly from *Wang* and *Robinson* resurfaced soon afterwards in what has come to be recognised as the leading authority on this subject, *R v Soneji* [2006] 1 AC 340. There the issue was whether confiscation orders made some three months following expiry of the maximum period permitted by the statute for postponement of such orders (six months) were nonetheless lawful. In substance, their Lordships decided unanimously that the fundamental failure of the trial judge had been to neglect making a postponement order having first satisfied himself, by making appropriate findings, that the exceptional circumstances dispensation whereby the statutory maximum period (of six months) could be extended was fulfilled.

[34] There are five opinions of the five judge judicial committee. That which is cited with most frequency and has received most attention throughout these proceedings is the opinion of Lord Steyn. As the judgment of

> Lord Steyn, with whom the other members of the House agreed, highlights at paras [13] and [14] in every instance where a statutory requirement is formulated in imperative terms without specification of the consequences to follow from non-compliance it is the task of the court first to identify with precision the nature of the non-compliance and, second, to ascertain the unexpressed parliamentary intention concerning the consequences to follow. We consider it of some importance to draw attention to para [13]:
>
> > 'There is an initial difficulty. Before one can consider the legal consequences of failures under [the relevant statutory provision] it is necessary to identify those failures.'"

As Lord Steyn noted in para [14]:

> "A recurrent theme in the drafting of statutes is that parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply."

At para [15] Lord Steyn adverted to the:

> "… more flexible approach of focusing intensely on the consequences of non-compliance and posing the question, taking into account those consequences, whether parliament intended the outcome to be total invalidity."
>
> [35] As appears from para [15] of his opinion, Lord Steyn formulated the governing test in simple terms: did parliament intend that the consequences of the non-compliance with the statutory requirement in play should be "total invalidity"? The mandatory/directory enquiry received its quietus in unequivocal terms, at para [23]:
>
> > '… the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, … the emphasis ought to be on the consequences of non-compliance and posing the question of whether parliament can fairly be taken to have intended total invalidity.'

Notably at para [24] Lord Steyn considered that any prejudice to the two accused persons resulting from the non-compliance in question, which was a failure to observe a statutory time limit, was:

> '… decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation for what were no more than bona fide errors in the judicial process.'

The "total invalidity" case was rejected unanimously by the House.

[36] Three of the other four members of the committee - Lords Rodger, Carswell and Brown - agreed unequivocally with Lord Steyn. Furthermore Lord Steyn referred approvingly to the further reasons given by Lords Rodger and Brown. The fifth member of the committee, Lord Cullen, did not expressly agree with any of the others. Before this court there was some debate about certain passages in the opinion of Lord Carswell. In our view there is no issue of substance in this respect for the following reasons.

[37] At para [60] Lord Carswell expressed himself to be "in full agreement" with the reasoning and conclusions of Lord Steyn. At para [63] he expressly acknowledged the shortcomings in the mandatory/directory dichotomy, describing "the modern case law cited by Lord Steyn" as a "salutary reminder of the correct approach." Next Lord Carswell observed that this dichotomy nonetheless continued to have "… some value … particularly [relating to] substantial performance." In the passages which follow and, in particular, in paras [67]-[68], Lord Carswell makes explicit reference to the intention of the legislature. Furthermore, he undertakes the exercise of measuring, or evaluating, the extent and gravity of the non-compliance in play. In para [68] he describes this as "small." We consider that Lord Carswell's approach is consonant with that of Lord Steyn. In short, in the exercise of determining objectively the intention to be imputed to parliament and measuring the nature, gravity and extent of the failing on the part of the public authority concerned must be reckoned as it is a legitimate consideration to take into account. This, in our view, follows logically from

Lord Steyn's starting point - in para [13] - namely the need to identify with precision the acts and/or omissions constituting the non-compliance under scrutiny.

[38] In our judgement, the following proposition is readily distilled from Soneji. In any case where there has been a failure to comply with a statutory requirement in a given process, the court, in the exercise of identifying the intention to be imputed to parliament regarding the consequences of the non-compliance in question, should normally consider and evaluate the nature, gravity and extent of the relevant act and/or omission. The court will consider it more likely that parliament intended total invalidity to be visited upon acts and/or omissions of non-compliance which may properly be considered egregious in nature, deliberate, actuated by impermissible motives or considerations or incompatible with the fundamental rights of affected persons. This, we would emphasise, is not designed to constitute an exhaustive list.

While the "substantial compliance" label may no longer be in vogue, we consider that the relevant passages in the opinion of Lord Carswell are to be viewed through the immediately preceding prism.

[39] It follows that we agree with the approach of Burnett J in *North Somerset District Council v Honda Motor Europe* [2010] EWHC 1505 (QB) at paras [43]–[44] and the endorsement which this received in the English Court of Appeal in Secretary of State for the *Home Department v SM (Rwanda)* [2018] EWCA Civ 2770 at paras [50]–[52]. Certain other reported decisions have featured in these proceedings both at first instance and on appeal. These include *Re ED's Application* [2003] NI 312, *Re McCready's Application* [2006] NIQB 60 and *McGrath v Camden London Borough Council* [2020] EWHC 369 (Admin). We would observe that these are all first instance decisions which do not illuminate the correct determination of this appeal. The citation of first instance decisions which in one way or another bear on the application of the Soneji principles will rarely be appropriate. This observation is applicable to most litigation contexts.

[40] We further consider that the law is correctly stated by Professor Gordon Anthony in Judicial Review in Northern Ireland at para 7.18:

> 'Where a decision maker fails to act in accordance with the statutory provision, the issue for the courts is whether the legislature intended that any corresponding decision should thereby be unlawful. This, in turn, reduces to an exercise in statutory interpretation in which 'the paramount objective is to ascertain the intention of the legislature in enacting the provision under consideration.' In seeking to identify that intention, the courts have said that 'it is necessary to have regard to the use of mandatory or directory language within the provision, to establish the purpose for the use of such language and to determine from the context of the provision and other aids to interpretation what consequence should flow from any breach. Depending on context, this may also lead the courts to ask whether a substantial compliance with a particular provision is sufficient or whether precise compliance is required given the overall legislative objective.'"

To like effect is Halsbury's Law of England (Volume 61A) paragraph 27:

> "In determining the consequences of breach of a requirement, the court must look to the words and objectives of the statutes in which the requirement appears, the purpose of the requirement and its relationship with the scheme, the degree and seriousness of the non-compliance, and its actual or possible effect on the parties. The court must attempt to assess the importance attached to the requirement by Parliament.
>
> If, in the opinion of the court, a procedural code laid down by a statute is intended to be exhaustive and strictly enforced its provisions will be regarded as invalidating an action taken in breach, but even a mandatory procedural requirement may be held to be susceptible of waiver by a person having an interest in securing strict compliance. Courts have asked

> whether the statutory requirement can be fulfilled by substantial compliance and, if so, whether on the facts there has been substantial compliance even if not strict compliance. Under some statutes non-compliance with procedural requirements accompanying the exercise of a statutory power directly affecting individual rights is expressly declared to have no vitiating effect unless a person aggrieved is substantially prejudiced thereby."

[49] These principles also feature in the decision of the Supreme Court in *PPS v McKee and Elliott* [2013] UKSC 32. In that case the key fact was that the defendant's fingerprints had been taken electronically utilising a device which had not been approved by the Secretary of State, in contravention of Article 61(8B) of PACE 1989. Giving the unanimous decision of the Court, Lord Hughes recalled, at para [9], that the legislation in question:

> "… was enacted against the background of the well understood general common law rule that evidence which has been unlawfully obtained does not automatically thereby become inadmissible."

This principle, of course, is now expressed in Article 76 of PACE 1989 and section 78 of PACE 1984. Having identified the *Soneji* line of authority as providing the route to resolving the issue, Lord Hughes set about identifying the purpose of the relevant statutory requirement, stating at para [16]:

> "… the other background material shown to this court demonstrates that the purpose of the proposal for type approval was not principally the protection of the individual against risk of conviction on inaccurate evidence. The concern was much more closely related to the needs for the technology to work properly so that investigations could proceed competently, for compatibility between police forces, both domestic and foreign, and for uniform machinery for search and comparison."

Having elaborated on this, Lord Hughes explained, at para [17], that the consequence of inadmissibility of the fingerprint evidence would be "unnecessary and inappropriate":

> "It is unnecessary because a reading of control fingerprints can always be checked subsequently. It is inappropriate

because to exclude such evidence would deprive courts of reliable and relevant material."

[50] The exercise of applying the governing legal principles identified above is closely comparable to that already carried out in determining the first limb of this ground of appeal. We refer to, without repeating, paras [28]–[38] above. We consider it material that there is no statutory requirement that the authorised search officer be of a rank above that of constable or possess any special qualification or experience. Nor does the statutory scheme require that they be members of any particular unit or based at any particular station. We further consider that the legislature must have had in contemplation some of the practical realities of policing. These would include police officers' work shifts, sickness absence, unexpected changes of circumstances, fluctuating corporate plans and priorities and the resulting difficulties in making unerring operational predictions and forecasts. Some of these prosaic realities featured in the evidence adduced at the appellant's trial. Of course, Parliament legislates in what is frequently called "the real world."

[51] The main source of this evidence was Constable Lynch, the log keeper. The thrust of his evidence was that at the time when the detective inspector completed the relevant parts of the record, he would not have known which officers were to be assigned to the search team. We must also take into account the absence of any evidential foundation for any suggestion that if the letter of this discrete statutory requirement had been fully observed the relevant part of the form would have been completed in any different way. In other words, the composition of the search team would presumptively have been the same. We further take into account that there was no outright failure to observe the statutory requirement. In substance, the officers concerned were in fact authorised, albeit by Detective Constable Lynch. Properly analysed, therefore, the failing related to who provided the requisite authorisation. Finally, this is the sole irregularity in the entirety of the search process and operation of which the appellant complains.

[52] When pressed by the court to articulate what, on the appellant's case, is the purpose underlying the statutory requirement under scrutiny, Mr Hutton KC submitted that it was designed to import control and regulation. We are disposed to accept this. The evidence establishes, however, that the elements of regulation and control characterised this search process and operation from beginning to end. This is evident from the relevant documentary records and the sworn police testimony. At its zenith, the appellant's case is that one of the multiple elements of control and regulation was provided by a police officer with a rank below that of inspector. The functions of the inspector had been discharged in all respects bar one. Furthermore, the appellant is unable to point to any concrete consequence adverse to her, any deprivation of rights or any tangible prejudice resulting from this irregularity.

[53] Giving effect to the analysis and reasoning in the preceding paragraphs, we are unable to identify any discernible reason for imputing to the legislature an unexpressed intention that a failure to strictly observe the authorisation provisions of

paragraphs 1 and 2 of Schedule 3 to the 2007 Act should have the extreme consequence of condemning the ensuing search as unlawful and/or rendering its fruits inadmissible in evidence in any ensuing criminal trial. Thus the second limb of the first ground of appeal fails.

[54] Accordingly, albeit for reasons which differ from those of the trial judge, we consider that there was no error of law in the rejection of the appellant's challenge to the lawfulness of the search giving rise to the discovery of the offending notes. It follows that the offending notes were admissible in evidence, with the result that there was no requirement for the trial judge to determine whether an exercise of discretion under Article 76 PACE 1989. The first ground of appeal is therefore dismissed.

[55] If there is any flaw in the preceding analysis and conclusion, it is appropriate to add that neither of the statutory regimes concerned provides that by virtue of the non-compliance asserted by the appellant provides the fruits of the relevant search (in this case the offending notes) shall not be admissible in evidence.

[56] We have reached our conclusion without relying on the decision of this court in *Doonan v Darcy* [1995] NI 378, which was canvassed in argument (though not at first instance). It concerned a different statutory provision, namely section 19(2) of the Northern Ireland (Emergency Provisions) Act 1991. As a general principle, in any given case where it falls to the court to construe a statutory provision, the exercise of drawing on a similar – but different – statutory provision is one fraught with risk. This is illustrated by the decision of the House of Lords in another Northern Irish case, *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1996] UKHL 6. The reality is that the wording of paragraph 2(2) of Schedule 3 to the 2007 Act differs from that of the statutory provision in play in *Doonan*. Furthermore, we must bear in mind that the cohort of legal principles which we have applied in determining this issue postdates – and thus did not feature in - *Doonan*. Thus the two juridical contexts are different. Insofar as *Doonan* has any bearing on the issue before this court, it is confined to its emphasis on the authorisation of the search being of demonstrably greater importance than the authorisation of the search officers.

Second Ground of Appeal: No Case To Answer

[57] The complaint enshrined in this ground is that the trial judge erred in rejecting the appellant's application for a direction of no case to answer. The first element of the application made to the judge, focusing on the statutory requirement of "likely to be useful [etc]", was that the notes in question did not have the requisite quality of utility within the terms of the statutory stipulation. The second element of the application was that there was sufficient evidence of the defence of reasonable excuse and a corresponding lack of evidence from or on behalf of the prosecution countering this to the requisite standard of proof.

[58] This court established during the hearing that the trial judge did not provide either a written ruling or a reasoned oral ruling on the defence application. From the

relevant portion of transcript it emerges that having received the submissions on behalf of the appellant the judge stated that he did not require to hear from prosecuting counsel, indicating that he had considered the written submission. The judge stated that he was refusing both the direction application and the application to exclude the evidence of what was found at the appellant's home during the search viz the offending notes. At para [7] of his judgment the refusal of the two applications made at the conclusion of the prosecution case is noted and the judge adds:

> "The issues which were raised then remain to be dealt with in this judgment."

The next reference to the direction application is in para [46] of the judgment, where the judge states:

> "When [an application for] a direction of no case to answer was made, Mr Hutton submitted that the information contained in the notes lacked an essential ingredient because in 2018 when they were found it could not possibly be said that they might be useful to anyone planning or committing future acts of terrorism. And he emphasised that in this context section 1 of the Terrorism Act 2000 requires that the act must involve serious violence or damage to property rather than lesser acts such as fundraising or publicity. In my judgment [sic] the hidden notes kept by the defendant comfortably satisfy that test. To take just one example, terrorists need to know where they can store weapons safely before they are next used in an attack on so called legitimate targets. That is part of planning such attacks. Exploring the question of who can be trusted is an essential part of that planning."

This passage must be considered in conjunction with the immediately preceding passages, at para [45]:

> "From this sort of record and scrutiny, people who continue to be committed to terrorism are assisted in committing or preparing further acts. For instance, they form a view or impression of who can be trusted in future planned activities. Alternatively, they can form a view on whether anyone should be punished for the loss of the weapons. Of course, any punishment would be an act of terrorism if it involved murder or a punishment beating/shooting or even a threat. In addition, terrorists could use the information gathered in order to develop a better understanding of how the security forces operate. That, in itself, contributes to further terrorist acts."

Together with a later passage, at para [47]:

> "In this context it is not necessary that the defendant herself is involved in future acts of terrorism. It is sufficient that she has made or collected information which is likely to be useful to others committing or preparing such acts."

[59] We turn to the ingredients of this ground of appeal. These are, in summary: there was no evidence (at the mid-stage of the trial) of when the appellant had made the notes (which conduct was agreed); there was no evidence to "counter the suggestion" that this occurred some-time after 2015; the court should consider the relevant date to be the date of the search, in February 2018; there was no evidence that on that date the notes had the requisite quality of utility in the statutory terms, bearing in mind also section 1 of the Terrorism Act 2000; and any previous utility had been extinguished by the passage of time.

[60] It is trite that the passages in the judgment reproduced above must be considered as a whole. This ground of appeal does not entail any developed challenge to or critique of the several elements of the judge's reasoning. Evaluative judgement based on the evidence adduced is the hallmark of these passages. In our view each of the expressed matters of evaluative judgement fell comfortably within the judge's margin of appreciation in the context of the evidence, documentary and oral, adduced by the mid-stage of the trial, together with the agreed facts. If and insofar as there are elements of inference and/or judicial notice in these paragraphs no error is ascertainable. Furthermore, no specific aberration has been formulated on behalf of the appellant. It is appropriate to add that the elapse of time point, which featured prominently in the submission made, was at its height purely speculative, devoid of any supporting evidence.

[61] It follows that the first limb of the application for a direction of no case to answer was correctly refused, with the result that the first limb of this ground of appeal has no traction.

[62] We shall now address the second limb of the direction application. This was formulated thus: the appellant having adduced sufficient evidence of the statutory defence of "reasonable excuse", the prosecution had failed to disprove this beyond reasonable doubt. The essential components of this defence were the appellant's asserted journalistic activities, her political views, the nature of other materials recovered from her laptop, her previous connection with Saoradh, a newspaper article dated 15 March 2018 and, finally, the layout of her room and the positioning of the offending materials. The trial judge did not address this limb of the direction application. This failure is not dispositive of this ground, which this court must proceed to evaluate in full.

[63] When this court probed the question of what evidence the appellant was said to have "adduced" at the mid-point of the trial, it was confirmed that this took the form of the following exhibits: an article published in a Republican newspaper approximately one month after the police search of the appellant's premises containing an interview of the appellant containing various references to Saroadh, Sinn Fein and MI5 canvassing the themes of recruitment attempts, inappropriate policing arrangements, police intimidation and harassment and personal accounts provided to the appellant by unspecified persons; a series of SMS messages generated on 16 January 2018 said to relate to an account of the preceding kind; certain files recovered from her laptop and her study containing her writings on the topics of (in brief summary) policing in Northern Ireland and the conduct of MI5; and a report of the Committee on the Administration of Justice ("CAJ") containing the aforementioned themes. These materials bore on the contention in the appellant's DS that she had an interest in these topics and had engaged in relevant journalistic conduct and writing, thereby raising the statutory defence of reasonable excuse.

[64] We have considered carefully the terms in which this discrete argument was advanced at the trial. It began with a contention that there was no direct evidence to counter the "suggestion" of how the defendant came to be in possession of the notes. This suggestion was not contained in any evidence. It was, rather, one of the components of the appellant's DS: see para [8] above. A DS is a species of pleading in a criminal case. It bears similarities with the Defence in civil proceedings. It is regulated in extensive terms by a rigorous statutory regime. None of these provisions confers on a DS the status of evidence. Nor is there any judicial decision of which this court is aware to this effect. Given all of these considerations, and applying orthodox principles, we consider that at the mid-point of the trial the evidence "adduced" did not include the DS. We explain why more fully in para [81] ff infra.

[65] At the mid-point of the trial the materials noted in para [59] above, excepting the SMS messages and the CAJ report, were in evidence (via cross examination of police witnesses). At that stage there had not of course been any sworn evidence from or on behalf of the appellant. These materials grounded the submission that the DS claim of the appellant having received the offending notes because of her journalistic activities was sufficient to subject the prosecution to an onus of disproof to the standard of beyond reasonable doubt. Counsels' submission also highlighted the specific location of the notes when discovered.

[66] Before this court, Mr Hutton KC advanced a discrete argument based on *R v Hyde* [2004] NICC 29. This is a first instance decision of the Crown Court. One of the statutory provisions considered in that case was section 118 of the 2000 Act and in particular subsection (2):

> "If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not."

This provision was engaged on account of the offences for which the appellants were prosecuted. An application for a direction of no case to answer was made by both defendants. The passages upon which this appellant relies are in paras [6]–[8]:

> "[6] The first question to determine is whether in the circumstances set out above the defendants have adduced evidence. A party adduces evidence if he presents or offers evidence in support of his case. The fact that the evidence is first offered by the Crown does not in my view prevent the same evidence being "adduced" on behalf of the defendant if he subsequently chooses to rely upon it.
>
> [7] The defendants rely upon the circumstances of the find and the interviews of the defendants to put in issue the question as to whether the offending items were possessed by them jointly or one of them individually. Because of the connection between the blank ammunition, the replica handguns and the live ammunition I am satisfied that these were the alternative possibilities.
>
> [8] I accept that the matters relied upon by the defendants put in issue the question as to whether each defendant was in possession and that it follows that the onus of proving that each defendant was in possession had to be discharged by the Crown beyond reasonable doubt without the benefit of section 77."

[67] Paras [6]–[8] of *Hyde* represent the views of a first instance judge on a rather important point of law. It seems a little surprising that there is no appellate court decision, English or Northern Irish, on this issue. This court considers that there is scope for argument on the correctness of the decision. However, bearing in mind that the attention which this issue received in the oral and written submissions of both parties was relatively meagre and taking into account the absence of any challenge by prosecuting counsel to the correctness of *Hyde*, we have determined to assume in the appellant's favour, without deciding, that it is correct.

[68] This court is mindful of the need to evaluate the second limb of this ground of appeal without reference to the evidence which the appellant subsequently gave at the trial. We must put ourselves in the shoes of the trial judge at the halfway stage. We have identified, and considered, all elements of the evidence adduced at the mid – point of the trial upon which the appellant relies. Furthermore this court has reminded itself of the contents of the DS, which inter alia made the case of reasonable excuse in a little detail.

[69] The resolution of this discrete ground of appeal turns firstly on the trial judge's assessment of the content and nature of the offending notes. We have examined this above and found it to be unimpeachable. We further consider that on a purely objective assessment: none of the materials on which the appellant relied/relies sounded on or addressed in any way the offending materials; they did not shed any benign or innocent light on the latter; the other materials were of an indisputably different kind in content, recording and presentation; the nexus between the appellant and the offending materials was incontestable; the offending materials were concealed; the room layout was at best a neutral factor; and the appellant's silence during her police interviews undermined, rather than promoted, her "reasonable excuse" defence.

[70] From all of the foregoing it follows that the trial judge's failure to engage with, and determine, the second element of the appellant's application for a direction does not avail her at this remove as this could not realistically have succeeded. The second limb of this ground of appeal fails accordingly, as does the ground itself in consequence.

Third and Fourth Grounds of Appeal

[71] These two grounds are interrelated and overlapping. They begin in the following terms:

> "The learned trial judge erred in making a finding that the appellant's evidence was untruthful in that in doing so he relied heavily on a finding that the appellant had departed from the account given in her Defence Statement when the appellant's evidence made no such departure ... when properly interpreted."

The immediately striking feature of this formulation is its acknowledgement – a correct one in this court's opinion – that the evaluation of the appellant's evidence was a matter for the trial judge and that this discrete finding entailed, inter alia, the judge's "interpretation" of the DS. Each of these considerations is of some importance, as we shall demonstrate.

[72] Para 4(n) of the DS is in these terms:

> "These original notes were forwarded to the defendant some considerable time after the events giving rise to Kevin Nolan's conviction and were forwarded after Kevin Nolan was sentenced. Any currency in the information contained in the notes was considered by the defendant to have long since dissipated. The defendant did not think that the information in the notes, at the time at which she received them, would be of any future use to

any one in any sinister way. Any usefulness or utility that the information might once have had (which utility is not accepted) had been spent. She believes that this was partly why the notes were considered suitable for sending to her at that time."

The material corresponding passage in the judgment is at para [42]:

> "For a number of reasons I do not believe the defendant's account. I do not believe that it might even possibly be a truthful account. In my judgment it is directly contradicted by all of the evidence including the following:
>
> (i) In her defence statement at para (n) cited above, she stated she believed that any relevance or currency in the information contained in the notes had long since dissipated. The obvious meaning of that portion of the defence statement is that she knew well that the notes related to the arms find in 2015 and the conviction of Mr Nolan in 2017 but thought that the information was no longer of use or value. That is definitively not the case which she made in her oral evidence during which she said that she made "a bit of sense" of parts like "Big Eyes" but that it was otherwise meaningless
>
> …
>
> (v) If the defendant had given oral evidence along the lines previewed in her defence statement, she would inevitably have been questioned about knowing a lot about the Kevin Nolan matters and why she thought there was no longer any value in the notes. It seems to me that those questions would have been exceptionally difficult for her to answer. In my judgment, she gave a new and different account in order to avoid such questions. The new account is simply false."

[73] In her examination in chief the appellant testified, inter alia:

(a) (When asked about the volume of material removed during the police search) "… I had about 6 or 7 A4 blocks in the house; I had other ones in the cupboards; I had books absolutely everywhere; I had pieces of writing jotted down in all different places and things that I started, things I meant to get back to."

(b) Everything removed by police, except the offending notes, had been returned to her.

(c) The "source" material was left at her house anonymously in an envelope. It consisted of "note paper … all notes … sectioned off, with like a turn up in the corner of each section … hard to read, it was barely legible at times …", some 10 days before Christmas 2017.

(d) Following an initial perusal the appellant set the material beside her computer in a room upstairs.

(e) She re-wrote the notes "over a lot of days" (the linguistic formula – undisputed – of both the trial judge and her counsel).

(f) The code found in the re-written material came from the original documents.

(g) The re-writing of this kind of material was her standard modus operandi – usually on a page but in this instance on cigarette papers.

(h) She had used cigarette papers to make notes in books "for about 30 years."

(i) "In this case, I decided to write them that way because that was the way they appeared – they appeared all sectioned off and I wanted to repeat that section. But it also meant if I wanted, I could put them all back together – all – put them all together and see was there any sort of flow in them, because the majority of them were just nonsense … I made a bit of sense of the likes of big eyes …

But to try and follow it through as a sensible thing or identify the authors or anything like that, it – it was meaningless …

I couldn't identify any of the names of the people in it. I didn't know who they were …

[Regarding her subsequent published interview] … it was information relating to ... a series of approaches … from MI5."

[74] In cross examination the appellant sought to maintain the claim that the notes which she claimed to have received were not coherent. Notably, however, she stated:

> "At times, I didn't know what the writer was trying to do …"
> [Emphasis added.]

She added:

> "It was so hard to follow and decipher - …. It appeared to be some kind of a code …
>
> I didn't know what they were talking about."

Next the appellant claimed not to recognise the identities of any of those described by initials/ciphers eg "KN." Asked whether she knew Kevin Nolan she replied :

> "No, I'd never heard of Kevin Nolan … Never heard of anyone in those notes."

Consistent with the "At times" reply above, she then confirmed that she did understand the content in part:

> "At times, when they spoke about the big eyes
> ….
>
> I took it that was MI5 … [and] … I recognised … the references to guns or explosives …"

The appellant confirmed that the contents of the notes were never a candidate for publication by her in any form. The appellant's professed reason for copying the notes was to protect their (unknown) author. She claimed that she always did this. She confirmed that she had not provided her solicitor with any comparable example of note making or copying.

[75] In response to questions from prosecuting counsel and the trial judge, the appellant testified that she had transcribed the content of the material received on to cigarette papers, using both sides because she "probably had very little cigarette papers." She did not alter the format of the material. It was "just a matter of turning them over to the other side." Writing notes on cigarette papers and inserting them in books was a long-standing practice of hers. Other examples would have been in her room at the time of the police search and were probably still there. It was pointed out that she had adduced no evidence of this kind.

[76] The appellant confirmed her awareness that the notes referred to "guns and explosives." She further confirmed that the contents of a "Post-it", which was put to her, had been written by her. She denied the suggestion that the content of the cigarette paper notes was original, rather than copied from something else. The perfume box containing the notes was on a bookcase conveniently adjacent to her workstation. The exercise of copying the notes lasted about one week. She confirmed that she understood fully the account of one particular event in the notes. Her explanation for not recording the notes on her laptop was "... I wouldn't have known who it was …"

[77] Upon completion of the appellant's cross examination the following exchange with the trial judge ensued:

> "Miss Perry, can I ask you something? Mr Hutton referred earlier in the case to your defence statement, which is a

summary of the case that you're going to make in this court. And it's from this defence statement that we know that the notes are written in your hand because they've been collected by somebody else, and therefore the proposition is put that you did not, yourself, collect any information at all, OK?

WITNESS: That's correct.

O'HARA J: You - you copied out information that somebody else had provided, OK?

WITNESS: That's correct, my Lord.

O'HARA J: But the next paragraph, paragraph N in the defence statement says: these original notes were forwarded to you some considerable [time] after the arms find which gave rise to Kevin Nolan's conviction and were forwarded after Kevin Nolan had been sentenced. Right? The next sentence says: Any currency in the information contain in the notes was considered by you to have long since dissipated, in other words, to have long since disappeared?

WITNESS: That's correct.

O'HARA J: Right, OK. But you've told Mr Steer in cross-examination you don't - you don't know who Nolan was.

WITNESS: I didn't know who Nolan was.

O'HARA J: Yeah, so how...

WITNESS: But when I was writing those notes, I just got the impression it was something that had happened.

MR JUSTICE O'HARA: Yeah.

WITNESS: Something that, as - as the detective said, that had been done with.

O'HARA J: OK. Let me - let me - let me put my translation on this sentence. It's - when it says any currency in the information contained in the notes was considered by you to have long since passed. That suggests to me, on reading it, in plain English that you did know that the notes had something to do with Kevin Nolan's conviction and sentence, and the arms find. Do you agree with that or not?

WITNESS: I don't agree with that, my Lord, no.

O'HARA J: Well then what - well, then, would you please explain what is meant in your own defence statement by the words "any currency in the information was" - was - sorry, any currency in the information contained in the notes was considered by you to have long since dissipated or passed?

WITNESS: Yeah, I just got the impression by reading them that I was given something that had been done and done - dusted, and I was to garner something out of it - I don't know what, but...

O'HARA J: Well, what - what - what gave you that impression?

WITNESS: Well, I can't remember them all now, but I just remember as I read through them, I thought I had been given something that was used, obsolete.

O'HARA J: It was obsolete?

WITNESS: Of no use to anyone.

O'HARA J: So...

WITNESS: Not even myself.

O'HARA J: Right. So, the notes, most of the notes meant nothing to you. You - you've used words like "useless, nonsense and meaningless"?

WITNESS: Yeah.

O'HARA J: But there's a few bits that might mean something, but you considered them to be obsolete?

WITNESS: Yes, something that...

O'HARA J: Right.

WITNESS: ... had been...

O'HARA J: So why had you kept them? Why did you keep notes which were useless, nonsense, misleading - sorry, meaningless and obsolete?

WITNESS: There was lots of things in the house that I should have dispensed with, that I had kept. Not deliberately, simply because at that time things were going in and out of my head. You know, other things in life go on all round you while you're doing things and they - they just weren't something that would have been uppermost in my mind. I didn't really place any relevance on them."

At this juncture, senior defence counsel stated that he had no re-examination of the appellant.

[78] We have given careful consideration to the full terms in which this ground of appeal is formulated. Its key elements are –

> "… the judge's interpretation of this passage of the Defence Statement [i.e. para (n)] was unfair to the appellant and was not justified … [resulting in] ... an unjustified conclusion as to inconsistency."

Addressing the "translation" which the trial judge canvassed in questions of the appellant, it is contended that this –

> "… worked an unfairness to the appellant in that the translation involved the learned trial judge reading things into the Defence Statement that were not present …"

In another passage it is argued:

> "The events shown in the notes, as interpreted with the benefit of the police evidence, occurred in 2015 and Nolan was sentenced earlier in 2017. The Defence were aware of the timeline of Nolan's prosecution and sentence at the time that the Defence Statement was drafted. There is no inconsistency between this and the appellant's evidence."

[79] Ultimately, having examined with care the appellant's written and oral submissions, we consider that the contours of this ground of appeal are relatively narrow. The trial judge, in construing para 4(n) of the DS, forged a nexus between the first and second sentences. The effect of this construction was to notionally insert the adverb "Therefore" at the beginning of the second sentence. Therein lies the heart of the appellant's criticism. What is the nature of the error asserted? It is contended, and repeated, that this construction of the paragraph was not "justified."

[80] It is appropriate to highlight some features of the governing statutory scheme, which is found in the Criminal Investigations and Procedures Act 1996. Summarising, the DS is a by now ingrained feature of every trial on indictment. It is a species of pleading. It is regulated by a series of solemn statutory requirements and formalities. Its contents commit the accused person to a specific, concrete case. It can give rise to a duty of further disclosure by the prosecution. Its compilation postdates initial disclosure by the prosecution (normally at committal for trial), enabling the breadth and depth of the Crown case to be evaluated on behalf of the defendant. It is compiled by qualified lawyers and presumptively has the full approval of the accused. There is a continuing duty to review it and amend it if appropriate. Section 6E(1)** in particular provides:

> "(1) Where an accused's solicitor purports to give on behalf of the accused—
>
> (a) a defence statement under section 5, 6 or 6B, or
>
> (b) a statement of the kind mentioned in section 6B(4),
>
> the statement shall, unless the contrary is proved, be deemed to be given with the authority of the accused.
>
> (2) If it appears to the judge at a pre-trial hearing that an accused has failed to comply fully with section 5, 6B or 6C, so that there is a possibility of comment being made or inferences drawn under section 11(5), he shall warn the accused accordingly.
>
> (3) In subsection (2) "pre-trial hearing" has the same meaning as in Part 4 (see section 39).

(4) The judge in a trial before a judge and jury—

(a) may direct that the jury be given a copy of any defence statement, and

(b) if he does so, may direct that it be edited so as not to include references to matters evidence of which would be inadmissible.

(5) A direction under subsection (4)—

(a) may be made either of the judge's own motion or on the application of any party;

(b) may be made only if the judge is of the opinion that seeing a copy of the defence statement would help the jury to understand the case or to resolve any issue in the case.

(6) The reference in subsection (4) to a defence statement is a reference—

(a) where the accused has given only an initial defence statement (that is, a defence statement given under section 5 or 6), to that statement;

(b) where he has given both an initial defence statement and an updated defence statement (that is, a defence statement given under section 6B), to the updated defence statement;

(c) where he has given both an initial defence statement and a statement of the kind mentioned in section 6B(4), to the initial defence statement."

[81] What is the nature of the "error" on the part of the trial judge which this ground of appeal entails? It is contended, and repeated, that his construction of the relevant passage was not "justified." This formulation invites the immediate riposte that the question of whether the interpretation of a document is "justified", with its connotations of right or wrong, is not a question of fact. By this ground of appeal this court is in effect invited to conduct a "right or wrong?" exercise and to substitute its view for that of the trial judge. The juristic basis of this court's entitlement to do so has not been clearly specified. An exercise of this kind is conventionally considered impermissible in an appellate court. We consider the real issue to be more nuanced, as we shall explain.

[82] Every DS is, at heart, a document, indelibly so. It is not clear to this court that lack of justification is a recognised or coherent basis upon which to challenge any trial judge's construction of a defence statement or, for that matter, any document. Doctrinally, the orthodox approach is that the construction of any document is a question law for the court and its meaning is to be ascertained objectively and by reference to its full context. This is conventionally the guiding principle: see for example *Re McFarland's Application* [2004] UKHL 17, para [24] per Lord Steyn. Multiplication of examples is unnecessary. The question which arises is whether the construction of a DS should entail some different approach. The parties provided further written submissions on this discrete issue in response to the invitation of the court.

[83] If the guiding principle formulated above applies to the construction of a DS, it would follow that an exercise of this kind on the part of a judge alone would be vulnerable to challenge only on the basis of error of law. Thus any challenge must formulate a recognised error or errors of law – for example irrationality, taking into account some extraneous fact or factor or disregarding something material, or some material misunderstanding or disregard of a significant contextual feature. This is not designed to be an exhaustive list. In this appeal no recognisable error of law of any kind is formulated on behalf of the appellant in advancing this ground. Rather, in their further written submissions counsel for the appellant have advanced the argument that the construction of a DS is a question of fact. The argument is formulated in these terms: the meaning of the words used in the DS, once … admitted into evidence, is a question of fact for the jury and/or a jury question … the DS, if admitted into evidence, is to be treated in like manner to any other statement from the accused. Direct analogy can be drawn to any contended confession statement from the accused.

[84] The argument on behalf of the appellant, therefore, forges a direct nexus between the construction of a DS and its admission in evidence. This requires some scrutiny. Evidence of what fact or facts? Proof of what fact or facts? It is certainly not a statement of the accused under caution, duly alerted to the possibility that it may become evidence at a later trial. Nor is it anything comparable. A DS neither proves nor disproves anything. Evidence may, of course, result from the cross examination of a defendant arising out of their DS: but the DS does not thereby become evidence.

[85] "Evidence" has a well-recognised meaning. In the pithy words of Professor Matthews:

> "Evidence is the usual means of proving or disproving a fact or matter in issue. The law of evidence indicates what may properly be introduced by a party (that is, what is admissible) and also what standard of proof is necessary (that is, the quality or quantity of evidence necessary in any particular case). In short, the law of evidence governs the

means and manner in which a party may substantiate his own case, or refute that of his opponent."

(Halsbury's Laws of England, 5th Edition Reissue, Volume 27(2021), para 443)

And see Phipson On Evidence (20th ed), para 1 – 10, with its heavy emphasis on fact. There is evident incongruity and artificiality in any attempt to bring the DS within these formulations of principle.

[86] It is necessary to examine the statutory framework in a little more detail. Section 6A of the 1996 Act regulates the contents of the DS:

"(1) For the purposes of this Part a defence statement is a written statement—

(a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely,

(b) indicating the matters of fact on which he takes issue with the prosecution,

(c) setting out, in the case of each such matter, why he takes issue with the prosecution,

[F2(ca) setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence,]

(d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.

(2) A defence statement that discloses an alibi must give particulars of it, including—

(a) the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given;

(b) any information in the accused's possession which might be of material assistance in identifying or finding any such witness in whose case any of the

details mentioned in paragraph (a) are not known to the accused when the statement is given.

(3) For the purposes of this section evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

(4) The Secretary of State may by regulations make provision as to the details of the matters that, by virtue of subsection (1), are to be included in defence statements."

By section 6A(2) the DS must provide specified particulars of any alibi. This provides another insight into its purpose and juridical status). The bland, the unparticularised and the perfunctory are antithetical to the purposes of the DS. They will avail the defendant nothing and may well operate to the defendant's detriment.

[87] The true juridical character of the DS takes its colour, firstly, from section 6A. The DS mechanism must also be considered in its full statutory context. It goes hand in hand with the prosecutor's duty of disclosure. It is no coincidence that each of these subjects is regulated by the same statute. It has been observed that the terms of the DS are "crucial" as regards the prosecutor's duty of secondary disclosure: *R v McCrory and Others* [2005] NICC 37, para [18] (per Hart J). We further refer to, without repeating, para [64] above.

[88] The DS also has the further function of exposing the unsustainable prosecution, thereby promoting both the public intertest and that of the accused. It also facilitates the identification of abuse of process contentions at a suitable pre – trial stage. In addition it will act as the stimulus for further appropriate police investigations. Furthermore, it has a notable trial management function, promoting the values of efficiency, expedition and clarity.

[89] The level of detail required by s 6A was prompted by concerns that the predecessor statutory provision, s 5, was too weak, failing to achieve its intended benefits (Blackstone, para D9.31): see for example *R v Bryant* [2005] EWCA Crim 2079. That said, it is still open to an accused to formulate in clear terms a DS requiring the prosecution to prove its case and making no positive case: *R v Rochford* [2010] EWCA Crim 1928.

[90] The juridical status of the DS received some attention from this court in *R v King and Foster* [2005] NICA 20. There, the three accused were jointly charged with murder. In his summing up the judge referred to the DS of one of the accused, containing the defence that although present when the murder was committed he had not

participated in it. The jury later asked to see this defendant's DS. The jury was further directed that the DS was "a procedural document which was not in evidence in the case." The judge did, however, inform the jury of some of the content, specifically:

> "Foster accepted having been present at or about the scene at which the deceased died … Foster asserted that he did not inflict any injuries upon the deceased."
>
> (See para [14].)

On appeal it was argued by Foster that the trial judge should have permitted the jury to consider the entire DS. This ground of appeal succeeded on the basis that the judge's selective reading of excerpts from the DS may have led the jury to believe that Foster's allegations against his co-accused had been made for the first time during the trial. Nicholson LJ, delivering the judgement of the court, stated at para [24]:

> "Foster's defence statement was not in evidence and, as the judge said, it would have been inappropriate (and irregular) to have sight of it."

[91] It would appear that *R v King and Foster* is the only case in which this court has pronounced on the juridical status of the DS. The treatment which this discrete issue received in the judgement of this court was admittedly limited. In passing, it is clear that trial judges in 2023 will be more receptive to a DS or part of its content being provided to the jury, in appropriate circumstances.

[92] In the elaborate DS code contained in the 1996 Act it would have been open to the legislature to include a specific provision that the DS is admissible in evidence. (Compare the provision in PACE 1989, Art 66(10), to this effect: para [21] above). However there is no such provision. A provision of this kind could easily have been devised. Furthermore, it is of some significance that the legislature has directed its attention to the following matters, in section 6E: the DS shall, unless the contrary is proved, be deemed to be given with the authority of the accused; the judge may direct that the jury be given a copy of the DS; this may be accompanied by a separate direction that the DS "… be edited so as not to include references to matters evidence of which would be inadmissible": section 6E(4)(b). This provision is of some note as it makes a clear distinction between the DS (on the one hand) and matters of evidence (on the other).

[93] We have considered the cases drawn to the attention of the court in the parties' further submissions. In brief compass:

(i) In *R v B* [2009] EWCA Crim 2113 there was evidence from the mother of one complainant that the defendant had said something to her, raising the question of whether this amounted to a confession. This specific question was left to the

jury. We consider that this was a paradigm task for a criminal jury, having no bearing on the DS construction issue raised by this ground of appeal.

(ii) In *R v Spens* [1991] 4 All ER 421, where the defendant was charged with company financial offences, the prosecution proposed to adduce evidence that his conduct was in breach of the City Code on Takeovers and Mergers. The Court of Appeal held that the interpretation of this instrument was a matter of law to be determined by the trial judge rather than a matter of fact to be decided by the jury. In thus deciding the court pronounced a general rule that the construction of documents is normally a matter of fact for determination by the jury (at 428h), instancing the exceptions of all forms of Parliamentary and local government legislation and binding agreements between parties. We consider that the court clearly had in mind documents adduced in evidence. The present case is of a different kind.

(iii) In R v *Clarksons Holidays Limited* [1973] 57 Cr App R 38, a company was charged with certain trade descriptions offences arising out of the contents of its holiday brochure. The crucial question was the meaning of the words. The jury was directed that it should determine this issue. The Court of Appeal upheld this direction, considering that this was "essentially a question of fact for the jury" (at p 53). Once again, the context was one in which a document – a vital proof in the prosecution case – was <u>in evidence</u>.

(iv) *R v Sunair Holidays Limited* [1973] 1 WLR 1105 is a similar case which followed *Clarksons Holidays*. Notably, the Court of Appeal couched the general rule in the reverse way, namely the construction of documents is a matter for the <u>judge</u>, subject to exceptions. Equally of note, in *Spens* the Court of Appeal observed that "… the holiday cases are very much in a category of their own": p 428I.

[94] In *Brutus v Cozens* [1973] AC 854 – frequently cited as a seminal decision of the House of Lords - the appellant was charged with using insulting behaviour whereby a breach of the peace was likely to be occasioned, contrary to section 5 of the Public Order Act 1936 as amended. His conduct involved demonstrating against the government of South Africa on one of the major courts at Wimbledon All England Lawn Tennis Club by blowing a whistle, throwing leaflets around and refusing to stand. Those said to have been insulted were spectators. The Magistrate dismissed the charge. On appeal by case stated a Divisional Court set aside this decision. Upon certification of a point of law of general public importance there was an appeal to the House of Lords. One question raised was whether the word "insulting" in the statute fell to be construed as a matter of law. The House held that whereas the proper construction of a statute is a question of law, where a familiar word is not used in any unusual sense no question of law arises. Thus the Magistrates, in deciding that the appellant's behaviour was not "insulting", had determined a question of fact. In the absence of a statutory definition, resort to dictionaries was to be discouraged. We consider the ratio decidendi of this decision to be of narrow compass and belonging

to a context – the meaning of a statutory word – far removed from that before this court.

[95] In *Halsbury* (Vol 27 2021) the authors suggest, at para 446:

> "The legal construction or interpretation of documents (such as deeds, wills, articles of association and contracts) is a question of law. In criminal cases, however, the court will rarely be concerned with the strict legal or contractual effect of the document. Issues of criminal liability will quickly turn on issues such as authorship, intent, dishonesty and causation, which are questions of fact."

In Blackstone at para 38 one finds a passage which in substance repeats the formulation in *Spens* (supra). As already explained, we do not consider that this promotes the appellant's argument. Furthermore, neither the passage in Blackstone nor that in Halsbury engages directly with the specific question which this court is addressing.

[96] As our review of the statutory framework and decided cases indicates, in a criminal trial it is possible for a DS or some of its contents to come to the attention of the jury. This would ordinarily unfold in an orderly fashion, with the trial judge first being alerted to the intentions of the party concerned, any necessary submissions having been considered and any appropriate judicial ruling made. Alternatively, the impetus could emanate from the judge. In a case involving a genuine dispute – to be contrasted with something trivial or tactical – about the meaning of certain content of the DS, it is unthinkable that the issue of meaning would simply be left at large to the jury. Rather, a construction ruling by the trial judge, which would surely be a legal ruling on a question of law, would be required.

[97] Furthermore, in appropriate cases, the requirements of section 6A, in particular subsection (1)(a) and (d), are such that purely legalistic terms and concepts will where appropriate be employed in a DS. It cannot be plausibly suggested that the construction of content of this kind is a question of fact for the jury rather than a question of law to be determined by the trial judge. In the present case, for example, there are passages in the DS relating to the making of adverse inferences, the discharge of the prosecutor's disclosure duties and the statutory defence noted above. These passages are replete with issues of law. Furthermore, we find it difficult to contemplate the content of a hypothetical academic essay on the application of the rules of evidence to the DS.

[98] To summarise, the DS has a series of unique characteristics and functions, all enshrined in statute. It is exclusively a creature of statute. Its compilation is a matter of statutory obligation. This is a solemn and formal exercise, carried out by the defendant's lawyers. It speaks for itself. It is not <u>evidence</u> of anything. It should not

be treated as a defence exhibit. The DS is a species of criminal litigation pleading. It commits the defendant to a concrete case, to be contrasted with any evidence bearing on the ingredients of such case. The uniqueness of the DS is such that it is not readily comparable with any of the written materials involved in the decided cases and texts which we have considered: statutes, contracts, holiday operators' brochures, codes of conduct, confessions and all manner of legal instruments. All of these features, taken together, combine to point to the conclusion that the construction of a DS is a question of law for the trial judge, whether sitting with or without a jury. The only decision bearing directly on this issue, *R v King and Foster*, supports this conclusion.

[99] On the premise that this ground of appeal raises an objective question of law no particular deference to the trial judge is to be accorded. This ground therefore is to be contrasted with one which (for example) entails a challenge to a trial judge's assessment of the veracity or reliability of a testifying witness, an exercise of discretion (e.g. severance of indictments) or a ruling on the admission of evidence. In construing the relevant words context is of self-evident importance. Thus the law reports are replete with decisions emphasising that documents such as decision letters written by public servants are not to be construed by a court in the same way as a statute, a will or some other legal instrument. The chief ingredients in the context in this instance are the following: the DS was an obligatory statutory requirement; it was compiled in the context of a prosecution for a serious criminal offence; its authors were experienced lawyers; it was prepared following committal for trial; it was not amended subsequently; it had the presumptive approval of the appellant; and later subjection to close scrutiny by prosecuting lawyers and the trial judge would have been as a minimum readily foreseeable. Given these contextual factors the scope for latitude in construing this document is limited.

[100] All of the preceding features and considerations apply presumptively to every DS. (They are presumptive because, for instance, they would not apply fully to an unrepresented defendant). Progressing from the general to the particular, one important feature of the trial context before this court is that the judge undertook the exercise of construing para 4(n) of the DS at a stage when he had received all the evidence, particularly that of the appellant. This was no preliminary or interlocutory ruling. The judge could not have been better informed.

[101] The trial judge entertained no reservations about the meaning of para 4(n) of the DS. He considered it "obvious." This court is unable to identify any error of law in the construction espoused by the judge. Furthermore, having construed the DS in this way, the judge did not rest. Rather, he provided a reasoned analysis of why the appellant's sworn evidence had entailed a "new and different account": see para [42](v). The extensive arguments on behalf of the appellant do not engage with this passage in any meaningful way. This court considers the reasoning in this passage to be cogent. None of the aberrations identified in para [79] above is suggested and none is identifiable.

[102] Alternatively, applying the criterion enshrined in the appellant's formulation of this ground and assuming the appellant's argument to be correct viz the meaning of para 4(n) of the DS is purely a question of fact, we consider that the trial judge's assessment of the meaning of para 4(n) of the DS was not merely "justified": in our judgement, it was irresistible – in his terms, "obvious."

[103] This ground of appeal has certain additional elements. These are, in summary, that the trial judge's assessment that the appellant's "story" was a fabrication, and his determination of the adverse inference issue are unsustainable as both were contaminated by his erroneous construction of para 4(n) of the DS. We have rejected the cornerstone of this contention. While this is sufficient to dispose of this further contention we nonetheless add the following.

[104] Subject to the foregoing and having regard to para [42] of the judgment in its entirety this ground of appeal also engages certain well-established principles, which were considered in the recent decision of this court in *McKenna v Ministry of Defence* [2023] NICA, at paras [34]–[35]:

> "[34] The principles governing the correct approach of an appellate court in an appeal of this nature are well settled. Some brief citation of authority will suffice for this purpose. In *Breslin v Murphy* [2013] NICA 75 this court, differently constituted, stated at para [8]:
>
> > 'In this court's decision in the first appeal we set out at paragraphs [6]-[10] the relevant appellate principles, referring to both the Northern Ireland and English authorities. These can be found in *Northern Ireland Railways v Tweed* [1982] NIJB, *Murray v Royal County Down Golf Club* [2005] NICA 2, *McClurg v Chief Constable* [2009] NICA, *Stewart v Wright* [2006] NICA, *Smith New Court Securities v Citibank NA* [1997] AC 259, *Lofthouse v Leicester Corporation* [1948] 64 TLR 604. The principles may be summarised briefly as follows:
> >
> > (a) Time and language do not permit exact expression of judicial findings and are surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (see Lord Hoffman in *Brogan v Medeva plc* [1996] 38 BMLR).

(b) Where there is no misdirection by the judge on an issue of fact conclusions on issues of fact are to be presumed correct and will only be reversed if the Court of Appeal is "convinced his view is wrong."

(c) It must be clearly shown that the judge did not take all the circumstances and evidence into account, misapplied evidence or drew an inference which there was no evidence to support.

(d) A judge's judgment must be read in bonam partem.

(e) Provided he deals with the substantial issues in the case and reaches supportable factual conclusions and does not neglect to take account of matters that might affect those conclusions his findings on disputed facts cannot be disturbed.'

[35] More recently, in *Kerr v Jamison* [2019] NICA 48 this court stated, at para [35]:

> 'Where invited to review findings of primary fact or inferences the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility: see for example Kitson v Black [1976] 1 NIJB at 5 – 7. The review of the appellate court is more extensive where findings are made at first instance on the basis of documentary and/or real evidence. However even where the primary facts are disputed the appellate court will not overturn the judge's findings and conclusions merely because it might have decided differently: White v DOE [1988] 5 NIJB 1. The deference of the appellate court will of course be less appropriate where it can be demonstrated that the first instance judge misunderstood or misapplied the facts. See generally Northern Ireland Railways v Tweed [1982] 15 NIJB at [10]–[11].'"

Continuing, having considered the decision of the Supreme Court in *R (AR) v Greater Manchester Police* [2018] UKSC 47, this court stated at para [68]:

> "Lord Carnwath also adverted to 'the general policy consideration that the purpose of the appeal is to enable the reasoning of the lower court to be reviewed and errors corrected …
>
> In the sense explained, the function of this court is one of review rather than rehearing."

Most recently, this court was prompted to observe:

> " … one of the appellant's complaints is that the courts below did not engage fully with everything that was assembled and advanced on his behalf. There is no legal system in the world in which a court can engage fully with every single detail. Long hours, late nights, weekends and supposed holiday periods are expended by judges in studying every case, preparing for hearings and compiling judgments and rulings/orders. The hearing is but one part of the process. It is of course a very important part, but it is undertaken in the real world. The legal system would grind to a halt if there was a judicial duty to address every single factual and legal issue raised in every case. That is not realistic, it is not viable, but more important it is not a requirement of the rule of law."

(*DPP v Nixon* [2023] NICA 57 at paras [11])"

[105] In *R v Thain*, [1985] NI 457 Lowry LCJ stated at 474 A-D:

> "The principles which guide an appellate court in hearing an appeal from the decision of a judge sitting without a jury have been recently restated in this court, with copious references to authority, in *Northern Ireland Railways v Tweed* [1982] 15 NIJB. They are applicable to a criminal non-jury trial, so long as the onus and standard of proof are kept in mind. For present purposes we state the four points which were summarised in that case:
>
> "1. The trial judge's finding on primary facts can rarely be disturbed if there is evidence to support it. This principle applies strongly to assessments of

credibility, accuracy, powers of observation, memory and general reliability of the witnesses.

2. The appellate court is in as good a position as the trial judge to draw inferences from documents and from facts which are clear but even here must give weight to his conclusions.

3. The trial judge can be more readily reversed if he had misdirected himself in law or if he has misunderstood or misused the facts and may thereby have reached a wrong conclusion. For this purpose his judgment may be analysed in a way which is not possible with a jury's verdict.

4. The appellate court should not resort to conjecture or to its own estimate of the probabilities of a balanced situation as a means of rejecting the trial judge's conclusions."

The effect of these principles requires no elaboration. The appellant's arguments did not engage with them in any meaningful way.

[106] The trial judge's assessment of the appellant's account as untruthful was not confined to his construction of para 4(n) of the DS. Rather it had several other ingredients. There is no sustainable challenge to any of these. The judge concluded that the appellant's account was directly contradicted by all the evidence. He identified no evidence supporting it. These are powerful, uncompromising findings. They are plainly harmonious with the evidence adduced. They betray no error of law.

[107] Furthermore, it is to be noted that the judge's diagnosis of a direct contradiction of the appellant's account by the evidence included what followed. The five particulars then formulated, therefore, were not designed to be exhaustive. It is clear to this court from its careful review of the transcribed evidence, particularly that of the appellant, that the judge could have amplified his list. In particular, and inexhaustively, the judge could readily have added that the appellant's claim that the notes allegedly received by her were never going to be of any journalistic value because of (a) their lack of intelligibility and (b) the anonymity factor was manifestly irreconcilable with her assertions that she nonetheless devoted a full week to the exercise of deciphering them and struggled to comprehend much of their meaning. The judge could also have made the same assessment of the appellant's claim that she copied the content of the notes into her own handwriting for the purpose of protecting the source – an unidentified person - and, further, one whose lack of identity, on her case, rendered the content journalistically useless. The contradiction is unmistakeable. Equally striking is the appellant's failure to adduce evidence of comparable writing conduct – which, on her case, was available. The judge

could also have added that the appellant's explanation of her failure to record the relevant information on her laptop (see para [72] above) was incongruous and, hence, unbelievable.

[108] For the reasons elaborated this court can identify no merit in this ground of appeal. The effect of this conclusion is that the freestanding section 58(3) ground of appeal must also fail. So too the challenge to the trial judge's determination to make an inference adverse to the appellant arising out of her effective silence during the police interviews. It is appropriate to add that this challenge had no merit in any event given the judge's unequivocal statement that it did not contribute to his guilty verdict.

[109] Given our analysis above, it is difficult to contemplate a case in which the author/s of a defence statement could permissibly give evidence about its contents, other than for example to explain an administrative failure resulting in the inclusion of an unintended word or passage or the mistaken transmission of a wrong version. By way of illustration, in this electronic age the possibility of a superseded initial draft being served erroneously rather than a finalised approved text is far from fanciful. This issue does not arise on this appeal and may require further consideration in an appropriate future case.

Conclusion

[110] The appeal against conviction is dismissed for the reasons given. The court will consider the appeal against sentence separately.