Neutral Citation No: [2021] NICA 55	*Ref:*	**McC11640**
	ICOS No:	**16/122892**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**12/10/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM
THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY AS1 (A MINOR ACTING BY HER MOTHER AND NEXT FRIEND) FOR JUDICIAL REVIEW

v

CHIEF CONSTABLE OF PSNI

Before: McCloskey LJ, Maguire LJ and McAlinden J

Appearances

Mr Ronan Lavery QC and Mr Mark Bassett (instructed by Brentnall Legal Ltd) for the Appellant
Mr Tony McGleenan QC and Ms Laura Curran (instructed by the Crown Solicitor's Office) for the Respondent

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

Anonymity

As the appellant continues to have the benefit of anonymity there shall be no publication by any person or agency of her identity or of anything which could lead to her being identified.

Introduction

[1] This is an appeal against the judgment and order of Keegan J whereby the application for judicial review of this litigant, described as AS1, was dismissed. The appellant was at the material time aged nine years and is now 14. The Respondent is the Chief Constable of the Police Service of Northern Ireland (*Police Service*)

[2] The stimulus for the initiation of these proceedings and all that has followed thereafter was a lawful police search of the appellant's home, conducted on 3 August 2016, entailing the generation of a video and audio recording by a police officer in which the appellant, amongst other persons, is visible intermittently. In these rather elderly proceedings leave to apply for judicial review was granted on 12 December 2017. The substantive hearing was conducted on 5 March 2018 and judgment was delivered on 16 May 2018. The notice of appeal is dated 12 June 2018.

[3] Thus over three years have elapsed since the delivery of judgment and lodgement of the notice of appeal. As this period of delay is on any showing inordinate the court raised this issue at an early stage, seeking a full explanation. The parties' response drew attention to an order of this court dated 28 February 2020 remitting the appeal in part to the trial judge. The purpose of this action was to secure adjudication on a new line of challenge which the appellant was seeking to pursue. This gave rise to a further hearing at first instance and a further judgment and associated order dated 2 February 2021. The neutral citation of the second judgment is *ASI (Number 2)* [2021] NIQB 11. See further [17] infra.

Factual Matrix

[4] The material facts are brief, uncomplicated and uncontentious. On 3 August 2016 police officers entered the appellant's home. Those present were the appellant, her older brother (also a child, aged 15 years) and their parents. The premises were searched by the police officers. The search began at 08:48 hours. It terminated at 09:26 hours. The appellant was present between 08:48 and 09:08. At this stage she was brought out of the premises. One of the police officers made a video and audio recording of activities within the premises. The appellant is one of those depicted in this recording. She is seen in her mother's arms, clinging to her neck. While most images of her are from the back or side, there are a couple of facial images also. The images are intermittent and mainly fleeting, spanning a period of some 15 minutes. There is nothing in the recording disclosing her name or anything other than her appearance whereby she could be identified.

[5] The search of the appellant's home was precipitated by the shooting and ensuing death of a male person in the Ardoyne area of Belfast on 15 April 2016. In the aftermath two illegal organisations claimed to have carried out the killing. Following receipt of certain information police determined to search the appellant's home in the exercise of their powers under the Justice and Security Act 2007 (infra).

The affidavit evidence on behalf of the Police Service describes, inter alia, a meticulous planning operation. This identified several factors giving rise to a determination that the search would be recorded by a hand held video camera device. The purpose of this exercise is described in the affidavit evidence in these terms:

> "The purpose of the hand held video camera was to provide evidence in relation to how entry was effected, how the search was conducted, how the residents were treated which would also be relevant in dealing with any complaints made by [the householder] or anyone in the property regarding conduct of officers towards his children and provide evidence of how the residents, [the householder] in particular, conducted themselves towards police."

[6] The factors weighed during the aforementioned planning exercise included in particular the indications that the killing may have been perpetrated by a so-called "dissident Republican" organisation; the assessment that members and/or supporters of such an organisation could attend the premises or their vicinity during the search operation; and the householder's known aggression and antipathy towards the police. While the possibility of children being present during the search was recognised it was considered that if they were depicted on a video recording this would be purely incidental.

[7] The police sergeant who made the recording deposes in his affidavit:

> "In circumstances like this …. my primary purpose is for the protection of police officers and when recording I would have no reason to actually record minors outside of them frustrating the search or if police were informing occupants (which could include minors) of their rights etc. I would not give any consideration to treating minors differently in recording them if they were frustrating the search or gaining rights as that is the reason I am there and failure to record such interaction I feel would be looked at negatively by the [Police Ombudsman] if any complaint was subsequently made …
>
> In my view, where the children were being addressed by PSNI or where they were interacting with police then it was necessary to record this as part of my duties and where they were captured otherwise this was unavoidable, for instance when one of the children was being carried by [her mother] and I recorded her interacting with PSNI officers."

The deponent further explains that the recording made by him, in common with others, was transformed digitally into a disc, continuing:

> "It has been retained due to these ongoing court proceedings …. [and] … there is a possibility of the minors bringing a personal injury claim …"

It is convenient to interpose at this juncture that the recording was viewed by the members of this court, without objection.

The Challenge

[8] By her application for judicial review the appellant challenged both the making and the retention of the recording. The legal bases of her challenge were the following:

(a) Section 6 of the Human Rights Act 1998, specifically article 8 ECHR.

(b) Articles 7, 8(2) and 24 of the Charter of Fundamental Rights of the European Union (the "Lisbon Charter").

(c) Article 1(1) of The Directive 95/46/EC, a measure of the European Parliament and the Council dated 24 October 1995 "on the protection of individuals with regard to the processing of personal data and on the free movement of such data."

The latter instrument of EU law was repealed by Regulation EU 2016/679, commonly known as the General Data Protection Regulation ("GDPR"), with effect from 25 May 2018. The intent of this measure was to harmonise data privacy laws throughout all EU Member States. In passing, this repeal took effect just after the delivery of judgment at first instance.

[9] In charting the contours of the appellant's challenge it is necessary to understand how this evolved as the proceedings have progressed. At the first stage of the proceedings at first instance the court was required to adjudicate on the making of the recording, resolving this issue in favour of the Police Service. At the second stage the issue which the court determined, again in favour of the Police Service, was the retention of the recording. The appellant lodged an appeal against the second of the first instance judgments – AS1 (Number 2) - which was thereafter abandoned. Thus, the appeal to this court is a challenge to the first judgment only, with the important caveat that the sole enduring ground of challenge is article 8 ECHR/section 6 of the Human Rights Act 1998.

[10] It is accepted by the Police Service that those parts of the impugned recording which depict the appellant constitute an interference with her right to respect for

private life protected by article 8(1) ECHR. Thus, the question becomes whether this interference can be justified in accordance with article 8(2).

[11] The case on behalf of the appellant is both narrow and focused. It is contended that the "in accordance with the law" requirement enshrined in article 8(2) which we shall describe as the quality of law requirement, is not satisfied. This requirement is well documented in both high level domestic jurisprudence and that of the ECtHR. At this juncture it is convenient to interpose one of the earliest expositions in the jurisprudence of the ECtHR:

> "66. The Court held in its Silver and others judgment of 25 March 1983 (Series A no. 61, pp. 32-33, para. 85) that, at least as far as interferences with prisoners' correspondence were concerned, the expression "in accordance with the law/ prévue par la loi" in Article 8(2) should be interpreted in the light of the same general principles as were stated in the Sunday Times judgment of 26 April 1979 (Series A no. 30) to apply to the comparable expression "prescribed by law/ prévues par la loi" in Article 10(2).
>
> The first such principle was that the word "law/loi" is to be interpreted as covering not only written law but also unwritten law (see the above-mentioned Sunday Times judgment, p 30, para 47). A second principle, recognised by Commission, Government and applicant as being applicable in the present case, was that "the interference in question must have some basis in domestic law" (see the the above-mentioned Silver and others judgment, p 33, para. 86). The expressions in question were, however, also taken to include requirements over and above compliance with the domestic law. Two of these requirements were explained in the following terms:
>
> "Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." (Sunday Times judgment, p. 31, para 49; Silver and others judgment, p 33, paras 87 and 88).

67. In the Government's submission, these two requirements, which were identified by the Court in cases concerning the imposition of penalties or restrictions on the exercise by the individual of his right to freedom of expression or to correspond, are less appropriate in the wholly different context of secret surveillance of communications. In the latter context, where the relevant law imposes no restrictions or controls on the individual to which he is obliged to conform, the paramount consideration would appear to the Government to be the lawfulness of the administrative action under domestic law.

The Court would reiterate its opinion that the phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention (see, mutatis mutandis, the above-mentioned Silver and others judgment, p. 34, para. 90, and the Golder judgment of 21 February 1975, Series A no. 18, p. 17, para. 34). The phrase thus implies – and this follows from the object and purpose of Article 8 – that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by para. 1 (see the report of the Commission, para. 121). Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident (see the above-mentioned Klass and others judgment, Series A no. 28, pp. 21 and 23, paras. 42 and 49). Undoubtedly, as the Government rightly suggested, the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous

interference with the right to respect for private life and correspondence.

68. There was also some debate in the pleadings as to the extent to which, in order for the Convention to be complied with, the "law" itself, as opposed to accompanying administrative practice, should define the circumstances in which and the conditions on which a public authority may interfere with the exercise of the protected rights. The above-mentioned judgment in the case of Silver and Others, which was delivered subsequent to the adoption of the Commission's report in the present case, goes some way to answering the point. In that judgment, the Court held that "a law which confers a discretion must indicate the scope of that discretion", although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law (ibid., Series A no. 61, pp. 33-34, paras. 88-89). The degree of precision required of the "law" in this connection will depend upon the particular subject-matter (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 31, para. 49). Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."

See *Malone v United Kingdom* [1984] 7 EHRR 14 where the context was that of executive authorisation by warrant of the interception of a citizen's correspondence. The passage quoted above has aged gracefully.

Relevant Statutory Provisions

[12](i) Sections 31A and 32, Police (Northern Ireland) Act 2000 (the "2000 Act"):

"31A Core policing principles

(1) Police officers and National Crime Agency officers shall carry out their functions with the aim –

(a) of securing the support of the local community, and

(b) of acting in co-operation with the local community.

(2) In carrying out their functions, police officers and National Crime Agency officers shall be guided by the code of ethics under section 52.

(3) Nothing in this section shall have effect in relation to anything done by a National Crime Agency officer outside Northern Ireland

32 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."

(ii) Section 24 of and Schedule 3 to the Justice and Security (Northern Ireland) Act 2007 (the "2007 Act"):

"24 Search for munitions and transmitters

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

SCHEDULE 3 MUNITIONS AND TRANSMITTERS: SEARCH AND SEIZURE

…..

Entering premises

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.

…

Records

6(1) Where an officer carries out a search of premises under this Schedule he shall, unless it is not reasonably practicable, make a written record of the search.

(2) The record shall specify -

(a) the address of the premises searched,

(b) the date and time of the search,

(c) any damage caused in the course of the search, and

(d) anything seized in the course of the search.

(3) The record shall also include the name (if known) of any person appearing to the officer to be the occupier of the premises searched …"

[13] The 2007 Act Code of Practice ("COP") is the final component of the statutory matrix. Its material provisions are outlined in [35] infra.

Relevant Police Service Policies

[14] Certain Police Service policies feature in the evidential matrix (see further [35] infra). These are:

(i) The Police Service of Northern Ireland body worn video privacy impact assessment (the "BWV policy").

(ii) The Police Service of Northern Ireland manual of policy, procedure and guidance on conflict management, Appendix K ("PB3/21").

(iii) The Police Service of Northern Ireland policy directive "Policing with Children and Young People" ("PD13/08").

(iv) The Police Service of Northern Ireland body worn video privacy impact assessment (the "BWV policy").

(v) The Police Service of Northern Ireland manual of policy, procedure and guidance on conflict management, Appendix K ("*PB3/21*").

(vi) The Police Service of Northern Ireland policy directive "Policing with Children and Young People" ("PD13/08").

The Proceedings at First Instance

[15] As recorded in the first instance judgment, in a context where the grounds of challenge had been heavily pruned in the order granting leave to apply for judicial review, the parties framed for adjudication by the judge the following question:

> "Whether the policy or practice of using video recording and retaining video footage obtained during a search of a home is contrary to section 6 of the Human Rights Act 1998 and Article 8 ECHR and/or contrary to European Union Law namely the right to privacy in the Charter and Directive 95/46/EC."

Neither the application of article 8 ECHR to the events and actions under scrutiny nor the fact of an interference with the appellant's right to respect for private life was in dispute. Furthermore it was not contested that there is no statutory provision expressly authorising the making and retention of the video recording in question. The judge concluded that this had a lawful basis under section 32 of the 2000 Act and the common law. She then observed that there was "no real argument" regarding proportionality. The real issue, she noted, was that of the "quality of law" and noted that there was nothing concealed about the basis for the impugned conduct. She then turned to the PSNI policy documents and, in particular, the Body Worn Video ("BWV") policy. The judge recorded that this code had been adopted in August and circulated within the public domain in February 2018. The judge then rehearsed the merits and advantages of the kind of police conduct contemplated and permitted by this policy.

[16] The key conclusions of the judge are in paras [39] and [46]:

> "Firstly I am persuaded that proper consideration was given to all of the issues by virtue of the respondent's affidavit evidence. I do not consider that the type of overt recording at issue in this case requires legislative authority. I consider that the common law offers sufficient protection. In my view the BWV policy document meets the quality of law test and it can be applied to this type of video recording. I accept that at the date of the interference the policy applied may not have met the quality of law test. However, the situation has been rectified as the current policy is compatible, it is public, it deals with privacy and is subject to ongoing consultation. It complements the other policy documents which refer to children's rights and data management to provide a comprehensive code. As such I do not consider that the policy itself breaches Article 8. Whether there is a breach of Article 8 in a specific case will depend on the particular circumstances of the case.

…

> Accordingly, I consider that the current policy or procedure of using video recording and retaining video footage obtained during a search of the home complies with Article 8 ECHR and EU Law. My conclusion is reached on the basis of the current policy structure which lays down principles which are capable of being predictably applied to situations. These documents deal with when the intervention should be used and the use and retention of images. The policy foundation for this type of intervention is public facing and subject to ongoing consultation. This should form the basis of any future interventions of this nature."

The Second Judgment at First Instance

[17] The second judgment materialised following the promulgation of the first instance judgment in the instant case and the ensuing lodgement of the appeal. A remittal followed. This appeal was stayed by this court pending the judicial determination of a new issue, namely the retention by the PSNI of the video recording. While an appeal against this decision was lodged it was not pursued. Meantime there had intervened the adoption by the PSNI of a new policy relating to the review, retention and disposal of video recordings of this kind (described in the papers as the "RRD Schedule"). The judge, in a separate judgment, decided that this new policy was lawful. This was not challenged by appeal.

The Appeal

[18] Two preliminary comments are appropriate. First, as regards taxonomy, in the latter phase of these proceedings the parties have employed the verb *to capture* and its derivatives to describe the act of making the recording. Second, from the outset the appellant has squarely challenged a PSNI "policy or practice", to be contrasted with any specific alleged conduct of PSNI officers. In short, the issue agreed by the parties for determination by the court at first instance omitted any reference, oblique or otherwise, to the factual matrix rehearsed at [4] ff above. It was purely abstract.

[19] Developing the preceding analysis, the appellant does not feature anywhere in the question formulated for the judge, per [15] above. Nor is it apparent from this formulation that the appellant could conceivably have been the beneficiary of any practical or effective discretionary judicial review remedy at first instance. Furthermore, the discretionary remedy pursued at this remove ie on appeal did not feature in either the notice of appeal or the skeleton argument on behalf of the appellant. All of the foregoing became the subject of pre-hearing case management orders emanating from the court.

[20] The aforementioned proactive judicial intervention had the following outcome, summarised thus:

(i) The second of the two grounds specified in the amended notice of appeal was abandoned.

(ii) The single ground of appeal pursued was formulated in the following terms:

> "Whether the capture of the footage by the PSNI adheres to the quality of law condition in Article 8(2) ECHR."

(iii) The appellant is pursuing declaratory relief only.

The further clarification provided by the appellant's legal representatives was that this court is not required to determine whether at the time of the material events there was an adequate legal basis in domestic law which would justify the interference with the rights of the appellant said to have been then protected by directly effective EU law. Expressly, the appellant pursued no ground of appeal based on the EU Charter of Fundamental Rights or any other measure of EU law. Nor did the appellant pursue any ground of appeal based on the Data Protection Act 2018.

Article 8(2) ECHR: "In accordance with the law"

[21] It is necessary to scrutinise more fully the ingredients of the quality of law requirement. The starting point is the summary, based on Malone (supra), that "law" embraces both written law and unwritten law, any article 8(1) ECHR interference must have some basis in domestic law, the latter must be adequately accessible and it must be couched in terms enabling the citizen to reasonably foresee how it would be applied to that person's future conduct. An even more condensed exposition of this requirement can be found in the jurisprudence of the ECtHR in, for example, *PG v United Kingdom* [2008] 46 EHRR 51 at [61]:

> "61. The Court has examined, firstly, whether the interference was "in accordance with the law." As noted above, this criterion comprises two main requirements: that there be some basis in domestic law for the measure and that the quality of the law is such as to provide safeguards against arbitrariness."

There is a cross reference in the footnote to this passage to [44]:

> "The expression 'in accordance with the law' requires, first, that the impugned measure should have some basis in domestic law; secondly, it refers to the quality of the

> law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him and that it is compatible with the rule of law."

[22] Lord Bingham of Cornhill in (*R(Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307 at [34] provided the following pithy exposition:

> "The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality."

[23] In *R (Catt) v Commissioner of the Police for the Metropolis* [2015] UKSC 9, in one of the two conjoined appeals, the police organisation in question maintained a database containing a photograph of the claimant, a description of his appearance, his date of birth and address and the fact of his presence at certain anti-weapons protests. The database had no statutory foundation. An interference with the claimant's rights under article 8(1) was established. The sole question was whether the quality of law requirement in article 8(2) was satisfied by the common law. The Supreme Court, by a majority of 4/1, dismissed the claimant's appeal. Lord Sumption, delivering the main judgment of the majority, formulated the "in accordance with the law" requirement in the following terms at [11]:

> "11. The requirement of article 8(2) that any interference with a person's right to respect for private life should be "in accordance with the law" is a precondition of any attempt to justify it. Its purpose is not limited to requiring an ascertainable legal basis for the interference as a matter of domestic law. It also ensures that the law is not so wide or indefinite as to permit interference with the right on an arbitrary or abusive basis. In R (Gillan) v Comr of Police of the Metropolis [2006] 2 AC 307, para 34, Lord Bingham of Cornhill observed that "the lawfulness requirement in the Convention addresses supremely important features of the rule of law":
>
> > "The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any

> personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality."

In the context of the retention by the police of cellular samples, DNA profiles and fingerprints, the Grand Chamber observed in S v United Kingdom (2008) 48 EHRR 1169, para 99, that there must be;

> "clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, inter alia, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness."

For this purpose, the rules need not be statutory, provided that they operate within a framework of law and that there are effective means of enforcing them. Their application, including the manner in which any discretion will be exercised, should be reasonably predictable, if necessary with the assistance of expert advice. But except perhaps in the simplest cases, this does not mean that the law has to codify the answers to every possible issue which may arise. It is enough that it lays down principles which are capable of being predictably applied to any situation."

At [7] he outlined the common law powers of the police in these terms:

> "At common law the police have the power to obtain and store information for policing purposes, ie broadly speaking for the maintenance of public order and the prevention and detection of crime. These powers do not authorise intrusive methods of obtaining information, such as entry on private property or acts (other than arrest under common law powers) which would constitute an assault. **But they were amply sufficient to authorise the obtaining and storage of the kind of public information in question on these appeals.**"

[Emphasis added.]

[24] The exercise of these common law powers was subject to a regime of statutory and administrative regulation, composed of the Data Protection Act 1998 (the "1998 Act") and a ministerial Code of Practice relating to the management of information gathered and retained by police forces. By virtue of the statutory "data protection principles" both the generation and retention of the information relating to the claimant had to be for the purpose of the administration of justice and the exercise of any other function of a public nature performed in the public interest (see in particular Principles 1 and 2). The Code of Practice was more prescriptive, providing that the information could be generated and retained only for one or more of the purposes of protecting life and property, preserving order, preventing crime, bringing offenders to justice and performing any legal duty or responsibility of the police.

[25] The Supreme Court was unanimous in holding that the combination of these three sources – the common law, the 1998 Act and the relevant provisions of the Code of Practice – satisfied the "in accordance with the law" requirement in article 8(2). In passing, Lord Toulson's dissent was based on his view that the retention of the information relating to the claimant did not pursue a legitimate purpose and was not proportionate.

[26] The capacity of the common law to achieve compliance by state agencies with the "in accordance with the law" requirement has been recognised by the ECtHR. In *Murray v United Kingdom* [1994] 19 EHRR 193 the applicant, having been arrested by the police on suspicion of commission of certain terrorist offences, was photographed without her knowledge or consent and the photograph, together with personal details about her, was retained in police records. The powers in play reposed in the common law: see paragraphs 40 and 80 of the Opinion of the Commission. The court concluded without hesitation that the quality of law requirement was thus satisfied that the impugned measures therefore had a basis in domestic law: see [88].

[27] The decision in *Murray* featured in *R (Wood) v Metropolitan Police Commissioner* [2009] EWCA Civ 414, where the impugned conduct of the police consisted of photographing the claimant, an anti-arms campaigner, in a public place as he lawfully walked along a street. An interference under article 8(1) was conceded. The legitimate aim of the prevention of disorder or crime or the protection of the rights and freedoms of others was recognised. However, by a majority, the Court of Appeal held that the lengthy retention of the photograph rendered the interference disproportionate. The court held that the relevant common law power satisfied the requirement of "*in accordance with the law*". This discrete issue received the fullest treatment in the judgment of Laws LJ, at [50] – [54]. The other two members of the court (the majority) declined to express a concluded view on this issue: see Dyson LJ at [80] – [81] and Lord Collins at [98] – [99]. Unlike the present case, the context was one of generation and retention of a photographic image.

[28] In *PG v United Kingdom* [2008] 46 EHRR 51 the article 8 complaint was based on the installation by the police of a covert listening device in one of the applicants' homes and, following their later arrest, in all of their cells. These instruments generated evidence which was deployed against them at their trial and, one of them having pleaded guilty, the others were convicted. The ECtHR held unanimously that there had been a breach of article 8 ECHR. The discrete finding that the impugned conduct had not been "in accordance with the law" is found at [62]:

> "62. It recalls that the Government relied as the legal basis for the measure on the general powers of the police to store and gather evidence. While it may be permissible to rely on the implied powers of police officers to note evidence and collect and store exhibits for steps taken in the course of an investigation, it is trite law that specific statutory or other express legal authority is required for more invasive measures, whether searching private property or taking personal body samples. The Court has found that the lack of any express basis in law for the interception of telephone calls on public and private telephone systems and for using covert surveillance devices on private premises does not conform with the requirement of lawfulness. It considers that no material difference arises where the recording device is operated, without the knowledge or consent of the individual concerned, on police premises. The underlying principle that domestic law should provide protection against arbitrariness and abuse in the use of covert surveillance techniques applies equally in that situation."

[29] In *R(P) v Secretary of State for Justice* [2019] UKSC 3 Lord Sumption, having set out the "classic definition" of "law" in the ECtHR jurisprudence, specifically *Huvig v France* [1990] 12 EHRR 528 at [26] and *Kruslin v France* [1990] 12 EHRR 547 at [27] said the following of the <u>accessibility</u> requirement, at [17]:

> "The accessibility test speaks for itself. For a measure to have the quality of law, it must be possible to discover, if necessary with the aid of professional advice, what its provisions are. In other words, it must be published and comprehensible."

And, as regards <u>foreseeability</u>:

> "The requirement of foreseeability, so far as it adds to the requirement of accessibility, is essentially concerned with the principle summed up in the adage of the American

> founding father John Adams 'a government of laws and not of men.' A measure is not 'in accordance with the law' if it purports to authorise an exercise of power unconstrained by law. The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers discretions, in terms or in practice, which make its effects insufficiently foreseeable. Thus a power whose exercise is dependent on the judgement of an official as to when, in what circumstances or against whom to apply it must be sufficiently constrained by some legal rule governing the principles on which that decision is to be made. But a legal rule imposing a duty to take some action in every case to which the rule applies does not necessarily give rise to the same problem. It may give rise to a different problem when it comes to necessity and proportionality, but that is another issue. If the question is how much discretion is too much, the only legal tool available for resolving it is a proportionality test which, unlike the test of legality, is a question of degree."

Following a review of some of the leading Strasbourg cases, Lord Sumption continued at [24]:

> "As can be seen from these citations, from the outset the Strasbourg court has treated the need for safeguards as part of the requirement of foreseeability. It has applied it as part of the principle of legality in cases where a discretionary power would otherwise be unconstrained and lack certainty of application."

In her concurring judgment, Baroness Hale made the following contribution to the requirement of foreseeability, at [73]:

> "The law will not be sufficiently predictable if it is too broad, too imprecise or confers an unfettered discretion on those in power."

[30] In *Re JR 38* [2016] AC 167 the Supreme Court, by a majority, held that the conduct of the police in photographing the applicant, aged 14 years, in a situation of rioting in a public place and disseminating the photographs to local newspapers

which published them did not violate the child's rights under article 8 ECHR. The "in accordance with the law" requirement was addressed most fully by Lord Kerr, at [69] – [70]:

> "69. As Sir Declan Morgan LCJ stated in para **32** of his judgment, section 32 of the Police (Northern Ireland) Act 2000 imposes a general duty on police officers to prevent the commission of offences and, where an offence has been committed, to take measures to bring the offender to justice. In light of its acknowledged responsibilities to children the police service devised Policy Directive 13/06 entitled *PSNI Policing with Children and Young People*. It aims to identify children and young people at risk of becoming involved in offending and works with partner agencies in the provision of support and intervention. It contains an express commitment to adhere to ECHR rights as well as the international standards in the UNCRC and the Beijing Rules. Policy Directive 13/06 is available to the public.
>
> 70 Publication of the appellant's photograph was subject to the Data Protection Act 1998. The photograph of the appellant constituted "sensitive personal data" (section 2(g) of the Act) and its publication was "processing" of the data under section 1(1) of the Act. The police service is a registered data controller and must therefore comply with the data protection principles in relation to all personal data which it holds as data controller. Under section 29 of the Act, personal data is exempt from the first data protection principle, if processed for the purposes of the prevention and detection of crime and the apprehension and prosecution of offenders, except in so far as it required compliance with Schedule 2 and/or Schedule 3 to the Act. Since the processing related to sensitive personal data, the requirements of both Schedules were engaged. If any of the conditions in these Schedules was satisfied, the respondent is deemed to have acted in accordance with the Act. A condition common to both schedules is that the processing be necessary for the administration of justice. Plainly, this applies in the appellant's case. There was therefore no breach of the Data Protection legislation and I am satisfied that the publication of the appellant's photograph was in accordance with law."

The other judgments delivered concentrated on other aspects of article 8. None of them disagreed with Lord Kerr on this issue.

[31] While there is an abundance of case citations in the appellant's skeleton argument, all of which the court has considered, it is unnecessary to augment our examination of some of the leading Strasbourg and domestic cases in the immediately preceding section of this judgment.

The Parties' Contentions Summarised

[32] On behalf of the appellant, the submissions of Mr Ronan Lavery QC did not entail any suggestion that the impugned conduct of the police officers had no basis in domestic law. The centrepiece of his argument was that this conduct required a specific authorisation in domestic law and none existed at the material time. As a result the requirements of both accessibility and foreseeability were not satisfied. The foundation of this core submission was the contention that the admitted Article 8(1) interference was of a particularly invasive nature as it trespassed upon the private domain and space of this young child's home.

[33] Mr Tony McGleenan QC on behalf of the PSNI submitted that the quality of law requirement was satisfied by an amalgam of sources, consisting of sections 31A and 32 of the 2000 Act, the 2007 Act, the statutory COP and the common law.

(vii)

Mr McGleenan's primary submission was that the aforementioned statutory provisions in tandem with the common law coalesced to satisfy the quality of law requirement. His alternative submission was that the statutory provisions and the common law, buttressed by the above mentioned policy instruments, combined to satisfy this standard. The court was further invited to consider excerpts from two reports, dated March 2017 and April 2021 respectively, of the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007.

Our Conclusions

[34] The determination of this appeal requires the court to evaluate a series of domestic measures consisting of "*law*" in the strict and narrow domestic sense and "*law*" in the broader Strasbourg sense. This exercise must be carried out by reference to (a) the date of the impugned conduct of the police officers concerned, 3 August 2016 and (b) the specific aspects of such conduct which affected and is impugned by the appellant. This court is not concerned with the interaction of the police officers with persons other than the appellant or the effect of such interaction on them.

[35] An enquiry into the pertinent domestic law measures on the eve of the events in question would have established the following:

(i) It was the general duty of police officers to protect life and property, to preserve order, to prevent the commission of offences and, where an offence had been committed, to take measures to bring the offender to justice (section 32, 2000 Act).

(ii) Police officers were obliged to carry out their functions with the aims of securing the support of the local community and acting in co-operation with the local community (section 31A, 2000 Act).

(iii) Police officers with the appropriate authorisation could enter and search any premises for unlawful munitions and/or any wireless apparatus and, in doing so, require occupants to remain within the premises (section 24 of and Schedule 3 to the 2007 Act).

(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).

(vi) Every form of interaction between police and children and young persons had to satisfy the objectives of inter alia treating them with dignity, understanding and respect and ensuring that their best interests were paramount (PD13/06).

[36] Giving effect to the guidance derived from the decided cases considered above, the court considers that all of the measures enumerated in [35] above had the status of measures of domestic law within the embrace of the "in accordance with the law" clause in article 8(2) ECHR at the material time, ie 3 August 2016. The first three were provisions of primary legislation, the fourth was a measure of subordinate legislation and the fifth and sixth fell within the broader Strasbourg concept of "law". All of them, in their individual ways, provide a basis in domestic law for certain types of police conduct and/or the constraints attendant thereon.

[37] Next we address this question: did the common law contribute to or augment the various sources of law identified above? As noted, the police power to photograph a person without their consent, for a legitimate policing purpose of course, reposes in the common law. We consider that there is no distinction of substance or in principle between the police photographing a citizen without their consent and making this video/audio recording which in an incidental, peripheral way captured fleeting images of the appellant. Having considered the main cases in which the common law, whether by itself or in combination with other measures, has been held to provide a sufficient basis in domestic law for compliance with the article 8(2) ECHR quality of law requirement, this modest, incremental development of the common law is a short step. Thus the common law is to be added to the para [35] list above.

[38] The court further considers that each of the aforementioned sources of law satisfied the quality of law requirement of accessibility. The first four were duly made and promulgated measures of primary and subordinate legislation. The fifth and sixth belonged to the public domain and could, therefore, be discovered or ascertained. The application and impact of the common law could have been ascertained with the benefit of legal advice if necessary. We have excluded from this cohort the BWV Policy for the simple reason that at the material time this was an internal Police Service instrument which was first promulgated in public in February 2018. Thus, it was not accessible to the public on 3 August 2016

[39] We turn to consider the further article 8(2) quality of law requirement of foreseeability. We consider that neither the ECtHR nor the UK Supreme Court has been overly prescriptive in their respective formulations of the characteristics of this discrete requirement. The high water mark of the appellant's argument was the passage at [62] of *PG v United Kingdom* (reproduced at [28] above. This passage repays careful reading. First, it must be considered within the context to which it belongs, namely that of the covert recording of private telephone conversations. Second, the UK Government's case on the "in accordance with the law" requirement was based on a broad, general police power namely that of storing and gathering evidence. Third, the court used the non-prescriptive language of "specific statutory **or other express legal authority"** (our emphasis). Fourth, it confined the need for this kind of authority to what it described as "more invasive measures", instancing the search of private property or the taking of personal body samples and including the covert taping of private telephone conversations, without attempting a comprehensive list. Fifth, attention must be paid to the final sentence in the passage:

> "The underlying principle that domestic law should provide protection against arbitrariness and abuse in the use of covert surveillance techniques applies equally in that situation."

[40] It is appropriate to dwell on this latter statement. It has been repeatedly stated by the ECtHR that the overarching purpose of article 8 ECHR is to protect the citizen against arbitrary State conduct. Thus it is necessary that all debates about the quality of law requirement in article 8(2) be conducted with this overarching purpose in mind. It is this purpose which explains the frequent statements in the Strasbourg and domestic jurisprudence about legal protection against arbitrariness, the prohibition of unlimited executive discretions and the need for protection against abuse of State power. In short, the relevant measure of domestic law under scrutiny and the associated impugned conduct of State agents must accord with the principle of legality. This is the overarching touchstone.

[41] Thus the multiple statements of the ECtHR in its jurisprudence and the analysis of Lord Sumption in *P* at [17] and *Catt* at [11] ff are demonstrably ad idem. It is within this doctrinal framework that the quality of law requirement of foreseeability falls to be considered in each individual case. Furthermore, within the discrete framework of the foreseeability requirement there is a clearly identifiable concept of reasonable predictability together with its close relative sufficient clarity. These expressions or their analogues are to be found in the leading cases to which this court has paid particular attention above. They are non-prescriptive and their application in any given case requires an evaluative judgement on the part of the court.

[42] The immediately preceding analysis also serves to explain why the court, in its evaluation of the quality of law requirement of foreseeability in any given case, must pay attention to the nature of the impugned conduct of the State agents concerned. In his submissions Mr Lavery QC correctly highlighted the considerations of home, family and privacy. The court readily accepts that these are stand out features of the factual matrix in question. However, they must be evaluated by reference to the specific conduct under scrutiny. As already emphasised, this is <u>not</u> the activities of the police officers concerned from the beginning to the end of the search of the appellant's home. Rather, it is confined to the incidental, peripheral and, realistically, unavoidable capturing of fleeting images of the appellant during a matter of minutes. Furthermore, this was no covert act. Rather, it was overt in its entirety, involving the use of a device which would have been familiar, and was visible to, all present. This discrete act was to the benefit and for the protection of all, including the appellant. Finally, the making of the recording capturing some images of the appellant is the <u>sole</u> impugned act.

[43] In the court's consideration of this impugned conduct on the part of the Police Service, any reasonable reflection on the overarching aim of article 8 ECHR must impel to the conclusion that the conduct of the police officer concerned – and that of other police - was the very antithesis of the arbitrary or unconstrained. The planning of this search operation was meticulous, the strategic decision at the planning stage to make the offending recording was the product of careful consideration weighing a range of material factors and the execution of this discrete decision involved no arbitrary or abusive conduct. Finally, overlying every aspect of this operation was

the framework of domestic laws making extensive provision for the oversight and accountability of police officers and the protection of the minor appellant and others. Furthermore, to the extent that it is material, all of the foregoing was superimposed by the availability of judicial oversight and remedies in both private law and public law proceedings. In short, the rule of law was dominant throughout.

[44] The article 8(2) ECHR requirement of foreseeability must be calibrated accordingly. What had to be foreseen? In short: that the appellant might feature in a limited way in a police recording of activities within her home made for a lawful purpose in the course of a lawful search. On any reasonable and realistic showing we consider that this was reasonably predictable via the combination of domestic legal measures considered above.

[45] To summarise, the quality of law requirement of foreseeability, as we have expounded this concept in the preceding paragraphs, was satisfied in the instant case by the combination of the provisions of primary and subordinate legislation listed in [35] above. We accept Mr McGleenan's submission that this combination sufficed in the particular context of these proceedings. If we are wrong in thus concluding, the common law, as we have analysed it, provides additional fortification, with the further buttressing of the material provisions of PD 13/06 and PB 8/14 if necessary.

[46] This case brings to mind Lord Bingham's memorable quotation from Shakespeare's Hamlet in one of the first jurisprudential milestones following the enactment of the Human Rights Act:

> "The Convention is dealing with the realities of life. It does not, as is sometimes mistakenly thought, offer relief from **the heartache and the thousand natural shocks that flesh is heir to.**"

(*Brown v Stott* [2003] 1 AC 681 at 703d)

A contribution from Lord Steyn in the same case (at 707h – 708c) also resonates:

> "The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights. The direct lineage of this ancient idea is clear: the European Convention (1950) is the descendant of the Universal Declaration of Human Rights (1948) which in article 29 expressly recognised the duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others. It is also noteworthy that article 17 of the European Convention

> prohibits, among others, individuals from abusing their rights to the detriment of others …
>
> The European Convention requires that where difficult questions arise a balance must be struck. Subject to a limited number of absolute guarantees, the scheme and structure of the Convention reflects this balanced approach."

Omnibus Conclusion

[47] It follows from the foregoing that while the analysis and reasoning of this court do not mirror those of the trial judge we concur with the decision at first instance. The appeal is dismissed in consequence.