

CAJ's submission no. S.440

**Submission to the Northern Ireland Office
Consultation on
Monitoring the use of emergency stop and search powers**

December 2014

The Committee on the Administration of Justice (CAJ) is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

The Northern Ireland Office (NIO) issued the document "[Consultation on paragraph 8.78 of the exercise of powers in the Justice and Security \(Northern Ireland\) Act 2007 Code of Practice](#)" for consultation between November-December 2014. The NIO is only consulting on one paragraph of its Code of Practice, namely paragraph 8.78 which currently reads:

A record of the stop will be made electronically by the officer. A unique reference number and guidance on how to obtain a full copy of the record must be provided to the person searched. If for any reason an electronic record cannot be made or a unique reference number cannot be provided at the time, guidance must still be given to the person searched.

The consultation is prompted by a successful legal challenge in May 2014 brought by *Emmet McAreevey*¹ relating to this provision of the code of practice. CAJ provided an affidavit in these proceedings in relation to our positions on, and engagement with the NIO over issues relating to the issuing of a Code of Practice covering the exercise of stop, question and search powers under the Justice and Security (Northern Ireland) Act 2007 (JSA 2007), and in particular the Code's coverage of matters relating to record keeping. The proceedings related to the NIO consulting on a draft Code of Practice but then inserting the above detrimental provision in the final Code that conflicted what had actually been consulted on. It was this issue (which related to providing records to persons searched) which was found to be unlawful, in the context of a 'fundamental change' not having been consulted on that the present consultation seeks to address.

Background

By way of background the type of stop and search powers under question are not those found in the ordinary criminal law which requires the threshold of individual 'reasonable suspicion' but rather emergency type powers which do not.

¹ [Application by Emmett Mc Areavey for leave to apply for Judicial Review 2013 No. 17454/01](#)

The infamous ‘section 44’ of the Terrorism Act 2000 contained such a power which was exercised in both Northern Ireland and Great Britain and at its height was used more than 250,000 times in a single year. It was the widespread and arbitrary use of this power that was found to be unlawful by the European Court of Human Rights in 2010 in the case of *Gillan & Quinton v UK* on the grounds it was “neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse”. The UK government responded by suspending section 44, and the PSNI shifted instead to rely on a similar power in JSA 2007, which only applies in this jurisdiction. Section 44 was ultimately repealed by the Protection of Freedoms Act 2012 which introduced a replacement ‘non-suspicion power’ under what is now sections 47A-47AE of the Terrorism Act 2000, which is more limited and had some additional safeguards, including a tighter ‘authorisation’ regime, whereby a senior police officer must at first preauthorise the geographical area the power can be used. No authorizations were made to use this power anywhere in 2011 or 2012. According to the reports of the Independent Reviewer of the Terrorism Acts (David Anderson QC), the power has still not been used once in Britain, but was used by the PSNI at the G8 summit in 2013, at a time JSA powers were unavailable due to a successful legal challenge.² The Protection of Freedoms Act 2012 also amended the JSA power to introduce an additional safeguard that a geographical and time bound authorisation is issued for the use of the no-suspicion power. It emerged in court in May 2014 that since this power came into force on the 10 July 2012 there had in fact been continuous authorisations in place for the whole of Northern Ireland.³

CAJ has had a long standing interest in ensuring the human rights compliance of stop, search and question powers. In November 2012 CAJ published new research entitled “*Still Part of Life Here? A report on the use and misuse of stop and search/question powers in Northern Ireland.*” This report reflected on the human rights compliance of powers almost 20 years on from previous CAJ research, entitled ‘*It’s Part of Life Here*’, involving a survey of young persons (aged 17-18) on similar matters.

Among the matters covered in the CAJ research are issues which have arisen further to a switch from paper to electronic recording and the related ongoing absence of ethnic monitoring inclusive of community background in the recording procedure. CAJ concluded that the JSA powers were still unlikely to be compatible with the ECHR even after the changes introduced under the Protection of Freedoms Act 2012. In particular CAJ singled out the absence of a binding Code of Practice on the JSA powers which the Secretary of State is empowered to issue under s34 JSA.

² *Fox, McNulty and Canning’s applications for judicial review [2013] NICA 19.*

³ *Ramsey’s (Steven) Application [2014] NIQB 59, paragraph 13.*

The report stated “despite having been used for five years there is still no Code of Practice for the JSA... This means there is no binding policy framework beyond the legislation defining and restricting the scope of usage of the powers”.⁴ Noting that this was a unique situation in relation to stop and search powers in Northern Ireland a central recommendation of the research was for the NIO to urgently consult on a Code. It is within the Code of Practice that binding record keeping duties can be set out. The research states specifically in relation to record keeping methods:

Record keeping methods

An accessibility issue raised with CAJ is the decision to move to using electronic means to record searches rather than the issue of paper records at the time of the search. Formerly standard practice was to issue paper documents often referred to as ‘blue docketts’ by interviewees. Searches can now be recorded on Blackberries and individuals given a reference number whereby a full record can then be obtained usually by attendance at a police station.

There has been a general debate, beyond the local arena regarding police paper work and the amount of time officers have to spend filling in forms. Whilst filling in a paper stop and search/question record does not appear to be a particularly complex or time consuming task, this may lie behind the switch to electronic recording. The change does however make receiving a record less accessible as a significant number of persons are likely to be unable or unwilling to attend police stations to collect records, particularly when they have difficult relations with the PSNI. Among the potential chill factor are perceptions that attendance at police stations could result in attempts to recruit persons as informers. All in all, it appears much more likely that records will no longer be collected by affected persons and hence less likely that challenges to misuse of powers will be successfully pursued. In addition, the absence of a carbon copy paper form may make persons less amenable to filling in self-defined monitoring data.

Refusals to keep or give records

Concern around how stop and search/question activity is recorded has been one of the recurring issues raised with CAJ. The individual misconduct issue relates to reported incidents of officers refusing to record searches.

⁴ CAJ Still Part of Life Here? *A report on the use and misuse of stop and search/question powers in Northern Ireland.*, page 22.

An interviewee said that the PSNI “sometimes don’t give a record” even when requested and officers had stated “they don’t have to give one.” There are also reports of officers giving out white cards without search numbers or without the officer’s number on it and openly saying that they were not going to record the search. Other reports are of information being given just on the corner of a piece of note paper. CAJ has heard an allegation of a police officer saying he had no record sheets despite the documents visibly sitting in the outer pocket of the police officers jacket at the time. There are reports of police officers saying the Blackberry is broken so they are unable to give out a record.⁵

The report also covered the issue of ethnic monitoring as part of record keeping, citing also the concerns of the Northern Ireland Human Rights Commission, in evidence given to Parliament, in relation to the lack of an ethnic monitoring (including community background) requirement.⁶ As set out in the CAJ report, in Great Britain the record keeping requirements in relation to ethnic monitoring are binding by virtue of its inclusion in the relevant Code of Practice for the respective power.⁷

Following the publication of the CAJ report, the NIO, on the 5 December 2012, issued a ‘draft Code of Practice for the exercise of powers in the Justice and Security (Northern Ireland) Act’ 2007 for 12 week consultation period (until the 6 March 2013). CAJ responded to this consultation.⁸ We also met with senior NIO officials to discuss it, as well as giving evidence on the research to the Policing Board.⁹

On 9 May 2013 the Court of Appeal in Northern Ireland delivered its judgment in *Fox, McNulty and Canning’s applications for judicial review [2013] NICA 19*, holding the JSA powers “cannot be properly exercised in the absence of a valid and effective code of practice which ensures Article 8 compliance” noting “the kind of safeguards against potential abuse or arbitrariness envisaged by the Strasbourg case law” were not present in the absence of a Code of Practice which effectively regulated their use. In response to the judgment the NIO brought a Code of Practice into force at

⁵ As above pages 34 and 38-39 respectively.

⁶ *Submission to Joint Committee on Human Rights on Protection of Freedoms Bill’* April 2011, paragraph 12

⁷ *Terrorism Act 2000, Code of Practice (England, Wales and Scotland) for the Authorisation and Exercise of Stop and Search Powers relating to Section 47A of Schedule 6B to the Terrorism Act 2000* Home Office, 2011, paragraph 5.4.1; *Police and Criminal Evidence Act 1984 Code A Code of Practice for Exercise by Police Officers of Statutory Powers of Stop and Search* Home Office 2010, paragraph 4.3(a)).

⁸ S408 CAJ’s submission to the Northern Ireland Office’s consultation on its Draft Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act, 2007 March 2013

⁹ Human Rights and Policing Standards Committee of the Northern Ireland Policing Board (28 February 2013).

00:00:01 on Wednesday 15 May using an urgent procedure.¹⁰ Whilst we had envisaged this may have been an interim code the NIO clarified that the code would, and did become permanent, after being laid for 40 days before Parliament.

On the 20 June 2013 the NIO published a summary of responses to the consultation. In addition to responding to similar issues around record keeping and equality monitoring raised by the Human Rights Commission and the Human Rights and Policing Standards Committee of the Policing Board the document deals with CAJ representations on these matters.¹¹ The NIO response makes reference to existing recording practice and additional general provisions in relation to avoiding discrimination being added to the Code. However, no explanation is given as to why there is no explicit inclusion of ethnic monitoring requirements within the mandatory elements of record keeping set out under paragraph 8.75 of the JSA Code, despite their inclusion being standard in equivalent Codes in Great Britain.

There was also no explanation in the *Summary of Responses* document as to why paragraph 8.78 in the new Code *removed* a provision from the draft Code that stipulated PSNI officer *must* provide a copy of the record at the time of the stop and search *when able to do so*. In our view this embedded the problems caused by the switch away from paper records had created.

It is this particular action which became relevant to the Judicial Review. The Summary of Judgment records the applicant, Emmet McAreavey, having told the court that he had regularly been stopped and searched by the police under the powers contained in the 2007 Act. Until approximately January 2012 he had been provided with a written docket after each incident confirming the power exercised. Since then, he has not been provided with any record (except on some occasions when he was given a partly completed information card) and the PSNI officers have recorded the details on a Blackberry. The applicant challenged the PSNI's decision not to provide him with immediate written documentary evidence and the requirement for him to attend in person at a police station to obtain a record of the search. He also challenged the failure before 15 May 2013 of the Secretary of State to implement a Code of Practice on the use of the stop and search powers, and the actual implementation from this date of the Code claiming that there had been no consultation on the final draft.

¹⁰ e-correspondence to CAJ of the 17 May 2013. The urgent procedure is provided for under s36(2) of the JSA allowing an order to be made without a draft being approved by Parliament when the Secretary of State is of the opinion it is necessary by reason of urgency.

¹¹ *A Summary of Responses to Public Consultation on Code of Practice (Northern Ireland) for the Authorisation and Exercise of Stop and Search Powers in the Justice and Security (NI) Act 2007*, paragraphs 9-11.

In response Counsel for the NIO contended that the final code did not remove an essential safeguard and in the absence of fundamental change there was no duty to re-consult. Mr Justice Treacy found however that the “failure to re-consult in respect of the fundamental changes to paragraph 8.78 in the final Code was unlawful” noting that one of the major purposes of the code was to ensure the powers were ECHR compliant, and the nature and extent of provisions intended to give essential safeguards were some of the most fundamental to be consulted upon, stating:

Whatever the subjective intention of the [PSNI and the Secretary of State] in putting together the draft Code, objectively and from the perspective of interested parties, the provision of on the spot written evidence went to the level of safeguards attending the various powers and was therefore fundamental. Truncating the nature and extent of the safeguards in the Code was clearly a fundamental change and one which in the interests of fairness needed to be consulted upon.¹²

The previous day a Judicial Review also on the JSA stop and search powers examined the general question of whether there were “*insufficient safeguards against arbitrariness to render the power compatible with the ECHR.*” The applicant Steven Ramsey, who had been stopped over 100 times under the powers, specifically questioned whether the ‘authorisations’ process to use the power was sufficient to render it compatible with the ECHR, given the context of continuous authorisations. There was also contention that the Code of Practice was a sufficient safeguard to render the power human rights compliant. In this instance the court found that the code and other oversight were sufficient safeguards against abuse and that the powers were not being exercised unlawfully.¹³

Nevertheless this second judgment did also touch upon the key issue of provisions for ethnic monitoring, which in Northern Ireland would clearly need to include community background. The summary of judgment states that the JSA code does have provisions urging officers to “*avoid racial or religious profiling when exercising their powers and supervising officers are urged to monitor the use of the powers by compiling comprehensive records.*”

¹² [Application by Emmett Mc Areavey for leave to apply for Judicial Review 2013 No. 17454/01](#)

¹³ Ramsey’s (Steven) Application [2014] NIQB 59, paragraph 13.

Uniquely, however, as referenced above, the Codes of Practice in Northern Ireland do NOT have binding ethnic monitoring requirements which oblige record keeping on same. This contrasts with every Code of Practice in Great Britain which does.

It is not clear therefore how supervising officers are to compile comprehensive records if the data is not gathered. Such data could be gathered by both persons who offer self-identification in filling in a monitoring form and by officer perception. In addition to CAJ, both the Human Rights Commission and Policing Board, the latter in their thematic review on stop and search powers,¹⁴ have pressed the PSNI to monitor the use of stop and search powers, including on community background. CAJ had stated in our *Still Part of Life Here* research:

There has been debate as to whether it is appropriate or if there is too much sensitivity in Northern Ireland to asking individuals to record their community background. However, such concerns would appear little different to those expressed and discounted in early debates on whether it was appropriate to gather data on other aspects of ethnicity during stop and search for the purpose of preventing discrimination. A similar self defining tick box form post-stop and search/question could assist in gathering such data.¹⁵

Mr Justice Treacy in the Ramsey judgement, whilst commenting that it would be intrusive for the police to 'direct' questions as to a person's community background but said there was no reason why "*if there is to be effective monitoring, that details of the perceived religion/ political opinion should be omitted or not recorded especially as in many cases the exercise of powers will be intelligence driven and the perceived religion/political opinion is likely to be known by the police.*"¹⁶

The Policing Board in its recommendation is clear that this should not entail a *requirement* to provide information on community background. Rather self-identification is optional. The Board gave the PSNI three months from the publication of the thematic review (October 2013) to consider how to include the recording of community background on stop and search and then report back on the statistics after the first 12 months of monitoring. There is however no reference whatsoever to this context and remedying the gaps in the code in relation to ethnic monitoring in the present consultation document.

¹⁴NIPB [Human Rights Thematic Review on the use of police powers to stop and search and stop and question under the Terrorism Act 2000 and the Justice and Security \(NI\) Act 2007](#) (October 2013).

¹⁵ CAJ 'Still Part of Life Here', page 36.

¹⁶ Ramsey [Summary of Judgment](#), 2014 NIQB 59

Whilst the *McAreevey* decision did not focus on this issue and hence does not compel the NIO to address this matter, in both the context of the Policing Board recommendation and the binding monitoring commitments contained within the PSNI equality scheme,¹⁷ it appears very remiss that the consultation document did not also propose changes to the Code of Practice to bring it in line with its equivalents in Great Britain which contain compulsory ethnic monitoring provisions.

In summary:

CAJ opposes the proposed paragraph 8.78 set out in the consultation document for the reasons set out in this submission which draw on our research indicating the ‘electronic’ record only format, especially which then requires collection from a police station, is much less likely to afford persons access to records of their stop and search and hence less likely to assist monitoring of the use of the powers and accountability for them;

CAJ would urge reverting to the provision, already consulted upon, whereby Police Officers are obliged to provide copies of records at the time of the search when able to do so, and concurrently that measures are put into place to facilitate this;

Furthermore this present issue of the format of records is directly linked to the question of ethnic monitoring, inclusive of community background, given as one of the most effective and less intrusive methods of doing so is self-identification by way of a paper monitoring form;

CAJ therefore urges the NIO to also introduce changes, further to recommendations by the Policing Board and duties under the PSNI Equality Scheme, to ensure that there is mandatory ethnic monitoring (inclusive of community background) provided for under the code of practice;

Committee on the Administration of Justice

December 2014

¹⁷ Issued as part of the “Equality, Diversity and Good Relations Strategy 2012-2017” and approved by the Equality Commission.