Neutral Citation Number: [2021] EWHC 3119 (QB)

Appeal No: 8 of 2021
Claim No: F68YJ572

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER HIGH COURT APPEALS CENTRE

1 Bridge Street
Manchester, M60 9DJ
11th November 2021

Before:

MR JUSTICE FORDHAM

- -

Between:
ANTHONY OWENS — **Appellant**
- and -
CHIEF CONSTABLE OF MERSEYSIDE POLICE — **Respondent**

- -

- -

Henry Gow (instructed by James Murray Law) for the **Appellant**
Michael Armstrong (instructed by Merseyside Police) for the **Respondent**

- -
Hearing date: 26/10/21
- -

Final Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM :

Introduction

1. This is a case about what constitutes an "intimate search", as statutorily regulated by sections 55 and 65 of the Police and Criminal Evidence Act 1984 ("PACE"). It also raises questions about what is said about "strip searches" and "intimate searches" in the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers ("Code C") and the College of Policing's Authorised Professional Practice on Detention and Custody: Control, Restraint and Searches ("the APP"). The case came before me as an appeal from the decision of HHJ Sykes ("the Judge"), striking out parts of the Appellant's pleaded claim. Permission to appeal was granted by Robin Knowles J ("the PTA Judge"). The hearing before me was in person.

2. The Appellant has brought a damages claim in the Liverpool County Court against the Respondent. The trial is to take place between a judge and jury and is now fixed for 21 February 2022. The previous fixture, for February 2021, was vacated by the Judge. The claim arises out of the way in which the Appellant was treated by police officers in May 2018. Having said that it was to be "assumed … that the [Appellant] will establish the facts as pleaded", the Judge – in her strike judgment – summarised the pleaded facts as follows:

> ***on arrival …, the [Appellant] was not taken to the Custody Desk, but was instead taken to the back of the police station. The [Appellant] was subject first to a strip search and during the course of the strip search [he] was ordered to: remove his boxer shorts; separate his penis and testicles; pull the foreskin of his penis back; turn around, lean over and separate his buttocks.***

   It is common ground that disputed factual questions are for determination at the trial. That includes whether (as Mr Gow confirms is being claimed by the Appellant) a purpose of being "ordered" to "lean over and separate his buttocks" was to enable a visual examination of the inside of the Appellant's anus. The Appellant's claim alleges: misfeasance in public office; unlawful imprisonment; assault; trespass to the person; personal injury; and breach of the Human Rights Act 1998 ("the HRA") by action incompatible with his Article 3 rights (the right not to be subjected to inhuman or degrading treatment) and/or with his Article 8 rights (the right to respect for private life). Claims made include: breach of PACE section 2; malicious falsehoods; unjustified and unlawful search; flagrant and deliberate contravention of Code C; aggravated and exemplary damages. A recurrent feature of the pleaded particulars was the contention – which the Judge struck out – that this was an "intimate search". Another feature – which the Judge left intact – is the contention that the police officers "breached the requirements of Annex A of Code C". It is known and understood that the Appellant's team intends also to argue breach of the APP, but reference to the APP does not currently appear in the pleaded particulars of claim. It is common ground that the HRA claims raise questions as to adherence with 'prescribed procedures' (as to which, see §21 below).

3. The Respondent's pleaded defence contends that this was a lawful "strip search". The defence pleads that, having been "asked" to remove his trousers and underwear, the Appellant was then "asked to separate his penis and testicles, to pull his foreskin back and then to turn around and lean over, separating his bottom cheeks". It adds: "People have been known to secrete class A drugs in these areas". The defence acknowledges that the Appellant was not charged or convicted with any offence arising out of the action taken against him.

4. The Respondent made an application to strikeout – or alternatively for summary judgment in its favour in relation to – those parts of the Appellant's particulars of claim which referred to the search as an "intimate search". Mr Armstrong emphasises that the focus of the strikeout application was squarely – and was only ever intended to be – on whether this was an "intimate search" as defined by PACE section 65. At a hearing on 6 January 2021, for reasons given in a judgment delivered ex tempore, the Judge acceded to the Respondent's application. She held that, applying the definition in PACE section 65, as interpreted by the Court of Appeal in R v Hughes [1994] 1 WLR 876, the search described by the Appellant did not "constitute an intimate search". That was because "there was no physical intrusion into a body orifice by physical examination".

The 'wrong in principle' issue

5. The PTA Judge granted permission to appeal on the basis that the Appellant's case as to the substance – that is, PACE section 65 and Hughes – met the threshold of arguability. But he also raised this question:

> ***… regardless of the position on the substance, in this particular case where there is to be a trial of the remainder of the case it is questionable on principle whether it is desirable that the point in issue on the strike out/summary judgment application should be decided separately from and in advance of the trial and decisions on the other points in issue, and free of the context of the trial and those decisions. On the hearing of the appeal the parties should address this question first, but should also discuss the question between themselves in advance of the hearing of the appeal.***

This envisaged that the 'wrong in principle' issue would be dealt with as a first point, in the light of any arguments made about it, which is what I will now do.

6. It is common ground that strikeout (or summary judgment) could in general be appropriate, if a question of law could be answered – independently of any disputed facts – in circumstances which were encapsulated by Lewison J (as he then was) in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at §15vii. That 'grasp the nettle' passage describes circumstances where there arises:

> ***… a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.***

The Judge took Lewison J's 'grasp the nettle' approach, explaining:

> ***The parameters of [the] issue are fairly narrowly defined. The issue for the court today to consider is whether or not the case, as pleaded by the Claimant, amounted to an intimate search, as opposed to a strip search. In that regard, I accept the submissions of the Defendant's counsel that the court today is in as good a position as the trial judge in dealing with that narrow issue; in other words, there can be no further issues of evidence, which will be available to the trial judge, which are not available to me today, and it is a matter of construction of the legal position.***

Mr Gow did not submit that it is wrong in principle to 'grasp the nettle': where an issue of law will become 'decoupled' from other linked issues to be ventilated at a trial; nor where the 'decoupled' issue might give rise to an appeal; nor when the timing is relatively close to the date fixed for the trial; nor by reason of the interrelationship between

"intimate search" under PACE section 65 and questions which remain as to breach of Code C and/or the APP. His argument was more nuanced.

7. Mr Gow's nuanced argument, on the 'wrong in principle' question raised by the PTA Judge, focused on different 'appeal routes'. He submitted that it was 'wrong in principle' in this case for the county court to use the strikeout power, because: (i) if it were to be determined at trial, the conclusion on the issue of law would be appealable 'direct' to the Court of Appeal; whereas (ii) if determined on strikeout, it would be appealable only 'indirectly' to the Court of Appeal (appeal being to the High Court and then to the Court of Appeal). In the present case – says Mr Gow – where Hughes looms large, access to the Court of Appeal and the 'route of appeal' to that Court are especially significant. On that basis – argues Mr Gow – it was 'wrong in principle' to 'grasp the nettle' and deal with the issue of law on a strikeout. Instead, the issues should all have been dealt with, together, at the trial. None of this was submitted to the Judge. But I do not hold that against Mr Gow: he was giving me an answer on a new topic, raised by the PTA Judge.

8. I cannot accept Mr Gow's 'appeal routes' argument. If his different 'appeal routes' point were a reason why strikeout (or summary judgment) in the county court were 'wrong in principle', there would surely be some rule or practice direction, case-law or commentary saying so (I was shown none). The 'appeal routes' argument would significantly restrict the 'grasp the nettle' principle. The logic of that principle carries with it the prospect of appealable determinations on issues of law 'decoupled' from the trial, as part of the price for the virtue of resolution. I can see no reason why the 'grasp the nettle' principle ought not to apply to the county court. Where there is a point of law worthy of consideration by the Court of Appeal, it can be ventilated in that Court. It may be possible to 'recouple' a strikeout issue with issues decided at trial, if that makes for a more coherent disposal in the Court of Appeal. Appeals – and their viability, appropriateness and case-management – are bridges to be crossed as and when the time comes and the county court does not need to get ahead of itself. Indeed, even if all of these were relevant factors to an exercise of judgment and case-management discretion, they do not render 'wrong in principle' the Judge's decision to 'grasp the nettle'. The Judge was not wrong in principle to 'grasp the nettle', and now I must do the same. I turn then to the issues of substance. I will start with some important groundwork, to identify and understand the context in which those issues arise.

The context

"Intimate search": statutory regulation (PACE s.55)

9. The starting point is the way in which "intimate search" is statutorily regulated, by PACE section 55. That section (as amended several times since 1984) provides as follows:

> ***Intimate searches.***
>
> ***(1) Subject to the following provisions of this section, if an officer of at least the rank of inspector has reasonable grounds for believing – (a) that a person who has been arrested and is in police detention may have concealed on him anything which – (i) he could use to cause physical injury to himself or others; and (ii) he might so use while he is in police detention or in the custody of a court; or (b) that such a person – (i) may have a Class A drug concealed on him; and (ii) was in possession of it with the appropriate criminal intent before his arrest, he may authorise an intimate search of that person.***

(2) An officer may not authorise an intimate search of a person for anything unless he has reasonable grounds for believing that it cannot be found without his being intimately searched.

(3) An officer may give an authorisation under subsection (1) above orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.

(3A) A drug offence search shall not be carried out unless the appropriate consent has been given in writing.

(3B) Where it is proposed that a drug offence search be carried out, an appropriate officer shall inform the person who is to be subject to it – (a) of the giving of the authorisation for it; and (b) of the grounds for giving the authorisation.

(4) An intimate search which is only a drug offence search shall be by way of examination by a suitably qualified person.

(5) Except as provided by subsection (4) above, an intimate search shall be by way of examination by a suitably qualified person unless an officer of at least the rank of inspector considers that this is not practicable.

(6) An intimate search which is not carried out as mentioned in subsection (5) above shall be carried out by a constable.

(7) A constable may not carry out an intimate search of a person of the opposite sex

(8) No intimate search may be carried out except – (a) at a police station; (b) at a hospital; (c) at a registered medical practitioner's surgery; or (d) at some other place used for medical purposes.

(9) An intimate search which is only a drug offence search may not be carried out at a police station.

(10) If an intimate search of a person is carried out, the custody record relating to him shall state - (a) which parts of his body were searched; and (b) why they were searched.

(10A) If the intimate search is a drug offence search, the custody record relating to that person shall also state – (a) the authorisation by virtue of which the search was carried out; (b) the grounds for giving the authorisation; and (c) the fact that the appropriate consent was given.

(11) The information required to be recorded by subsections (10) and (10A) above shall be recorded as soon as practicable after the completion of the search.

(12) The custody officer at a police station may seize and retain anything which is found on an intimate search of a person, or cause any such thing to be seized and retained – (a) if he believes that the person from whom it is seized may use it- (i) to cause physical injury to himself or any other person; (ii) to damage property; (iii) to interfere with evidence; or (iv) to assist him to escape; or (b) if he has reasonable grounds for believing that it may be evidence relating to an offence.

(13) Where anything is seized under this section, the person from whom it is seized shall be told the reason for the seizure unless he is – (a) violent or likely to become violent; or (b) incapable of understanding what is said to him.

(13A) Where the appropriate consent to a drug offence search of any person was refused without good cause, in any proceedings against that person for an offence – (a) the court, in determining whether there is a case to answer; (b) a judge, in deciding whether to grant an application made by the accused under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 (applications for dismissal); and (c) the court or jury, in determining whether that person is guilty of the offence charged, may draw such inferences from the refusal as appear proper.

> ***(14) Every annual report – (a) under section 22 of the Police Act 1996; or (b) made by the Commissioner of Police of the Metropolis, shall contain information about searches under this section which have been carried out in the area to which the report relates during the period to which it relates.***
>
> ***(15) The information about such searches shall include – (a) the total number of searches; (b) the number of searches conducted by way of examination by a suitably qualified person; (c) the number of searches not so conducted but conducted in the presence of such a person; and (d) the result of the searches carried out.***
>
> ***(16) The information shall also include, as separate items – (a) the total number of drug offence searches; and (b) the result of those searches.***
>
> ***(17) In this section –***
>
> ***"the appropriate criminal intent" means an intent to commit an offence under – (a) section 5(3) of the Misuse of Drugs Act 1971 (possession of controlled drug with intent to supply to another); or (b) section 68(2) of the Customs and Excise Management Act 1979 (exportation etc. with intent to evade a prohibition or restriction);***
>
> ***"appropriate officer" means - … a constable;***
>
> ***"Class A drug" has the meaning assigned to it by section 2(1)(b) of the Misuse of Drugs Act 1971;***
>
> ***"drug offence search" means an intimate search for a Class A drug which an officer has authorised by virtue of subsection (1)(b) above; and***
>
> ***"suitably qualified person" means - (a) a registered medical practitioner; or (b) a registered nurse.***

10. The provisions of PACE section 55 speak for themselves. I will, however, endeavour to encapsulate the key elements, as follows. Only two types of "intimate search" can lawfully be conducted. One type is an "intimate search" for (what I will call) an "injurious item": something concealed on the individual which the individual could use to cause physical injury to themselves or others and might use in that way while detained (s.55(1)(a)). The other type is an "intimate search" for a Class A drug concealed on the individual (s.55(1)(b)): this is called a "drug offence search" (s.55(17)). The drug offence search is a type of "intimate search" which can only lawfully be conducted where the individual has given an informed (s.55(3B)) and written consent (s.55(3A)). Should the individual – following a warning – decline to give such a written consent, no "intimate search" can proceed, but adverse inferences can be drawn in criminal proceedings (s.55(13A)). One necessary precondition for any "intimate search" is that the individual has been arrested (s.55(1)). Another is that prior authorisation (s.55(3)) has been given by a sufficiently senior officer (s.55(1)). Another is that this authorising officer must reasonably believe, both that there is concealed on the individual an injurious item (s.55(1)(a)) or Class A drug (with pre-arrest criminal intent) (s.55(1)(b)), and that the item cannot be found without an "intimate search" (s.55(2)). An "intimate search" cannot be carried out by a police officer of the opposite sex to the individual (s.55(7)). It must be carried out (s.55(5)) by a registered doctor or nurse (s.55(17)), except in an injurious item case where a senior officer considers this impracticable (s.55(5)). It must be carried out on medical premises, except in an injurious item case where it may, alternatively, be carried out in the police station (s.55(8)(9)). Any item found in an "intimate search" may be seized and retained if (s.55(12)) a custody officer: believes that the individual on whom it was concealed may use it to cause physical injury to themselves or another

person, or to damage property, or to interfere with evidence or to assist an escape; or reasonably believes that the item may be evidence relating to an offence. There are important requirements as to the giving of information given to the individual (s.55(3B), (13)); recording of information in the custody record (s.55(10)(10A); and reporting of information in an annual report (s.55(14)-(16)).

"Intimate search": statutory definition (PACE s.65)

11. Next, and at the heart of this appeal, is this. By PACE section 65, Parliament has defined the phrase "intimate search", for the purposes of Part V of PACE (which includes section 55). The statutory definition is as follows:

> ***"intimate search" means a search which consists of the physical examination of a person's body orifices other than the mouth.***

Compared to the original in 1984, this is a modified definition. The modification was the inclusion of the words "other than the mouth". The modified definition was inserted in April 1995, by means of section 59 of the Criminal Justice and Public Order Act 1994, which also relocated the definition from PACE section 118 (applicable to the Act as a whole) to section 65. This means that when Hughes was decided in November 1993, the mouth was a statutorily regulated "body orifice". I mention at this point that not all similar definitions of "intimate search" were modified in that way. One example is "intimate search" as described in Prison Service Instruction 67/2011 ("PSI 67/2011"). That instrument, concerned with searches of prisoners and their visitors, was discussed by the Court of Appeal in BK v Secretary of State for Justice [2015] EWCA Civ 1259 at paragraph 36. Another example is "intimate search" in section 164 of the Customs and Excise Management Act 1979 ("the 1979 Act"), which deals with customs officers conducting searches (an Act, as it happens, referenced in PACE s.55(17)).

Parliament's emphasis on "body orifice"

12. There are two particularly conspicuous features of the PACE section 65 statutory definition of "intimate search". The first is Parliament's clear focus on "body orifice". It was common ground before me that, as Blackstone's Criminal Practice (2021) at §D1.100 says:

> ***'Body orifice' would include ears, nose, anus and vagina.***

Mr Gow and Mr Armstrong both add to this list: the opening of the urethra (which I accept). Mr Gow (but not Mr Armstrong) would add: the openings of breast milk ducts (a dispute which I am satisfied that I do not need to resolve for the purposes of deciding this appeal). The emphasis on "body orifice" means, to take an example, that a search to identify the presence of (and, if present, extract) an item in a person's armpit, including using physical contact and physical force, could never be an "intimate search" as statutorily defined by PACE section 65. It might be Class C drugs or a plastic bag containing banknotes. There is no "intimate search".

"Concealed" and (within) "body orifice"

13. That emphasis in PACE section 65 on "body orifices", in the phrase "examination of a person's body orifices" (other than the mouth), needs to be read with the phrase "concealed on him" in PACE section 55(1). Putting those two features of these linked

provisions together, what can be concluded (and I conclude) is this: Parliament was concerned with items which are concealed within – that is, inside – a relevant body orifice. Parliament was not concerned with items concealed on the body, but outside (including on the surface of) a relevant body orifice. That means, to take an example, that the police could search to ascertain the presence of (and, if present, extract) an item resting on the outside of an anus or vagina, including using physical contact and physical force. Again, the item might be Class C drugs or a plastic bag containing banknotes. There is no "intimate search".

Parliament's emphasis on "physical"

14. The second conspicuous feature of the statutory definition of "intimate search" is Parliament's clear focus on a "physical" examination. It is common ground between Mr Gow and Mr Armstrong that something which is "simply a visual examination", or a "mere visual examination", would not fall within the statutory definition of "intimate search". Moreover, x-rays and ultrasound scans are dealt with by separate provision: PACE section 55A. The Court of Appeal in Hughes spoke of "mere visual examination" as not falling within the statutory definition of "intimate search". The definition in section 164(5) of the 1979 Act (for customs searches) spells out the point, by providing that "'intimate search' means any search which involves a physical examination (that is, an examination which is more than simply a visual examination) of a person's body orifices". That means, to take an example, shining a light and looking closely into a person's ear would not be an "intimate search" as statutorily defined. It is also common ground that getting someone to bend over or spread their legs, or using force to bend them over or spread their legs, would not be a "physical" examination of a person's body orifices. Beyond that, what is hotly contentious is what "mere visual examination" means, and whether it would include applying force to the surrounding area of the body orifice, to expose the inside of the body orifice, so as more effectively to look inside.

Tiers of regulatory instrument: legislation, code of practice, operational guidance

15. In this appeal, reference has been made to three tiers of regulatory instrument concerned with search procedures. The first and top tier is PACE, as the relevant primary legislation. It contains the statutory regulation (section 55), and the statutory definition (section 65), of "intimate search". The second tier is Code C. This is one of the codes of practice issued by the Secretary of State pursuant to a statutory power (PACE section 66). Pursuant to PACE section 67(10) and (11): the failure on the part of a police officer to comply with a provision of Code C does not of itself render the police officer liable to any criminal or civil proceedings; but Code C is admissible in evidence in all criminal and civil proceedings; and its provisions are to be taken into account in determining any question or to which it appears to the court or tribunal conducting the proceedings to be relevant. The third and bottom tier is the APP, which is in the nature of "operational guidance". As I have already indicated, other instruments were helpfully referenced in the present case. One piece of primary legislation, in the field of customs and excise searches, is section 164 of the 1979 Act. One other source of published policy in the context of searches and the police was the "original Home Office Circular on PACE". That is an instrument which the parties were unable to access in the public domain (despite laudable attempts by Mr Armstrong) but whose contents are described in the textbook Zander on PACE (8th edition) at §5-16 (see §20 below). Another instrument which, as I have explained, applied to searches of prisoners and prison visitors was PSI 67/2011 (see §33 below).

Different species of search

16. Next, there are various different species of search which may be undertaken by or on behalf of the police. First, there is search by a custody officer of a detained person pursuant to section 54 of PACE (within Part V), which statutory power does not permit an "intimate search" (see section 54(5)). Secondly, there is a "strip search". This is a species which is not separately statutorily defined or statutorily regulated in PACE, but which is addressed by Part B (§§9-12) of Annex A to Code C. A "strip search" is "a search involving the removal of more than outer clothing" (Code C Annex A §9), which "may take place only if it is considered necessary to remove an article which a detainee would not be allowed to keep and the officer reasonably considers the detainee might have concealed" (§10). The Respondent accepts, and submits, that the search in the present case was a regulated "strip search". Thirdly, there is an "intimate search". This is what is at the heart of this appeal, as statutorily defined (PACE section 65) and statutorily regulated (PACE section 55). But it also the subject of Part A (§§1-8), and then the Notes for Guidance (A1-A6), within Annex A to Code C. As will be seen in the next two paragraphs below, the question as to what sort of search should be treated as a permissible "strip search", and when it should instead be treated as an "intimate search", is addressed in Code C Annex A (§§11(e) and (f)); and in the APP.

Key contents of Code C, the APP and commentaries

17. Code C Annex A Part B (strip searches) §11(d)-(f) provide as follows:

> ***(d) the search shall be conducted with proper regard to the dignity, sensitivity and vulnerability of the detainee…, including in particular, their health, hygiene and welfare needs… Every reasonable effort shall be made to secure the detainee's cooperation, maintain their dignity and minimise embarrassment. Detainees who are searched shall not normally be required to remove all their clothes at the same time, eg. a person should be allowed to remove clothing above the waist and re-dress before removing further clothing;***
>
> ***(e) if necessary to assist the search, the detainee may be required to hold their arms in the air or to stand with their legs apart and bend forward so a visual examination may be made of the genital and anal areas provided no physical contact is made with any body orifice;***
>
> ***(f) if articles are found, the detainee shall be asked to hand them over. If articles are found within any body orifice other than the mouth, and the detainee refuses to hand them over, their removal would constitute an intimate search, which must be carried out as in Part A.***

18. The APP, under the heading "When might a strip search become an intimate search?", says this (emphasis in the original):

> ***The touching or applying of bodily force to any orifice (other than mouth) or the <u>immediate surroundings</u> of any body orifice would constitute an "intimate search" for the purposes of PACE. Any intentional physical contact with the genitals (e.g., moving or lifting them) as opposed to a mere visual examination should be considered an "intimate search".***
>
> ***If necessary to assist the search, the detainee may be required to hold their arms in the air or to stand with their legs apart and bend forward so a visual examination may be made of the genital and anal areas provided no physical contact is made with any body orifice.***

The second of these paragraphs, as can be seen, replicates Code C Annex A §11(e).

19. <u>Blackstone's Criminal Practice</u> says this at §D1.100

> ***Physical insertion into a bodily orifice amounts to an intimate search, as does any application of force to a body orifice or its immediate surroundings. Code C Annex A §11(e) implies that touching an orifice in these circumstances would also amount to an intimate search.***

20. Zander on PACE says this at §5-16:

> ***The original Home Office Circular on PACE (para 1-16, fn.46, paras 43-44) said that a physical insertion into a body orifice would constitute an intimate search as would "any application of force to a body orifice or its immediate surroundings". The circular also suggested that even a mere visual inspection of intimate parts of the body should be regarded as an intimate search "even though physical contact may be absent".***

It continues:

> ***But in Hughes the Court of Appeal held that making a suspect spit something out (in that case a plastic wrapper containing cannabis) that he had just put into his mouth was not an intimate search. It was not a search so much as action to prevent the destruction of evidence. A search required some physical intrusion into a body orifice, some physical examination rather than mere visual examination or an attempt to get the person to extrude what was contained in a body orifice …***

The relevance of 'prescribed procedures' to HRA claims

21. An important part of the legal context, to which reference has been made by both parties in this appeal, concerns the legal relevance of prescribed procedures and adherence to them, when a court comes to decide whether there has been a violation of Article 3 and Article 8 rights, for which the HRA provides remedies. Three cases, in particular, have featured in relation to this topic. The first case is Wainwright v United Kingdom (2007) 44 EHRR 40. That case concerned strip searches of a mother and son who were visiting a relative at a prison in Leeds. The search of the son (Mr Wainwright) involved his being told to remove the clothes from the lower half of his body, after which (§14): "One of the prison officers looked all around his naked body, lifted up his penis and pulled back the foreskin". The domestic courts held that this touching was a trespass to the person sounding in damages for battery (§§22, 46 and 55). The Strasbourg court considered the prison rules (§27) and other search procedure instruments (§§28-31), the applicability of Article 3 standards to "strip and intimate body searches" (§42), and of Article 8 standards (§43), and found a violation of Article 8 (§49) in relation to both of the searches, a conclusion based on this statement:

> ***Where procedures are laid down for the proper conduct of searches on outsiders to the prison who may very well be innocent of any wrongdoing, it behoves the prison authorities to comply strictly with those safeguards and by rigorous precautions protect the dignity of those being searched from being assailed any further than is necessary.***

The second case is PD v Chief Constable of Merseyside Police [2015] EWCA Civ 114 (19.2.15). That was a case which concerned the removal of the clothing of a 14-year-old girl at a police station, with the purpose of preventing self-harm (§16). She was the claimant and Merseyside Police the defendant. Consideration was given to the letter and "spirit" of Code C Annex A relating to "strip searches" (§§18, 28). It was common ground that there had been no "intimate search" (§22). The Court of Appeal held that there had been no breach of the letter or "spirit" of Code C and no breach of Article 8 (§43). The Court of Appeal explained (§29) that the relevance of Code C Annex A was that:

> ***… a breach of the code would constitute evidence either that the removal of the claimant's clothing was unlawful for the purposes of Article 8(2) and section 7 of the [HRA] or that the manner in which the removal was carried out was a disproportionate means of achieving the defendant's legitimate aim.***

As the Court of Appeal went on to explain in PD, this was in a context in which the first instance judge had found that the obligation of the defendant, for the purposes of Article 8, extended to abiding by the "spirit" of the Code. The third case is the case of BK (8.12.15) That case concerned "full body searches" – that is, "strip searches" (§1) – of women prisoners. It was a case in which the unlawfulness of the searches had been conceded and damages claims were pending in the county court (§1). The Court of Appeal was considering Article 3 and Article 8 in the context of a freestanding claim that the PSI 67/2011 was itself a prison policy which infringed those rights (§2). The Court considered the prison rules (§24), PSI 67/2011 (§§30-38), and a local instruction on searching (§39). The HRA-based challenge to PSI 67/2011 failed (§75). The Court of Appeal said this in the course of its judgment (§51(vi)):

> ***… there can be no doubt that strip-searching is capable in itself of engaging Article 3 (and Article 8). Certainly the application of strip searches, particularly to those who are not prisoners or reasonably suspected of having committed a criminal offence, requires rigorous adherence to prescribed procedures and the need to protect human dignity.***

The phrase "rigorous adherence to prescribed procedures" (BK §51(vi)) fits with Strasbourg's "comply strictly" with "procedures… laid down for the proper conduct of searches" (Wainwright §48).

The distinction between interpretation and application

22. There is in the law, in relation to any legal instrument including primary legislation, an important distinction between: (a) questions of interpretation; and (b) questions of application. Questions of interpretation are questions of law. Questions of application engage judgment and appreciation. There are dangers in 'glossing' a statute – particularly in relation to a concept of which a definition has already been given by Parliament – by imposing further linguistic delineations in the name of statutory interpretation. It is true that the legal meaning of the statute, the legal limits of a statutory power or duty, and whether a statutory language is capable in law of applying to particular facts, engage objective questions of law for the Courts to decide. But the correct answer to whether or not a particular set of circumstances fall inside or outside a term which has been identified in legislation by Parliament may be that what has been raised is in truth a question of application to the facts, as a matter of appreciation and judgment. In the present case, such a question would not only be a question for the trial, but would be a question for trial, in which there is to be a judge and jury, with a principled division of responsibility between the two.

Questions of 'what' and 'by whom'

23. It is important to appreciate that the Respondent's arguments, as to why there was in the present case no "intimate search" as statutorily defined by section 65, involve two identifiable moving parts. First, there is a 'what' point. This concerns what action or actions, in law, can or cannot constitute an "intimate search" for the purposes of PACE section 65, correctly interpreted and lawfully applied. In particular, is the only act which can constitute an "intimate search" an act of physical intrusion into a body orifice?

Secondly, there is a 'by whom' point. This concerns by whom a relevant action or actions must be taken in order in law for it to constitute an "intimate search" for the purposes of PACE section 65, correctly interpreted and lawfully applied. In particular, is the only act which can constitute an "intimate search" an act done to the individual being searched. Before the Judge, and before me on this appeal, Mr Armstrong for the Respondent thus maintains that there could in this case be no "intimate search" within the statutory definition for two distinct reasons. His 'what' reason is that the necessary action was absent: there was no physical intrusion into a body orifice. His 'by whom' reason is that even if the act could have sufficed if done to the Appellant by a police officer, this could not be an "intimate search" because there was no action done to the Appellant by another person: rather, the Appellant was separating his own penis and testicles, pulling his own foreskin of his own penis back, and separating his own buttocks.

The 'what' issue: what actions are capable of being a PACE s.65 "intimate search"?

24. I turn to grapple with the substantive issues. I start with the 'what' issue, which poses this question: what action or actions are capable of falling within the statutory definition of "intimate search", correctly interpreted and lawfully applied? On this issue, I am going to undertake the analysis in two stages. I am conscious that, after she gave judgment in favour of the Respondent on the strikeout, the Judge asked whether there was anything which Counsel considered required clarification. In response, Mr Armstrong said this:

> ***… can I just ask whether you consider yourself bound by the case of Hughes, whether you consider yourself bound but, in the alternative, even if you are not bound, you consider that it is not an intimate search; or that you simply find that you are not bound by Hughes, but you consider it is not an intimate search?***

The Judge said:

> ***I consider it to be a binding authority on this court, and I am bound by the decision in Hughes. Thank you for seeking clarification in relation to it.***

I will seek, in a similar spirit, to promote transparency in my own analysis.

Stage 1: if the position were free from authority

25. I will start by considering the position in the absence of the assistance to be derived from authority. If the question were free from authority, I would have answered the 'what' question in a way whose essence I would encapsulate as follows:

> *Encapsulation (remembering that the mouth is not a relevant "orifice"):*
>
> *(1) The following actions are in law capable of falling within the statutory definition of "intimate search" (PACE s.65) correctly interpreted and lawfully applied, where they are actions done to ascertain whether an item is – or to extract an item that is – concealed within a body orifice: (i) action involving physical intrusion into a body orifice; or (ii) action involving physical contact with a body orifice; or (iii) action involving physical force applied to an area immediately surrounding a body orifice.*
>
> *(2) Actions not falling within (1) above are not in law capable of falling within the statutory definition of "intimate search" correctly interpreted and lawfully applied. That includes: (a) other action (eg. looking at or into a body orifice) to*

> *ascertain whether an item is concealed within the body orifice; (b) other action to ascertain whether an item is, or to extract an item that is, present or concealed on the body but not within a body orifice (eg. looking at or touching or moving an intimate body part; or looking at or touching a body orifice; or looking at or touching or moving a body part or area immediately surrounding a body orifice).*

This position is wider than that for which Mr Armstrong contends, which is limited to actions covered by paragraph (1)(i). It is narrower than the position for which Mr Gow contends, which would include actions covered by paragraph (1) but also those covered by paragraph (2)(b).

26. I will summarise here the reasons why I would have arrived at the encapsulation, were the matter free from authority. The actions in the encapsulation described in (1), as distinct from those in (2), fit with the two conspicuous features to which Parliament was giving particular emphasis in the statutory definition: the emphasis on "body orifices" (see §12 above); and the focus on "physical" examination (see §14 above). They each involve an "examination" which is "physical", and which is about a "search" for items which are "concealed" (s.55(1)) inside (within) (see §13 above) "body orifices": using "physical" action in ascertaining or extracting something which is within "body orifices". They fall naturally within the meaning of an "examination of a person's body orifices other than the mouth", where that "examination" is by its nature "physical". That gives the statutory language its natural and ordinary meaning. Parliament did not – as it could have done – define "intimate search" as being a physical examination "inside" or "within" a person's body orifices. The actions described in (1), as distinct from those in (2), fit with the idea that a "physical" examination in relation to concealment and "body orifices" is tightly restricted: to injurious items and (with prior written consent) Class A drugs. They fit with the idea that an "examination", which is "physical", in the context of items concealed within "body orifices", should be undertaken by a registered clinician doctor or nurse (except in an injurious item case where assessed as impracticable) and on medical premises (except in an injurious item case). This interpretation recognises that the police can, without taking "physical" action in doing so, look inside the "body orifices". It also recognises that the police can, including by taking "physical" action, ascertain or extract items concealed on the body but not concealed inside (within) a body orifice. That means the police can, for example, look under (or, where applicable, between) intimate body parts – including breasts or foreskin or testicles or buttocks – including in a manner which is "physical" (touching or moving them, or removing an item found), all in relation to concealed items which are not inside a body orifice. It is an interpretation which recognises that the idea of "intimate", in the PACE sections 55 and 65 statutory phrase "intimate search", is narrower than the idea of a 'search of intimate body parts'. Parliament could have defined "intimate search" as being any physical examination 'of an intimate body part', or of a 'body part adjacent to a body orifice', but it did not do so. Indeed, a broader sense of "intimate" can be seen in the definition used for the regulated action of taking of an "intimate sample" (PACE section 62), which includes "pubic hair" and "a swab taken from any part of a person's genitals (including pubic hair)", as well as "a swab taken … from a person's body orifice other than the mouth" (PACE section 65). The definition of "intimate search", in the same section (section 65), and using the same word "intimate", is clearly narrower and focused exclusively on "body orifice other than the mouth". This interpretation fits with guidance (see §§18-20 above) in the APP (and the original Home Office circular) and in the commentary in Blackstone's Criminal Practice (albeit that these are not an aid to statutory

interpretation and albeit that other content of these sources goes further), in recognising that – and in explaining when – a search involving "application of force to a body orifice or its immediate surroundings" can constitute an "intimate search" (ie. where it is being done to ascertain whether an item is – or to extract an item that is – concealed within a body orifice). Finally, this interpretation avoids the alarming proposition that the statutory definition of "intimate search" allows this consequence: a police officer undertaking a strip search – having no power to insert her fingers inside a woman's vagina to ascertain, for example, whether the woman has cannabis or a plastic bag of banknotes concealed inside the vagina – could instead use her fingers to apply physical pressure at the opening of the vagina, to squeeze or stretch open the vagina, and thus achieve the same outcome.

Stage 2: the position, as seen in the authorities

27. I turn to consider the position, illuminated by the authorities. In Hughes the Court of Appeal (Lord Taylor CJ, Schiemann and Wright JJ) was dealing with a criminal appeal which posed the following certified question:

> ***[W]here an officer believes that what a suspect has placed in his mouth is a prohibited substance and attempts to recover it from the suspect's mouth by taking hold of his jaw and nose in order to compel the suspect to spit out whatever is in his mouth, does that amount to an intimate search as defined by section 118 (1) of [PACE]?***

In the key passage in its judgment, the Court of Appeal said this (at p.878F-879A):

> ***The question certified, therefore, relates specifically to the question as to whether what took place was an intimate search. [Counsel], on behalf of the appellant, contends that it was. He submits that any attempt to look inside, to probe inside, or otherwise discover and reveal the contents of a body orifice amounts to an intimate search. Clearly he accepts that to insert fingers into an orifice would amount to an intimate search, but he says it is not necessary to do that in order to come within the definition in the statute. He maintains that by laying hands on the appellant, one hand on the jaw, the other hand on the outside of the nostrils, so as to force the mouth to be opened and the cannabis to be extruded was an intimate search. We do not accept that argument. In our judgment the definition given in the statute clearly requires that there should be some physical intrusion into the body orifice, some physical examination rather than mere visual examination in order to attempt to cause the person to extrude what is contained in the body through one of its orifices.***
>
> ***The provisions of section 55 of the Act of 1984 require that where an intimate search is made it should be conducted by a suitably qualified person, and that person is defined as being a registered medical practitioner or a registered nurse. In our judgment it would be absurd if a visual examination of an open mouth had to be conducted by a registered nurse or a registered medical practitioner because it was an intimate body search. By the same token we consider that in this case the constable was merely getting the appellant to spit something out, and that did not amount to an intimate search of a body orifice.***

The Court of Appeal then went on to consider recognised failures by the officer to carry out what the PACE Codes of Practice required in relation to a search (p.879C), concluding (p.879D, F) that the evidence from the search did not fall to be excluded on fairness grounds (PACE section 78). The headnote writer, reporting Hughes in the Weekly Law Reports, recorded the Court of Appeal as having:

> ***Held, dismissing the appeal, that an "intimate search" as defined by section 118(1) of [PACE] required some physical intrusion into a body orifice of a person by some physical examination, rather than a mere visual examination in order to cause the person to extrude what was contained in the body; that, although the constable's actions constituted a "search" for the purposes of***

> ***[PACE], merely causing the appellant to spit something out did not amount to an intimate search of a body orifice, and did not come within section 55(5) …***

28. There are several lines of argument which might provide a basis for distinguishing Hughes. That is what Mr Gow submits that this Court should do. First, Hughes was a case concerned with the mouth, at a time when the statutory definition included the mouth. This led the Court of Appeal to conclude that "it would be absurd if a visual examination of an open mouth had to be conducted by a registered nurse or a registered medical practitioner". As I have explained (see §11 above), the statutory definition materially changed in April 1995, by virtue of the 1994 Act. That is a recalibration of the statutory scheme capable of casting new light and calling for re-examination of the meaning of "intimate search". Secondly, Hughes was a case in which the certified question invited focus on whether the police action was a "search" at all. As has been seen (§20 above), Zander on PACE says this of Hughes: "It was not a search so much as action taken to prevent destruction of evidence". I interpose at this point that a note in [1995] Crim LR 407 suggested that Hughes be confined to its own particular facts. Thirdly, although the headnote writer in the WLR in Hughes fused the concepts of "physical intrusion into the body orifice" and "some physical examination" using the word "by" ("some physical intrusion into a body orifice of a person by some physical examination"), in fact there was a separating comma ("some physical intrusion into the body orifice, some physical examination"), treated in the headnote as meaning "and in that sense" ('some physical intrusion into the body orifice *and in that sense* some physical examination'). Fourthly, it is striking that what the Court of Appeal described, as being outside the statutory definition, "mere visual examination". The word "mere" connotes, most naturally, 'looking without touching'. Those, as I see them, are the potential lines of argument for distinguishing Hughes.

29. Hughes does not stand alone. It was discussed and applied in the judgment of the Scottish Court of Session (Lord Justice-Clerk Gill, Lord Maclean and Lord Caplan) in Tolmie v Dewar 2003 SC 265. That case concerned action by a prison officer who was claimed (see §5) to have:

> ***put his hands between the [prisoner]'s buttocks, forced them apart and inspected the anal area… requiring him to 'expose' his anus***

The relevant instrument in Tolmie was a prison rule (see §3), which allowed "visual examination of the external parts of the body following the removal of the prisoner's clothing", which also allowed "the visual examination of his open mouth without the use of force or any instrument", but which excluded "the physical examination of a prisoner's body orifices". The Court of Session described Hughes (at §9) as being a case which had:

> ***held that an intimate search required some physical intrusion into the body orifice***

The Court of Session went on to hold that this "ratio" of Hughes was "sound", and that it was "applicable" to the claims which were being made in Tolmie. The exclusion did not apply. The claimed action of the prison officer was not "the physical examination of a prisoner's body orifices".

Conclusions

30. Like the Judge, I have concluded that Hughes is authority, which is binding on me, which interprets "physical examination of a person's body orifices" as requiring "some physical

intrusion into the body orifice". That draws the line at paragraph (1)(i) of the encapsulation which I set out above. It is Mr Armstrong's argument. It is how Hughes was understood, by the headnote writer and but by the Scottish appellate court in Tolmie v Dewar. I agree with Mr Armstrong that Tolmie, although not binding on me, contains an analysis which it is right for me to choose to accept and adopt, as directly relevant and as highly persuasive, including in identifying the ratio of Hughes and in recognising it as sound in principle in a factual context such as the present.

31. Based on Hughes, the position in essence – as I see it – is this. The Court of Appeal was recognising, as I have (see §13 above), that "intimate search" is about items which are "concealed" (see s.55(1)) within (inside) a "body orifice". Given that the item is concealed within (inside) the body orifice, the relevant examination in the highly regulated search for it is equally an examination within the body orifice. In short, "physical examination of" means "physical examination inside". Once the item is recognised as concealed within (inside) a body orifice, it is a short and logical step to recognise the physical examination as confined to physical action taking place within (inside) a body orifice. The physicality required by the statutory definition is itself the physical intrusion within – and thus physical intrusion into – the body orifice. This has the virtue that any search (to ascertain the presence of, or extract, a concealed item) involving physical intrusion into a body orifice is an "intimate search". That draws a clear line in the sand. It is clearer and more straightforward than drawing lines which recognise some 'physicality' (eg. bending the individual over or forcing their legs apart) in examining inside an orifice is not an intimate search. It is also clearer and more straightforward than an approach where physical contact with a body orifice, or with a body part near a body orifice, will sometimes be within, and sometimes being outside, the statutory definition depending on the purpose (that can be illustrated by comparing the encapsulation above at paragraphs (1)(ii) and (iii) on the one hand (intimate search) with paragraph (2)(b) on the other hand (no intimate search)). It is this, most highly intrusive, of physical acts – physical penetration into the body orifice – which is the reason why registered doctors and nurses feature in the statutory regulation in PACE section 55. Other steps, short of physical intrusion into the body orifice, are steps which fall short of "intimate search". When those lesser steps succeed, an "intimate search" is not necessary, as it is required to be (see s.55(2)). What is said in the APP (see §18 above) is not new: it was said in the original Home Office Circular, as Zander on PACE explains (see §20 above). Blackstone's Criminal Practice (§19 above) is reflecting the contents of the APP. Neither guidance nor commentary is an aid to interpretation. They cannot expand the statutory definition, properly interpreted and lawfully applied. The Court of Appeal in Hughes cannot be taken to have been ignorant of the circular, and the Court was very well aware of the then PACE codes of practice, making reference was made to them and to breaches of them. As to "mere visual examination", the Court of Appeal in Hughes was focusing throughout on what was going inside the orifice – that being the place of concealment of any relevant item (see §13 above). Where what was going inside the orifice involved some physical contact, that was "physical intrusion into the body orifice", and so that was "some physical examination". Where all that was going inside the orifice was the line of vision of the person conducting the search, that was "mere visual examination". The only "examination", taking place inside the body orifice, was "visual". What matters is the exploration inside the body orifice: where that exploration is physically penetrative it is "physical intrusion into the body orifice" and therefore "some physical examination"; where that exploration was not physically penetrative it was "mere visual examination". After all, the factual scenario arising directly in Hughes

involved the officer "taking hold of [the individual's] jaw and nose", so as to make the individual open his mouth and spit out what was inside. Moreover, counsel's argument in Hughes – to which the Court of Appeal's reasoning was directly responding – was an argument referring to "any attempt to look inside", but which included doing so "by laying hands on the appellant, one hand on the jaw, the other on the outside of the nostrils, so as to force the mouth to be opened …" The Court of Appeal in Hughes found the requirement of the statute clear, and one which made best sense of the requirement of examination by a medical practitioner. The medical practitioner is needed for an act of physical penetration inside the body orifice – an internal physical examination inside the body orifice – being the most highly intrusive of searches calling for the heightened regulatory protection of the section 55 regime. All of this is reflected in the wisdom of the Court of Session in Tolmie v Dewar, which is powerfully persuasive, especially given the factual context in which the argument in that case arose. Although the statutory definition was amended following Hughes to remove the reference to the mouth, that change cannot bear the weight of constituting an expansion of the meaning of "intimate search" for those orifices – which still include the ear and the nose – which have continued to fall within the reach of the retained definition.

32. I am satisfied that this is the analysis which I should follow. I have been enlightened by relevant authority. Case-law is there to assist, and it has. The principles of precedent, and the hierarchy of the courts, exist for very good reason. They promote certainty. They guard against error. Like the Judge, I am satisfied that the course which I should, indeed must, take in the present case is to follow what Hughes decided – persuasively reinforced, as what that Court decided and as to its soundness, by Tolmie – and to accept, and faithfully follow, the established wisdom in these authorities that the definition of "intimate search" ("the physical examination of a person's body orifices other than the mouth") requires an act of physical intrusion into a body orifice. On that basis, I find in favour of the Respondent on Mr Armstrong's 'what' point. Having approached the issue in the two stages that I have, Mr Armstrong will not now need to ask of me the follow-up question which he asked of the Judge (§24 above).

33. I add this by way of a postscript. I have referred above to PSI 67/2011, an instrument governing searches of prisoners and prison visitors, to which the Court of Appeal referred in BK (see §21 above). PSI 67/2011 was an instrument whose contents made clear (see BK at §36) that "intimate searches", which prison officers were prohibited from undertaking, meant searches "involving intrusion into a bodily orifice". As Mr Armstrong accepted, and as could be seen from the copy of PSI 67/2011 which he supplied after the hearing, the phrase 'physical intrusion into body orifices' as defining 'intimate search' arose from the express provision made within that instrument (relevant provision could be found at Annex A §26 and Annex B §§16, 25, 27, 31, 33).

The 'by whom' issue: are actions which the individual is 'ordered' to take included?

34. The 'by whom' issue poses this question: by whom must the relevant action or actions be taken, in order for them to be capable of falling within the statutory definition of "intimate search", correctly interpreted and lawfully applied? The Judge recorded Mr Armstrong's 'by whom' argument, being "that there was not a physical examination of the [Appellant's] body orifices by any of the officers in this case". Mr Armstrong submitted, and maintains, that – even if the 'what' aspect of "intimate search" was met by the actions in this case – the 'by whom' aspect of "intimate search" was not. Having recorded this as part of the argument, the Judge – as Mr Armstrong accepts – did not

decide the strikeout on this basis, even as an alternative to her conclusion on Mr Armstrong's 'what' point. Nor would I. I will explain why. The first thing to say is that neither Mr Armstrong nor Mr Gow showed me any domestic case-law which addressed whether a "search" – or an "intimate search" – for the purposes of PACE does, or does not, need in law to involve the individual being "searched" to have the relevant action done to them by another person, rather than being ordered to do the action themselves. Mr Gow showed me comparative cases by way of illustration. One was the New York case of Barnville (23.2.05), discussing arrangements under which those "strip searched" were "made to 'squat'", and discussing previous case-law about a "more invasive" species of "visual body-cavity search" in which "the suspect is required to spread the lips of the vagina and/or the cheeks of the buttocks to allow visual inspection of those body cavities". He also showed me the Canadian case of R v Saeed [2016] SCC 24 [2016] 1 SCR 518 (23.6.15), a case about a penile swab, where the individual under arrest and at the police station was told "that he could choose either to take the swab himself, or to have a male officer take it for him" (§22) and did so "under … direction" from the police officer (§25).

35. In the present case, there is a factual question about whether the Appellant was "asked" or "ordered" to do the actions described by the Judge (see §2 above). I put that question to one side. It is a factual matter for the trial. Mr Armstrong points to a passage in the Appellant's witness statement which describes the officer as having "asked" him to do the actions. However, as Mr Gow points out, the witness statement needs to be read as a whole. Elsewhere, it says that the police officer "informed me that he wanted me to do exactly as he said"; that the Appellant "did as he said"; and that when "[d]uring the search one of the Officers asked whether I was being forced to do anything I did not want to do" the Appellant "stated that I did not know what they were talking about but I just felt like crying due to the search". The context was that this was in a police station, the Appellant was confronted by a police officer, and the officer was describing actions for the Appellant to take. The pleaded claim is that the Appellant was "ordered to" take the actions involved in the search. The Judge, rightly, recorded that it was to be "assumed that the [Appellant] will establish the facts as pleaded". It is a matter for trial whether, for example, it can convincingly be said by the Respondent that the Appellant was being invited to take voluntary action, as a matter of his free choice, acting consensually.

36. Mr Armstrong's argument on 'by whom' came to this. He accepted that, in principle, the actions which can constitute a "search" regulated by PACE can be actions done to the individual (in particular by a police officer); or they could be actions done by the individual themselves under orders given by a police officer. Mr Armstrong accepted that in the species or search regulated by section 32 of PACE, the phrase "a constable may search [a] person" – and so the limits and protections applicable to that power – would be engaged by 'orders' given by a constable to the individual to do acts by which the "search" takes place, such as the emptying of pockets or removal of outer clothing. Mr Armstrong also accepted that in Code C Annex A §§9-12 the phrases a "strip search" and "police officer carrying out a strip search" (§11(a)) – and so the limits and protections applicable to that species of search – would be engaged by 'orders' given by a police officer to the individual to do acts by which that "search" takes place, such as the removal of under-clothing, or the act of bending over. However, says Mr Armstrong, the phrases "intimate search" (PACE sections 55 and 65), "physical examination of a person's body orifices other than the mouth" (section 65), and "intimate search … carried out by a constable" (section 55(6)) – and so the limits and protections applicable to that species

of search – would be engaged only by acts taken by a person other than the individual being searched, and would not be engaged by 'orders' given to the individual to do acts by which that "search" takes place. The statutory limits and protections (in PACE section 55), says Mr Armstrong, would not apply – though he emphasises that the HRA protections could nevertheless still apply – if a police officer 'orders' the individual to place their own fingers inside (and so physically intrude) their own body orifice, so that the police officer can ascertain the presence of (or, if present, extract) a concealed item. That would be so, says Mr Armstrong, even if there were 'duress' or 'coercion' of the individual by the police officer. The reason, says Mr Armstrong, is this. Code C Annex A §11(f) speaks of the detainee being "asked to hand over" articles found, and speaks of there being an "intimate search" where an item is extracted after being "found within any body orifice other than the mouth" in circumstances where "the detainee refuses to hand them over". That, says Mr Armstrong, shows that consent is irrelevant to whether there is an "intimate search" as statutorily defined, and that action taken by the individual can never constitute an "intimate search", even in circumstances of coercion by reason of orders given to the individual by a police officer.

37. I cannot accept these submissions. The starting point is that Mr Armstrong is surely right to accept that a "search" of clothing, or of the body, including a "strip search" of the body, happens equally when a police officer performs a relevant action or 'orders' the individual to perform it. Mr Armstrong can in my judgment point to nothing in the regulation of "intimate search" in PACE section 55, or the definition of "intimate search" in section 65, which changes that position. He can point to nothing relating to the nature of an "intimate search" – however the 'what' point is resolved – which explains why the position should be changed for the "intimate search". Why should ordering the individual to empty their pockets constitute a "search", and ordering them to strip naked and bend over should constitute a "strip search", but ordering them to place their own fingers inside their anus or vagina should not constitute an "intimate search"? It is impossible to see why Parliament should be understood as: (a) ensuring that the limits and protections of a "search", in general, cannot be avoided or circumvented by a police officer, instead of taking an action themselves, 'ordering' that the individual do it; but (b) not ensuring this for an "intimate search". Indeed, since the "intimate search" is – whatever view is taken on the 'what' question – the most intrusive of the various species of search, attracting the most protective statutory regulation, this is where avoidance or circumvention would be of the greatest concern. Nor can I see how Code C Annex A §11(f) supports Mr Armstrong's argument that "intimate search" is in this respect different. That paragraph is recognising that there could be a consensual act of removal of an item from within an orifice. In that respect, the word "asked" in Code C Annex A §11(f) can be contrasted with the word "required" in §11(e). Clear words, in any instrument, would in my judgment be necessary in order to indicate that acts which would constitute an "intimate search" if done by the police officer can be 'ordered' (and 'coerced') without constituting an "intimate search". That is so, leaving aside the problem that the words of the Code cannot cut across the meaning of the primary legislation, as Mr Armstrong's own submissions on the 'what' question (and the phrase "provided no physical contact is made with any body orifice" in Code C Annex A §11(e)) recognise. An "intimate search" does not stop being an "intimate search" just because it is effected by acts taken by the individual being searched, under orders from a police officer. On the other hand, an "intimate search" remains an "intimate search" where it is done, in the case of Class A drugs, with a prior written consent from the individual (section 55(3A)). Had Mr

Armstrong been wrong on the 'what' point, I would have allowed the appeal. In my judgment, he is wrong on the 'by whom' point.

The 'non-adherence with prescribed procedures' issue

38. On the 'what' issue, I have upheld the Judge's conclusion that the claim in this case cannot in law have constituted an "intimate search" for the purposes of statutory definition (PACE section 65) and statutory regulation (PACE section 55), correctly interpreted and lawfully applied. However, as Mr Armstrong emphasised, the nature and purpose of the strikeout application was only intended to remove references in the Appellant's pleaded case to "intimate search" as statutorily defined and statutorily regulated. The question which remains is: where does that leave the contents of Code C and the APP? Mr Armstrong accepts that it would, in principle, be open to the Appellant to seek to advance a claim which I will encapsulate as follows:

> ***Line of argument.*** ***(1) Code C and the APP each contain prescribed procedures, failure to adhere with which can in principle be the basis of a conclusion of violation of Convention rights under the HRA; (2) Code C and/or the APP identify actions (a) which would constitute an impermissible strip search and/or (b) which are to be treated as being an "intimate search" (thus attracting the same safeguards as an "intimate search" statutorily defined); (3) what happened in this case constituted a failure to adhere with Code C and/or the APP such that in consequence HRA damages are recoverable.***

As I have explained, it is common ground that the particulars of claim do not at present contain any reference to the APP, although it is known and understood that the Appellant intends to rely on the APP. It is common ground that the particulars of claim do contain points (1), (2)(a) and (3), but only by reference to Code C. It is common ground that the particulars of claim do not contain point (2)(b). Finally, it is common ground that none of this was addressed with the Judge, who raised with both Mr Gow and Mr Armstrong the question of what should happen in relation to the particulars of claim and what amendment was appropriate, in light of her conclusions on the question of law, the statutory definition of "intimate search" and the strikeout.

39. The position of the parties is as follows. Mr Armstrong says that the appropriate way forward is for the Appellant now to prepare an amended particulars of claim which the Respondent can consider; that if objection is raised there can be an urgent hearing in the county court; that if no objection is raised or sustained, the Respondent should then have permission to file an amended defence responding to the substance; and that all of this can be done without jeopardising the trial date next February. Mr Gow says two things. First, says Mr Gow, this Court should grant permission to the Appellant to amend the particulars of claim to advance the line of argument which has been identified, and to the Respondent to amend the defence in response. But secondly, says Mr Gow, this Court should proceed now to make declarations of unlawfulness, applying the same 'grasp the nettle' principle (see §6 above), on the basis that the search which the Respondent accepts took place in this case clearly constituted non-adherence with the prescribed procedures in Code C which unanswerably gives rise to an HRA breach and sounds in damages, applying the approach seen in the HRA caselaw (see §21 above).

40. In my judgment, the correct and appropriate course is as follows. The question of law, regarding the statutory definition of "intimate search", now stands determined. However, determining that issue before the Judge and on this appeal has exposed in clear terms the line of argument (see §38 above) which remains capable of being advanced. There is no

difficulty in recognising its essence, and there is no surprise still less any unfair surprise. The discipline of providing clarity, and fleshing out the relevant detail, in the particulars of claim is a necessary one. It is clearly appropriate, in the interests of justice and having regard to the overriding objective to give permission – now, and without further ado – to the Appellant to amend the particulars of claim to ensure that the line of argument which I have identified is included and particularised, and for the Respondent to have permission – now, and without further ado – to respond. The implications are clear. It is clear what in substance would be added by the Appellant. The trial date can be retained. It would not promote the overriding objective or the interests of justice to refuse, or defer the questions for negotiation or another hearing. I propose to give the Appellant permission, within 14 days, to amend the particulars of claim to ensure that they reflect the line of argument which I have set out. I propose to give the Respondent permission, within 14 days thereafter, to amend the defence to respond. I am not going to make any declaration of unlawfulness. There was no application or cross-application by the Appellant before the Judge, from whose judgment this is an appeal. It is true that a declaration of unlawfulness was raised in the Appellant's grounds of appeal, which were before the PTA Judge. It is also true that the APP is not currently pleaded, nor is point (2)(b) from the line of argument identified above. The various points relating to prescribed procedures and the HRA, relating to what happened in this case, and relating to any line of defence which the Respondent has identified in its defence or may now identify in its amended defence, are in my judgment all matters for the trial. Included in those points are Mr Gow's reliance on other contents of the Code – for example, his claim of non-adherence with Code C Annex A §11(d) – and the disputed question whether this was a case of "request" or "order". Stepping back, this appeal on a question of law under the statute was not, and has not become, an appropriate forum for seeking to resolve part or parts of the Appellant's claim based on the other instruments. They can and should be addressed at trial, on the amended pleadings on both sides.

Conclusion

41. For the reasons which I have given, the appeal is dismissed and the parties have permission to amend the pleadings. I am grateful to Counsel for liaising in light of circulation of this judgment in draft. By doing so they were able to reach agreement as to consequential matters. I made the following Order: (1) The appeal is dismissed. (2) The Appellant do pay the Respondent's costs of the appeal agreed in the sum of £4,441.80 not to be enforced until the conclusion of the claim. (3) The Appellant has permission to file and serve an amended Particulars of Claim (if so advised) dealing with the issue raised at paragraph 38 of the judgment of Mr Justice Fordham by 4pm on 25th November 2021. (4) The Respondent shall have permission to file and serve an amended Defence (if so advised) by 4pm on 9th December 2021. (5) The parties have permission to file and serve further witness evidence (if so advised) limited to any issue raised in the amended pleadings by 4pm on 10th January 2022. (6) The costs of and incidental to the amendment to the statements of case be the Respondent's in any event, not to be assessed or enforced until the conclusion of the claim.