

KING'S BENCH DIVISION
ADMINISTRATIVE COURT
BETWEEN:

AC-2025-LON-002926

THE KING
on the application of
SEX MATTERS

Claimant

-and-

(1) NATIONAL POLICE CHIEFS' COUNCIL
(2) CHIEF CONSTABLE OF THE BRITISH TRANSPORT POLICE

Defendants

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

CLAIMANT'S SKELETON ARGUMENT

References are to the Core Bundle [CB/XX] and Supplementary Bundle [SB/XX].

1. INTRODUCTION

1. On 5 January 2026, Mr Justice Johnson granted the Claimant permission to challenge the guidance issued respectively by the First and Second Defendants concerning the conduct of strip searches of detainees pursuant to s.54 of the Police and Criminal Evidence Act 1984 ('PACE').
2. The first guidance document is that of the National Police Chiefs' Council ('NPCC') entitled '*Interim Guidance – Searching by Transgender officers and employees of the Police and the Searching of Transgender detainees*' (the 'NPCC guidance') [CB/134-135]. The second guidance document is that of the

British Transport Police ('BTP') entitled '*Interim – Transgender and Non-Binary Search Guidance*' ('the BTP guidance') [CB/136-157].

3. In short, both documents purport to create a consensual strip-searching regime "*in contradiction of the requirements of statutory powers [s.54(9) PACE]*"¹ whereby detainees can agree to participate in strip searches conducted by police officers of the opposite sex. The Claimant submits that such guidance is *ultra vires* s.54(9) PACE because that provision mandates in clear and unequivocal terms that a strip search must be conducted by an officer of the same sex as the detainee. Put shortly – s.54(9) of PACE enacted a same-sex guarantee which amounts to a statutory duty and which cannot be breached through the police unilaterally creating a consensual regime in contradiction to it.

4. Permission was granted on the grounds that, following the decision of the Supreme Court in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 ('*For Women Scotland*'):
 - (i) **Ground one**: there is no lawful basis for the police to conduct an opposite sex strip search based on the consent of the persons involved and, as such, the policy is *ultra vires* and/or in breach of statutory duty; and

 - (ii) **Ground two**: in formulating their guidance, the Defendants failed to comply with the Public Sector Equality Duty ("PSED") in that they failed to properly consider the impact on female police officers and female detainees in participating in a 'consensual' opposite-sex strip searching regime.

5. A third ground of claim was not pursued following receipt of the Summary Grounds of Resistance. The costs in respect of ground three are reserved to the substantive hearing of the claim for judicial review.

¹ Paragraph 5.3 of the BTP Guidance [CB/141]

6. Following service of the Detailed Grounds of Resistance and related witness evidence, the parties have agreed to the withdrawal of Ground Two by consent in an order signed on 18 May 2026.
7. The sole issue for determination by the Court, save for the costs of Grounds Two and Three², is the question of law underpinning Ground One: do the police have the power to conduct a strip search in breach of the same sex statutory duty imposed by s.54(9) of PACE?
8. The Claimant submits that:
 - (i) The language of s.54(9) of PACE 1984 is clear and unequivocal. The provision mandates that a police officer can only conduct a strip search of a detainee of the same sex. The Act does not make any provision for derogation from that obligation.
 - (ii) Parliament made provision elsewhere in PACE for the operation of consent and, through the absence of such a provision in s.54, must have intended that the same-sex guarantee in s.54(9) is a non-derogable duty.
 - (iii) Section 54(9) therefore imposes a statutory duty to conduct a strip search in accordance with the same-sex guarantee which, following the judgment in *For Women Scotland*, means that police officers are not empowered by any rational construction of s.54 of PACE to operate a consensual, opposite-sex, strip-search regime in contradiction of the statute.
 - (iv) There is no power at common law, independent of PACE, by which a police officer can conduct a strip search of a private citizen on the basis of consent, such that the Defendants' guidance can be rescued and rendered lawful.

² It is submitted that any costs submissions in relation to Counts 2 and 3 be made after judgment on Ground One is handed down.

2. THE LEGAL FRAMEWORK FOR 'STRIP SEARCHING' IN ENGLAND AND WALES

(i) The Police and Criminal Evidence Act 1984

9. The Police and Criminal Evidence Act 1984 contains a suite of powers pertaining to search of the person, the most well-known perhaps being the 'stop and search' power contained in s.1 and the power of search upon arrest contained in s.32. Those powers permit a relatively limited physical intrusion upon a person by a police officer – being limited to the removal of a jacket, coat and gloves and (only in the case of a search pursuant to s.32) permitting a search of a person's mouth. The limited nature of the searches permitted under ss.1 and 32 is congruent with these types of searches involving no exposure of the body, being performed in public/in view of the public, and outside of a police station.
10. Throughout PACE, Parliament has made clear when the exercise of a power of search is contingent upon more detailed protections; such protections include a condition pertaining to the sex of the searching officer. There are four powers of search enacted in ss.54 (searches of detained persons), 54A (searches to ascertain identity), 54B (searches of persons answering to live link bail) and 55 of PACE (intimate searches) which contain a same-sex guarantee. That guarantee is articulated either by use of the words that the person conducting the search be either '*the same sex*' or not '*of the opposite sex*' as the detainee. The powers enacted in ss.54, 54A, 54B and 55 pertain to persons detained at a police station, in police detention otherwise than at a police station (e.g., detained in a hospital) or present at a police station.
11. In relation to what has become commonly known as 'strip searching' and by reference to the powers quoted above, a police officer may search a person by requiring them to remove clothing, other than 'outer clothing', 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 such

an article: s.54(6)/(6A); PACE Code C, Annex A, paragraphs 9-10. Such searches can only be carried out by an officer and include what the College of Policing and the Defendants' guidance refer to as (a) "More Thorough Searches" ('MTS'), requiring removal of clothing additional to removal of a jacket/coat/gloves and (b) "Exposing Intimate Parts" ('EIP') searches, which expose the buttocks, genitals or (female) breasts. Section 54(9) of PACE states that, in respect of all MTS and EIP searches: "*The constable carrying out a search **shall** be of the same sex as the person searched*" (emphasis added). Section 54 contains no reference to consent of the detainee.

12. An intimate search, which consists of physical examination of an orifice other than the mouth, is carried out pursuant to s.55(1); PACE Code C, Annex A, paragraph 1. Where an officer and not a healthcare professional is authorised to conduct an intimate search (such instances are very rare), s.55(7) states: "*A constable **may not** carry out an intimate search of a person of the opposite sex*" (emphasis added). In respect of an intimate search sought to be performed for the purposes of establishing if a detainee has a Class A drug concealed on them, s.55(3A) requires that: "*A drug offence search shall not be carried out unless the appropriate consent has been given in writing*".

13. Insofar as the role of consent is concerned in the operation of PACE – specifically, as regards when a police officer can use reasonable force in the exercise of any power conferred upon them by the Act – s.117 provides as follows:

"117 Power of constable to use reasonable force.

Where any provision of this Act—

(a) confers a power on a constable; and

(b) does not provide that the power may only be exercised with the consent of some person, other than a police officer,

the officer may use reasonable force, if necessary, in the exercise of the power."

14. Section 117 is applicable to searches conducted under s.54: *Davies v Chief Constable of Merseyside Police* [2015] EWCA Civ 114 at [23]. Thus, the Claimant would observe at this juncture that Parliament, via the language of

s.117 of PACE, expressed its intention that the operation of the power conferred by s.54 of PACE is not contingent upon the consent of another person, including the detainee.

(ii) **The PACE Codes and Annex L**

15. The Home Secretary is required to produce Codes of Practice in connection with the use of powers of search and the detention, treatment and questioning of persons by police officers: s.66 PACE. The Codes are available for inspection at police stations and are admissible in a court of law. The Codes are amended by way of secondary legislation following consultation with defined persons/entities: s.67(2)-(4) PACE.

16. Section 39(1) PACE provides that it is the duty of the custody officer in a police station to ensure that all persons in police detention are treated in accordance with the Act and any Code of Practice issued under the Act.

17. PACE Code A governs the exercise by police officers of statutory powers to search a person or a vehicle without first making an arrest: paragraph 1.03. Annex A to Code A contains a list of 'stop and search' powers. That list does not include the power of search under s.54 PACE. The list, however, "*should not be regarded as definitive*": Code A, paragraph 1.03. Paragraph 1.5 of PACE Code A states:

"An officer must not search a person, even with his or her consent, where no power to search is applicable. Even where a person is prepared to submit to a search voluntarily, the person must not be searched unless the necessary legal power exists, and the search must be in accordance with the relevant power and the provisions of this Code." (emphasis added)

18. Code C is the relevant code of practice which governs this detention and treatment of detainees. On 10 July 2012, Code C was amended by way of inclusion of 'Annex L'. Annex L states that a Gender Recognition Certificate ('GRC') changes a person's legal sex for the purpose of ss.54 and 55 searches but that a person being searched must not be asked if they have a GRC. Annex

L thereafter sets out the procedure to be followed in order to identify a person's gender for the purposes of a statutory search.

19. Annex L purports to permit opposite sex searches to take place, because of the following paragraphs:

“ANNEX L ESTABLISHING GENDER OF PERSONS FOR THE PURPOSE OF SEARCHING AND CERTAIN OTHER PROCEDURES

1. Certain provisions of this and other PACE Codes explicitly state that searches and other procedures may only be carried out by, or in the presence of, persons of the same sex as the person subject to the search or other procedure or require action to be taken or information to be given which depends on whether the detainee is treated as being male or female. See Note L1.

2. All such searches, procedures and requirements must be carried out with courtesy, consideration and respect for the person concerned. Police officers should show particular sensitivity when dealing with transgender individuals (including transsexual persons) and transvestite persons (see Notes L2, L3 and L4).

(a) Consideration

3. In law, the gender (and accordingly the sex) of an individual is their gender as registered at birth unless they have been issued with a Gender Recognition Certificate (GRC) under the Gender Recognition Act 2004 (GRA), in which case the person's gender is their acquired gender. This means that if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman and they must be treated as their acquired gender.”

20. The current version of PACE Code C has had effect since 20 December 2023 [SB/715]. It necessarily pre-dates the judgment of the Supreme Court in *For Women Scotland*.

21. The BTP Guidance expressly states that Annex L is now to be disapplied³ [paragraph 4.4; CB/139]. Several other forces have confirmed to the Claimant

³ It was similarly expressly disapplied by the Second Defendant in its earlier guidance.

that they have disapplied Annex L⁴. The First Defendant has accepted that Annex L is “*probably unlawful*”⁵.

22. The Claimant wrote to the Home Secretary on 13 June 2025 to ask that Annex L be withdrawn. The Home Secretary has been served with the pre-action protocol letters and responses, notifying her that she is to be named as an Interested Party. On 29 August 2025, the Home Secretary informed the Claimant that she was actively considering the position in respect of the continuation of Annex L to PACE Code C, in light of the judgment in *For Women Scotland*. On 24 September 2025, the Home Secretary filed an Acknowledgment of Service and stated that she was “*considering her position regarding Annex L*”. On 9 March 2026, the Home Secretary wrote to the Court stating that she is “*actively developing her position regarding the legislative framework governing same-sex searches, PACE and Annex L. The Home Secretary’s current policy intention is to ensure that the legislative framework reflects a biological sex-based approach to police searches. The SSHD continues to work with other Government Departments to ensure certainty and clear guidance for the police that accords with the Supreme Court’s judgment in For Women Scotland*”. There have been no further updates.

(iii) **Police powers at common law**

23. It was held in *Rice v Connolly* [1966] 2 QB 414, per Lord Parker CJ at p.419B–C that:

“It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice.”

24. The above passage was cited by the Divisional Court in *Steel v Goacher* [1983] R.T.R. 98 at p.102J and explained as follows:

⁴ See letters from Merseyside [SB/660], Northumbria [SB/667], Surrey [SB/672] and Sussex police [SB/673]

⁵ Summary Grounds of Resistance at [35] [CB/86]

“The police could not carry out these duties unless they had the power to make reasonable inquiries of members of the public and the decision in Rice v Connolly makes it clear that in making such inquiries a police officer is acting within the scope of his duties and, thus, lawfully and within the execution of his duty. Of course, this power does not carry with it a power to detain or arrest and if the member of the public refuses to answer the police officer's questions he cannot be detained unless the officer has grounds for arresting him.”

25. In *R (Centre for Advice on Individual Rights in Europe) v Secretary of State for the Home Department* [2019] 1 W.L.R. 3002 ('Aire Centre'), the claimants challenged the legality of an enforcement operation by the Home Office by which EU citizens would be asked by police officers, if they were arrested, about their nationality and the basis on which they were exercising their rights to reside in the UK. In upholding the legality of the policy, the Court of Appeal held that at [38]:

“Put simply, the judge was correct to hold that police officers do have power at common law to ask questions of individuals and provide the answers to the Secretary of State in order to assist him in the exercise of his governmental function of enforcing immigration law”

26. It was in the context of that conclusion that the Court of Appeal went on to hold in the next sentence of [38] that:

“...as a matter of capacity, a police officer has the power to do anything an ordinary citizen can do, including non-coercive questioning of a person in custody; secondly, and in any event, the questioning is for a police purpose.”

(iv) **Strip searches and/or intimate searches: the Human Rights Act 1998**

27. Strip searching is capable, in itself, of engaging Articles 3 and 8 ECHR: *BK v Secretary of State for Justice* [2015] EWCA Civ 1259 at [51]. A search carried out appropriately, with a legitimate purpose and with respect for human dignity could be compatible with Art.3. However, where the search was carried out in a manner which was debasing and significantly aggravated the humiliation inherent in the procedure, Art.3 was engaged: *Yankov v Bulgaria* (39084/97)

(2005) 40 E.H.R.R. 36, [2003] 12 WLUK 338; *Wainwright v UK* (2007) 44 E.H.R.R. 40.

28. Breach of the relevant PACE Code may constitute evidence that a strip search has been unlawful contrary to Article 8(2) ECHR and s.7 of the Human Rights Act 1998, or a disproportionate means of achieving the aim of the search: *Davies v Chief Constable of Merseyside Police* [2015] EWCA Civ 114 at [29]; *Owens* at [21].
29. The minimum level of severity in relation to Article 3 ECHR regarding the conduct of law enforcement officers is conduct which diminishes human dignity and which is not strictly necessary: *Bouyid v Belgium* (2016) 62 EHRR 32.
30. The state has a negative obligation to refrain from carrying out searches in a manner which infringes Articles 3 and 8 of the ECHR; the state is further under a positive obligation to ensure, so far as reasonably practicable, that individuals are protected from cruel, inhuman and degrading treatment and from a disproportionate interference with their private life. In order to fulfil that obligation, there must at a minimum be an appropriate legislative and administrative framework which makes for the effective prevention of the risk of such Convention breaches, including appropriate preventative operational measures with suitable supervisory control and monitoring and mechanisms to ensure that such provisions were effectively implemented: *LW v. Sodexo* [2019] 1 W.L.R. 5654 at [41].
31. In *Valasinas v Lithuania* (Application 44558/98), the European Court of Human Rights found a violation of Article 3 ECHR where a male prisoner had deliberately been subject to a strip search in front of a female visitor, including having his genitals touched by the prison guard conducting the search.

3. THE GUIDANCE UNDER CHALLENGE

(i) The NPCC and BTP Guidance

32. On 11 January 2024, the NPCC withdrew its 2021 guidance '*Searching by Transgender Officers and Staff* [SB/324]. That guidance was withdrawn following criticism of it by the Minister for Crime, Policing and Fire, because it permitted male police officers who self-identified as women to strip search female detainees.

33. On 30 September 2024, BTP issued *Transgender and Non-Binary Search Position* guidance. This permitted same sex PACE strip searches to be carried out on the basis of an officer's or a detainee's sex as modified by a GRC. The guidance also purported to create a consensual opposite sex strip search regime.

34. The Claimant sought to challenge that guidance by way of judicial review. In short, the Claimant contended that the search policy was unlawful because it exposed female detainees to a risk of inhuman and degrading treatment through being searched by male officers, and that the policy exposed male and female police officers to a risk of harm through forced contact with genitalia of detainees of the opposite sex. The Claimant further contended that the same-sex guarantees in ss.54(9) and 55(7) PACE could not be altered by s.9(1) Gender Recognition Act ('GRA') and the search policy was *ultra vires*.

35. On 16 April 2025, the Supreme Court handed down judgment in *For Women Scotland*. The Court held:

- (i) For the purposes of the Equality Act 2010, "woman" means a biological woman and "sex" means biological sex, regardless of GRC status; and
- (ii) That "*where the words of legislation, enacted before or after the commencement of the GRA 2004, are on careful consideration*

interpreted in their context and having regard to their purpose” found to be inconsistent with the rule in s.9(1) GRA that a GRC changes a person’s sex in law for all purposes, that rule was disapplied by s.9(3) GRA without the need for express words of disapplication or for such disapplication to arise by necessary implication (emphasis added).

36. On 22 May 2025, the NPCC sent updated guidance to police Forces nationally. The NPCC directed Forces not to share a copy of this guidance. The Claimant’s solicitor obtained a copy of the NPCC Guidance through a FOIA response on 6 June 2025. The NPCC Guidance states that **[CB/134-135]**:

- (i) *“The police have a duty to respect Article 8 rights. Therefore, as far as operationally viable, where an individual whose lived in gender is not the same as their biological sex expresses a preference to be searched by an officer of their lived gender, efforts will be made to ensure an appropriate officer is identified to conduct the search. In such circumstances, the search would require the written consent of the authorising officer, the person detained and the particular officer/s conducting the search.”*
- (ii) *“A trans officer can be exempt from searching. There will be no career detriment to the officer or member of staff.”*
- (iii) *“The purpose of the proposed consensual regime is to preserve the integrity and dignity of trans detainees who are in custody where the alternative of a PACE search might amount to an interference with their Art 8/Art 3 rights. The same does not apply to an officer.”*
- (iv) *“There will be no career detriment to the officer or member of staff” who refuses to search a trans detainee. A request for an officer to carry out an opposite sex strip search will not be a “lawful order”.*

37. On 30 May 2025, BTP withdrew its ‘*Transgender and Non-Binary Search Position guidance*’. The Claimant’s challenge to that guidance was stayed by way of consent on 17 June 2025 until 30 June 2025 **[SB/525]**.

38. On 30 June 2025, BTP published ‘*Interim – Transgender and Non-Binary Search Guidance*’. Section 5 (“Consensual Searches”) states that under certain circumstances (including as to capacity) a detainee can consent to a search

outside the requirements of the legal power, in particular the requirement for a same-sex searcher (paragraphs 5.3—5.4).

39. Section 6 (“More thorough searches (MTs) and searches exploring intimate parts”) states:

“6.2. For the purposes of this guidance sex will mean biological sex (sex registered at birth).

6.3. The Officer must be the same biological sex (sex registered at birth) as the person being searched for More Thorough and EIP searches under statutory powers. (Section 54 of the Police and Criminal Evidence Act 1984 and Code of Practice on the Exercise by Constables of Powers of Stop and Search of the Person in Scotland)

6.4. Any officer or member of staff can refuse to search a Transgender detainee as part of a More Thorough Search or Search Exposing Intimate Parts with no detriment to their career.

6.8. Where the Transgender or Non Binary detainee indicates a preference to be dealt with by officers of a different biological sex to them for More Thorough and EIP searches, the detained person is to be informed that this can only be conducted as a consensual search (Section 5 of this guidance) with the officers, authorising officer and detained person’s explicit consent. This consent can be removed at any time from either party and the search conducted under the statutory powers as per section 6.6.”

40. At paragraphs 6.11-6.12 of the BTP Guidance, wording is set out for a declaration which is to be signed in the event of a consensual search.

(ii) **Operation of the Guidance**

41. Opposite-sex strip searches implemented in accordance with the Defendants’ Guidance expose female police officers being required to search a trans identifying male detainee (most likely with male genitalia). Male and female officers have expressed serious concern about what is involved in a female officer searching a male detainee; a man may not be cooperative to a female officer’s request for him to reveal his anus or pull back his foreskin and there is

a concern that a male detainee may prolong the search in order to humiliate the female officer⁶.

42. In these scenarios, given the likelihood that the strip search will be taking place at a police station, the search may be taking place against the detention clock ‘running down’⁷⁸. There will therefore likely be pressures of time brought to bear if a female officer expresses reluctance at examining a male’s genitalia – especially, for example, if the detainee is behaving in a challenging manner.

43. The Claimant relies upon the second witness statement of Maya Forstater, who reports the concerns and fears of a number of serving female police officers about the operation of a consensual opposite sex strip search policy outside the terms of PACE, as provided for in both Defendants’ Guidance⁹. The following paragraphs are of particular relevance¹⁰:

30 Under the new policies, cross-sex searches are said to be possible on a “consensual” basis, outside PACE and under a common-law principle that police officers can do anything by consent with members of the public that other citizens can do. The officers we spoke to said that these assertions ran contrary to all their training, and to the law as they have been taught to understand it. All said that in any situation where they are interacting with members of the public and a search is a possibility, there is an element of duress that means consent cannot be freely given. They also gave several examples of types of interactions to which two civilians can consent, but an officer or member of staff and a civilian cannot.

[...]

32 They rejected the idea that police officers can automatically enter into mutually “consensual” agreements with citizens to do anything that private citizens can consent to do with each other. The understanding of all the officers we spoke to was that in custody, and in the other situations where officers have lawful coercive powers (such as in stop and search), the element of duress means the very notion of “consent” is void. The

⁶ Witness Statement of Maya Forstater [CB/212], paragraphs 73-86 [CB/232-236]

⁷ In the first instance, a person shall not be kept in police detention for more than 24 hours without being charged: see sections 41-43 of PACE

⁸ “...quick decisions might need to be made [under s.54 PACE] for the protection of the detained person and others”: *Carter v Chief Constable of Essex Police* [2024] EWHC 126 (KB) at [47]; see also second witness statement of Catherine Larkman at paragraph 21

⁹ See footnote 6

¹⁰ CB/220

legal basis for a search under PACE is not consent: it is the lawful exercise of a power granted by PACE. Without that lawful power they questioned whether any search can be lawful.”

4. GROUNDS FOR JUDICIAL REVIEW

(i) The Claimant’s position

44. The source of the police’s power to conduct a strip search is s.54 of PACE. That power is overwhelmingly likely to be exercised during a person’s detention at a police station. The statutory power of search is qualified by the mandatory same-sex restriction contained in ss.(9): “*The constable carrying out a search **shall** be of the same sex as the person searched.*”

45. In general terms, the PACE architecture follows an identifiable pattern: the more intrusive the search in question, the greater the guarantees or protections afforded by the Act and its Codes. Thus, a person who is stopped and searched on the street under s.1 can have their coat and gloves removed by an officer of any sex, no doubt because their body is in no way being exposed to the officer or anyone else, and the search is relatively perfunctory. But, as the degree of physical intrusion increases – which one sees from the searches permitted by ss.54-55 – the Act guarantees certain enhanced conditions in respect of the conduct of strip and intimate searches:

- a. First, that a person who is or may be required to expose their genitals is in the controlled environment of police detention i.e., not in public; and
- b. Secondly, that where such a search is conducted by a police officer (as is the case in searches pursuant to ss.54 and 55), it is conducted by an officer of the same sex as the detainee.

46. There is no rational way of interpreting that escalating range of guarantees other than that they are mandatory. Further, it is hard to fathom that these guarantees were enacted for any purpose other than preserving, in a clear and predictable manner, the integrity and dignity of the detainee in what anyone

would accept to be humiliating circumstances where they are at the receiving end of one of the most intrusive powers available to the state, and are therefore at the most heightened risk of abuse of state power¹¹.

47. It was observed by the Supreme Court of Canada in *R v Golden* [2001] 3 SCR 679 that:

*“90 Strip searches are thus inherently humiliating and degrading for detainees regardless of the manner in which they are carried out and for this reason they cannot be carried out simply as a matter of routine policy. **The adjectives used by individuals to describe their experience of being strip searched give some sense of how a strip search, even one that is carried out in a reasonable manner, can affect detainees: “humiliating”, “degrading”, “demeaning”, “upsetting”, and “devastating”** (see *King, supra*; *R. v. Christopher*, [1994] O.J. No. 3120 (QL) (Gen. Div.); J. S. Lyons, *Toronto Police Services Board Review, Search of Persons Policy -- The Search of Persons -- A Position Paper* (April 12, 1999)). **Some commentators have gone as far as to describe strip searches as “visual rape”** (P. R. Shuldiner, *“Visual Rape: A Look at the Dubious Legality of Strip Searches”* (1979), 13 *J. Marshall L. Rev.* 273). **Women and minorities in particular may have a real fear of strip searches and may experience such a search as equivalent to a sexual assault** (Lyons, *supra*, at p. 4). *The psychological effects of strip searches may also be particularly traumatic for individuals who have previously been subject to abuse* (Commission of Inquiry into Certain Events at the Prison for Women in Kingston, *The Prison for Women in Kingston* (1996), at pp. 86-89). **Routine strip searches may also be distasteful and difficult for the police officers conducting them** (Lyons, *supra*, at pp. 5-6)”. (emphasis added)*

48. It is for that very reason – namely, the acute vulnerability of the detainee – that it is submitted the conditions in which a strip search are carried out ought to be entrusted to Parliament and not the police (or citizens), including the terms on which the conditions for statutory searches are to be derogated from.

49. These principles notwithstanding, both Defendants have purported to create a shadow regime of ‘consensual’ opposite sex strip searching which operates independently of the terms of s.54(9). In particular, the BTP Guidance

¹¹ See *R v Golden* [2001] 3 SCR 679 at [89], citing *R v. Flintoff* (1998), 16 C.R. (5th) 248 (Ont. C.A.) at p.257.

acknowledges that this regime (which is the same as the regime proposed by the NPCC) is “*in contradiction of the requirements of statutory powers*” [paragraph 5.3; **CB/141**]. It is submitted that neither the NPCC nor BTP is empowered unilaterally to create a policy which is in breach of a statutory duty.

50. The Defendants now rely upon what is suggested to be a power/right enjoyed by police officers as “*ordinary citizens*” to seek consent to consensual opposite sex strip searching. They rely for that proposition on the judgment of the Court of Appeal in *Aire Centre* at [38-39]. The difficulty is that the Court of Appeal’s confirmation that the police’s powers at common law embrace that which ‘ordinary citizens’ can do was reached on the basis that the ‘power’ or ‘right’ in issue was no more than the ability to ask a question – on those facts, in order to help the Secretary of State enforce immigration law.

51. Similarly, the English courts’ examination of the extent of police powers at common law in the cases of *Rice v Connolly* and *Steel v Goacher* (both cited with approval in *Aire Centre*) involved no more, on the facts, than a police officer asking a suspect his name (*Rice*) and a police officer asking a suspected drunken driver to undergo a breathalyser (*Steel*). Thus, the courts in these decisions agreed that the police at common law have powers to ask questions in order to keep the peace, prevent crime, protect property from criminal damage and ‘bring offenders to justice’. But none of those purposes are realistically engaged by an officer who seeks consent from a detainee to conduct a strip search in breach of the same sex guarantee contained in s.54(9) of PACE.

52. By reference to the foregoing, the statute does not empower an officer to conduct a strip search of the opposite sex, consensually or otherwise. Moreover, there is no apparent power at common law to operate a consensual regime “*in contradiction of the requirements of statutory powers*”. The consent regime purportedly created by each Defendant is therefore *ultra vires* and/or is in breach of the statutory duty articulated in s.54(9).

53. The position is not rescued by Annex L to Code C which is in apparent contradiction to the statute following the decision of the UKSC in *For Women Scotland*, as reflected in the concession made by BTP that Annex L is no longer to be followed (paragraph 4.4 of its Guidance).

54. The net result is that the position of female police officers and trans identifying female detainees is subject to uncertainty and vulnerability through ad-hoc exposure to opposite sex strip searches which are contrary to the mandatory protections of primary legislation: all the while the statute mandates a same-sex guarantee in the conduct of strip searches, each Defendant has promulgated guidance which is inconsistent with that, without any apparent power to do so. Simultaneously, Annex L remains in force, despite the Second Defendant having expressly accepted that it cannot be applied. The position with regards to Annex L is unacceptably confusing.

(ii) **The Claimant's response to the Defendants' position**

55. The Defendants seek to make good the legality of the consensual strip search regime by references to four propositions:

- a. A search is a trespass to the person absent a lawful power. Consent renders a search lawful;
- b. At the highest level, detention does not in principle vitiate consent as a lawful basis for what would otherwise be an assault;
- c. The police are permitted to rely on consent as a basis for a search; and
- d. There is no rule of law that precludes an officer from doing so.

56. Before dealing with each of those propositions in turn, the Claimant repeats paragraph 1 of its Reply [CB/98]: The Court is encouraged to take as the starting point that the consensual strip search regime is accepted to be contrary

to the terms of PACE. The question, therefore, is whether the police can lawfully contract out of the express statutory obligation imposed on them, rather than whether a private citizen can consent to it.

57. In respect of the first proposition, it is submitted that:

- a. It is accepted that consent is not a defence to all forms of assault in criminal law; that much follows from the decision of the House of Lords in *R v Brown* [1994] 1 A.C. 212. It is worth stating that the precise *ratio* of *Brown* is that, absent good reason, a victim's consent affords no defence to a charge under ss.20 or 47 of the Offences Against the Person Act 1861 and that the satisfying of sado-masochistic desires does not constitute such a good reason. Thus, a prosecutor does not need to establish the absence of consent in order to prove these offences.
- b. However, *Brown* has nothing to do with the exercise of police power. The decision of the House of Lords was concerned with the extent to which consent operated to negate criminality arising between citizens, in private, for sexual gratification (see speech of Lord Mustill at p.272H for a clear exposition of the public policy considerations). The *ratio* of the case cannot, or should not, be contorted into a basis for the operation by the police of a consensual strip search regime in breach of a statutory duty. Whether there is a legal basis for a private citizen to consent to a strip search in breach of a statutory duty is a question which engages serious considerations of public policy and not a mechanistic analysis of whether consent can freely be given.

58. In respect of the second proposition, it is submitted that:

- a. There is limited assistance to be derived from decisions in which the courts have had to grapple with whether informed consent was given to prisoners requiring medical treatment. In particular, the passage from *Freeman v Home Office (No 2)* [1984] QB 524 cited with approval by the

High Court in *K* [2015] UKUT 376 (AAC) at [131-133] was premised on the relevant doctor who “*has a power*” in respect of the detainee. The point here is that there is no power to conduct a strip search outside the terms of s.54(9).

- b. The Defendants’ reliance on *Owens v Chief Constable of Merseyside* [2021] EWHC 3119 (QB) to show that there is a consensual searching scheme under PACE is misconceived: the s.55 power to conduct an intimate search expressly provides for a consent provision in relation to an intimate search for Class A drugs. This only highlights the absence of such a provision contained within the duties within s.54(9) – which must be deemed to have been Parliament’s intention.

59. In respect of the third proposition, it is submitted that:

- a. The Defendant maintains reliance upon *Aire Centre*. The Claimant repeats its submission that the ratio of this case does not assist the Defendant in identifying a freestanding basis at common law for the conduct of a strip search. In that case, the Court of Appeal held that police officers had power at common law to do anything an ordinary citizen could do, including non-coercive questioning of a person in custody, which was not constrained or restricted by their particular duties and obligations and powers additional to members of the public and specific to their office.
- b. But, in possessing the “*same powers and rights as an ordinary citizen*”¹² i.e., the ability to ask non-coercive questions, the police are not empowered to seek consent to remove a person’s clothing and examine their genitals. Such an exercise obviously goes beyond non-coercive questioning.

60. In respect of the fourth proposition, it is submitted that:

¹² At [39]

- a. In circumstances where the Defendants have already accepted that the consent regime operates “*in contradiction*” to the statute, and where it is trite that PACE is the composite regime for the existence of police powers of arrest, search and seizure in England and Wales, it is not for the Claimant to identify a power by which police officers can seek consent to examine a person’s genitals in a police station. It is for the Defendant to point to the precise basis in law by which a police officer derives the power to act in defiance of a clear duty imposed by primary legislation. It is submitted that they have not done so.

- b. The Defendants’ reliance on *Rottman v Commissioner of Police of the Metropolis* [2002] 2 A.C. 692, to the effect that PACE does not expressly extinguish pre-existing common law police powers is, with respect, misconceived: section 53(1)(b) expressly abolished any common law powers of searches which existed prior to enactment of PACE, which authorised “*any search by a constable of a person in police detention at a police station*”¹³. That category embraces the searches now caught by s.54(9).

- c. In that connexion, and in the case of *R v Golden* [2001] 3 SCR 679, the Supreme Court of Canada reviewed the history of the power of search at common law in England and Wales prior to the enactment of PACE and observed – correctly, it is submitted – that:

“57 The common law power to carry out a personal search upon arrest in England has been superseded by the statutory powers of search set out in the Police and Criminal Evidence Act 1984 (U.K.), 1984, c. 60 (“P.A.C.E.”). The four main categories of search under the P.A.C.E. scheme are the “superficial” search, “full” search, “strip” search and “intimate” search. Superficial searches do not require the suspect

¹³ **53 Abolition of certain powers of constables to search persons.**

(1) Subject to subsection (2) below, there shall cease to have effect any Act (including a local Act) passed before this Act in so far as it authorises—

(a) any search by a constable of a person in police detention at a police station; or

(b) an intimate search of a person by a constable;

and any rule of common law which authorises a search such as is mentioned in paragraph (a) or (b) above is abolished

to remove any indoor clothing, while a full search may involve the removal of clothing but does not involve the removal of underclothing.

58 A strip search, which is defined in Annex A to P.A.C.E. Code of Practice C as “a search involving the removal of more than outer clothing” may only be carried out in compliance with the rules relating to strip searches set out in the P.A.C.E. Code. Such a search must always be carried out by a person of the same sex as the person being searched, out of sight of anyone of the opposite sex and anyone who does not need to be present. Normally two people must be present in addition to the person searched. Although the search involves the removal of all clothing, it should be done in such a way that the person is never completely undressed and should be conducted as quickly as possible. While a visual inspection of genital and anal areas may be conducted, no physical contact may be made. If objects are discovered in any body orifice other than the mouth and the person refuses to hand them over, their removal would constitute an intimate search which must be carried out in accordance with the rules pertaining to intimate searches.” (emphasis added)

61. Finally, it is respectfully submitted that the Defendants have failed to grasp the serious consequences of their position. If they are correct that this Court can – for the first time – articulate the existence of a common law power enjoyed by the police to act in defiance of a clearly confined statutory power of search where a citizen gives consent, the Defendants ought to have identified the terms on which such a power can be fettered, so as to reduce the risk of abuse of power which could flow from the ability of any police officer to abandon the mandatory provisions of primary legislation. No such terms have been identified.

5. CONCLUSION

62. The Court is respectfully invited to:

- a. Declare that the guidance of both defendants, in purporting to create a consensual opposite-sex strip search regime is in breach of s.54(9) of PACE 1984;

- b. Declare that there is no power at common law to conduct a strip search in breach of that duty;
- c. Quash the guidance of both Defendants; and
- d. Award the Claimant its costs to be assessed if not agreed.

**TIM OWEN KC
MATRIX**

**KATE O'RAGHALLAIGH
DOUGHTY STREET**

21 May 2026