SECRETARIAT GENERAL
SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRÉTARIAT DU COMITE DES MINISTRES

Contact: Simon Palmer
Tel: 03.88.41.26.12

Date: 31/05/2011

DH - DD(2011)419*

Item reference: 1115th DH meeting (June 2011)

Communication from National Human Rights Institution (NHRI) in the case of Gillan and Quinton against the United Kingdom (*Application No. 4158/05*) and reply of the government.

Information made available under Rules 9.2 and 9.3 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

* * *

Référence du point : 1115e réunion DH (juin 2011)

Communication de « National Human Rights Institution (NHRI) »dans l'affaire Gillan et Quinton contre le Royaume-Uni *(Requête n° 4158/05)* et réponse du gouvernement.

Informations mises à disposition en vertu des Règles 9.2 et 9.3 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

* In the application of Article 21.b of the rules of procedure of the Committee of Ministers, it is understood that distribution of documents at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers (CM/Del/Dec(2001)772/1.4). / Dans le cadre de l'application de l'article 21.b du Règlement intérieur du Comité des Ministres, il est entendu que la distribution de documents à la demande d'un représentant se fait sous la seule responsabilité dudit représentant, sans préjuger de la position juridique ou politique du Comité des Ministres CM/Del/Dec(2001)772/1.4).

Execution of Judgments of the European Court of Human Rights

Gillan & Quinton v the United Kingdom (application no. 4158/05)

Information submitted by the Equality and Human Rights Commission (the Commission)

1.The Commission requests that the above judgment be transferred to the procedure of enhanced supervision.

2. The Commission considers the case discloses major structural and complex problems, that would benefit from enhanced supervision by the Committee of Ministers. The Commission has reviewed the government's action plan.

3. Following the courts judgment in Gillan and Quinton the UK government announced that it would suspend the use of S 44 stop and search without reasonable suspicion. Guidance was accordingly disseminated to chief constables to suspend use of this power.

4. The government launched a review of on a number of counter terrorism measures, including the use of S 44. A large number of organisations, including the Commission gave evidence to the review.

5. Following the review the government has brought forward proposals for reform of S 44 in the Protections of Freedom Bill.

6. The bill contains amendments to the s 44 power to include greater restrictions on its use. These include;

- Narrowing the definition for when an authorisation can be sought to where a senior officer :
  (a) reasonably suspects that an act of terrorism will take place; and
  (b) considers that—
  (i) the authorisation is necessary to prevent such an act;
  (ii) the specified area or place is no greater than is necessary to prevent such an act; and
  (iii) the duration of the authorisation is no longer than is necessary to prevent such an act

- Enhanced opwoers to confirm, cancel or vary the authorisation by the Secretary of State
- Restrictions on the length of authorisation to 14 days.
- A code of practice

However the provision that there is no requirement of reasonable suspicion to exercise this power of stop and search explicitly remains .

These provisions are currently being debated by Parliament.

7. On 18th March 2011 a remedial order under s 10 of the Human Rights Act came into force, amending s 44 with identical provisions to those contained in the Protection of Freedoms bill on a temporary basis, with an associated code of practice. The government stated that they required a remedial order to fill an urgent gap in their powers, pending passing of the Protection of Freedoms bill. The Commission is unaware as to whether any authorisation is currently in place, or has been sought under these powers, as there is no requirement to publish authorisations.

8. The Joint Committee on Human Rights is undertaking legislative scrutiny of the remedial order and is due to report at the end of May. The Commission submitted evidence to the Committee, attached at annex 1 The remedial order is due to be debated by Parliament.

9. The Commission has obtained the advice of Rabinder Singh QC and Professor Aileen Mccolgan on the compatibility of remedial order and the proposed legislation under the Protection of Freedoms with the ECHR, and the Courts judgement in Gillan. Counsel had advised that;

> "It is our view that the proposed new regime for what might justifiably be termed "arbitrary S&S" (this by contrast with "reasonable suspicion S&S" under PACE), although an improvement on the current position, is likely to be incompatible with Articles 5, 8, 10, 11 and 14 ECHR, of the Equality Act 2010 and of international law.
>
> The fundamental difficulty with the regime is that the lack of any requirement for reasonable suspicion in our view renders selection for S&S arbitrary so as to breach Article 5 to the extent that it amounts to deprivation of liberty; to create problems as regards the creation of a legal basis for interference with Articles 8, 10 and 11 of the Convention and; and to invite discrimination contrary to Article 14 of the Convention by those exercising the power of selection for S&S. The various amendments to the legislation which have been made, and which have been suggested, while they are welcome improvements, do not remove this fundamental difficulty. The more that further enhancements of the regime were to occur as regards (for

example) temporal and geographical limitations on authorisations, and in particular judicial approval of the issue of authorisations, the more likely it is that the new regime will be compatible with the Convention rights. However, in our view, it will remain the case that its operation is likely to result in breaches of Articles 5, 8, 10, 11 and 14 because of the fundamental requirement of 'lawfulness".

A copy of Counsel Advice is attached at Annex 2

11. The Commission has particular concerns as to the impact on race and ethnic groups of stop and search powers generally, and more specifically that the use of s 44 , and therefore future stop and search powers not based on reasonable suspicion will be discriminatory. The Commission is also concerned regarding the impact of use of such powers on good relations and in particular Muslim communities.

12. Analysis by the Commission shows that stops and searches under s44 powers were six times as frequent for the black population as for the white population in England and Wales, and nearly six times as frequent for the Asian population as for the white population.[1]

13. The Commission is due shortly to publish research on the impact of counter terrorism measures on Muslim communities. The research finds that for many Muslims, particularly young men, being stopped and searched in the street by the police was one of the most common encounters with counter terrorism policing. Most Muslims in the research discussion groups, had direct experience of being stopped and searched, had close friends and family that had been affected or had witnessed the police carrying out stops and searches in their local area.

In general, individuals did not make a distinction between stops under s44 relating to terrorism compared to stops under other police powers. Concerns focused around three main issues: the extent of stops (that is the number of stops being carried out); the treatment of individuals when they are stopped; and the perceived discriminatory use of the powers. The strongest negative feeling arose from perceptions that individuals were being stopped because of their religion or race.

[1] Analysed from data for the period October 2009 – September 2010 published in Home Office Statistical Bulletin: Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stop & searches, Quarterly update to September 2010, Great Britain. Disproportionally ratios compared with the white population: Black or Black British 6.1, Asian or Asian British 5.7, Mixed ethnic group 2.6, Chinese or other 4.3. See the EHRC publication 'Stop and Think' for definition of proportionality ratios. Population estimates used in the calculation were from ONS, Population estimates by ethnic group (experimental) mid-2007, 2010. Table EE4.

See also House of Commons library research paper 11/20

The concerns about the impact of stop and search were also shared by practitioners both in the police and local authorities in the research case study areas. A senior police officer interviewed in one of the case study areas outside London said that they were reluctant to use s44 powers in his area because of its potential damaging impact on relations with local communities. In his experience, where s44 powers are used on a significant scale, they become the main point of contact between the police and local residents. The damage to community relations from poor treatment or profiling can occur because, when large numbers of stops are carried out, it is inevitably, 'the least experienced officers who are then asked to carry out what is, from the perspective of community policing, one of the most important tasks'. The officer who said this had been left with the impression that the actions of some officers may be based on racial or religious profiling or, at the very least, create the perception that they are. [2]

14. While the current legislative proposals and remedial order are an improvement on the previous s 44 stop and search regime, and meet some of the concerns expressed by the Court in Gillan, the Commission considers that the remedial order and proposed legislative framework are still likely to breach the ECHR and fail to comply with the Courts judgment in Gillan.

15. As such the Commission considers that the government's proposals and actions to date fail to provide adequate implementation of the Courts judgment in Gillan and Quinton. The Commission considers that the case raises major complex and structural issues that would benefit from enhanced supervision by the Committee of Ministers.

[2] Choudhury, T. (forthcoming 2011) The impact of counter terrorism measures on Muslim communities. Manchester: EHRC

Annex 1

Equality and Human Rights Commission

Parliamentary submission to the Joint Committee on Human Rights

Scrutiny of replacement power to stop and search without reasonable suspicion

For further information, please contact:

Sarwar Khan
Parliamentary Affairs Officer
Tel: 020 3117 0312

Email: sarwar.khan@equalityhumanrights.com

Contents

Summary.....7
Compliance of the remedial order with human rights.....8
Restrictions on the scope of the power 9
Code of Practice 12
About the Equality and Human Rights Commission 14

Summary

1. The Equality and Human Rights Commission (the Commission) welcomes the opportunity to provide evidence to the Joint Committee on Human Rights as part of its scrutiny of the replacement power to stop and search without reasonable suspicion. Our submission is provided in the context of our statutory duty to promote, enforce and monitor the effectiveness of equality and human rights enactments.[3]

2. The Commission recognises that there may be very exceptional circumstances in which it is necessary for there to be a power to stop and search without reasonable suspicion. However, we suggest that any departure from the principle of reasonable suspicion must be only used where it is absolutely necessary, for instance, to prevent a real and immediate act of terrorism or to search for perpetrators or weapons following a serious incident.

3. The Commission believes that use of the stop and search power without reasonable suspicion must be non-discriminatory and in accordance with the provisions of the European Convention of Human Rights (the Convention).

4. We welcome proposals in the Protection of Freedoms Bill to amend section 44 stop and search powers. But, as currently drafted, these are likely to fail to meet requirements under the Convention. The Commission would suggest additional safeguards for use of these powers.

[3] Sections 8 and 9, Equality Act 2006.

Compliance of the remedial order with human rights

5. The Commission has obtained the advice of Rabinder Singh QC (who was counsel in the case of Gillan[4]) and Professor Aileen McColgan as to the compliance of provisions in the Protection of Freedoms Bill to amend Sections 44-47 of the Terrorism Act 2000, with domestic and international human rights and equality requirements.

6. A copy of counsel's advice is attached in annex 1. On this point, counsel has advised that:

"It is our view that the proposed new regime for what might justifiably be termed "arbitrary S&S" (this by contrast with "reasonable suspicion S&S" under PACE), although an improvement on the current position, is likely to be incompatible with Articles 5, 8, 10, 11 and 14 ECHR, of the Equality Act 2010 and of international law.

The fundamental difficulty with the regime is that the lack of any requirement for reasonable suspicion in our view renders selection for S&S arbitrary so as to breach Article 5 to the extent that it amounts to deprivation of liberty; to create problems as regards the creation of a legal basis for interference with Articles 8, 10 and 11 of the Convention and; and to invite discrimination contrary to Article 14 of the Convention by those exercising the power of selection for S&S. The various amendments to the legislation which have been made, and which have been suggested, while they are welcome improvements, do not remove this fundamental difficulty. The more that further enhancements of the regime were to occur as regards (for example) temporal and geographical limitations on authorisations, and in particular judicial approval of the issue of authorisations, the more likely it is that the new regime will be compatible with the Convention rights. However, in our view, it will remain the case that

[4] Gillan & Quinton v UK [2010] ECHR 28. In this case the European Court of Human Rights considered compliance of the previous section 44 stop and search powers with the Convention.

its operation is likely to result in breaches of Articles 5, 8, 10, 11 and 14 because of the fundamental requirement of 'lawfulness".

7. For these reasons, the Commission believes that the exercise of stop and search powers without reasonable suspicion may breach Convention rights.

Restrictions on the scope of the power

8. As outlined above, the Commission believes that, in general, stop and search in absence of reasonable suspicion may breach Convention rights. However, it is clear that the more tightly the provisions under which the stop and search power is exercised, the more likelihood that the exercise of the power will be lawful.

9. The court in its findings in Gillan[5] made a number of criticisms of the use of the powers. The Commission considers that greater circumscription of the powers is more likely to meet at least some of these criticisms.

10. In the next section, the Commission considers in more detail the questions raised by the JCHR in relation to ways in which such a powers might be circumscribed.

- **Requirement of reasonable belief on part of the authorising officer**

11. The Commission welcomes the introduction of reasonable suspicion to the requirement that an authorising officer suspects an act of terrorism will take place (S 43 B (1)(a). We also welcome the provisions in the Code of Practice to the Remedial Order of the 2000 Act, requiring an explanation as to why the powers are felt appropriate and necessary, and why other measures are regarded as inadequate.

[5] Gillan & Anor v UK [2009] ECHR 28

12. We would suggest that the following would provide better checks on the use of the power, and meet some of the criticisms expressed by the Court in Gillan:

    i. the introduction in the statute of a requirement of reasonable belief of the officer of the matters in section 43 (1) (b) (i-iii), and
    ii. a requirement that the authorising officer provide an explanation as to why the powers are necessary and appropriate (and why other measures are regarded as inadequate).

- **Geographical area and duration of authorisation**

13. The Commission would suggest that the provisions should be more tightly proscribed to include a specific geographical limit and would suggest a limit of no more than one square mile. As recommended in our advice from counsel, the greater the geographic and temporal limitations, combined with other requirements, the more likely the regime will be compatible with Convention rights.

14. In relation to the duration of an authorisation, the Commission suggests that a maximum duration period should be no longer than 48 hours. Any need for longer periods of designation should require a fresh authorisation, made by a judge.

15. Concerns were raised in respect of the previous legislation that rolling authorisations were used, to create long continual periods of designation. The Commission suggests the provisions are amended to prevent this occurring, with a limit specified as to the number of authorisations that can be made consecutively and in relation to a given place, without new evidence.

16. However, these limitations to both time and geographical extent should not substitute the ongoing requirement for authorising

officers to justify the necessity of both time and geographical restrictions, as suggested in paragraphs 11 and 12 above.

- **Prior judicial authorisation**

17. The Commission considers that designations and subsequent requests for renewal should be subject to prior judicial authorisation. In urgent cases, the Commission considers that an authorisation could be made by a senior police officer, with the requirement that it must be confirmed by a judge within 24 hours.

18. The court in the Gillan case expressed concern over review of authorisations. In particular, the court noted the limited review powers of the Secretary of State and that (as far as it was aware) no authorisations had subsequently been refused. It also expressed concern that the only judicial scrutiny of use of the powers was limited judicial review.

19. As legal counsel state in their advice on this matter:

"The position would be improved in our view, if authorisations required judicial approval, thus increasing the likelihood of robust and independent scrutiny of the necessity for them. The fact that the s.44 regime, despite its requirement for authorisations, operated in such a way that the Home Secretary herself, in a written Ministerial Statement issued on 17 March 2011, referred to it as "discredited, ineffective and unfair" does not suggest that the executive is necessarily to be trusted to keep in check police enthusiasm for arbitrary S&S powers which resulted in a rolling authorisation being in place across the whole of London for almost a decade....."

And in relation to the issue of renewal of authorisations:

"It remains a matter of real concern that the executive can, without judicial supervision, maintain a regime of arbitrary S&S. It is hard to say how the power to reissue authorisations could be tightened up so as to avert criticisms 4 and 6 of the ECtHR in *Gillan*, absent judicial

involvement, without seeing over time how these powers are actually operated in practice."

- **Public notification**

20. The Commission would welcome public notification of authorisations. Firstly, we consider this may have a practical, deterrent effect in respect of the risk of terrorist activities. Secondly, we consider it would enable better scrutiny by the public, interested organisations, Parliament and regulatory bodies (such as the Commission), as to the operation of the provisions.

21. The Commission considers that public notification of authorisations could facilitate judicial scrutiny through providing evidence for public law challenges to authorisations and the use of the powers. However, the Commission notes counsel's advice that knowledge of the possibility of such a stop and search would not itself make the proposals compliant with Article 5 (see paragraph 25 of counsel's advice attached.)

Code of Practice

Provisions on the face of the Bill

22. The Commission welcomes the provisions in the Protection of Freedoms Bill on code of practice in relation to stop and search powers.[6] This places a duty on the Secretary of State to prepare a code of practice and requires that the code is kept under review. However, we consider that elements of the Code that restrict the use of the powers should be on the face of the legislation. This may address some of the criticisms made in Gillan.

23. The Commission regards this important for several reasons. Firstly, the provisions of the Code, as currently stands, are not legally binding, unlike legislation and secondly they are easier to

[6] Clause 61, Protection of Freedoms Bill 2010

amend than primary legislation which could mean restrictions are lifted in future without sufficient scrutiny and debate.

24. The Commission considers that placing elements of the Code on the face of the legislation would enable greater clarity as to the effect of the Code, enable breaches to be challenged in court and make checks in relation to the use of stop and search powers legally binding.

Peaceful protestors

25. The Commission would recommend that consideration is given in the Code to clarify the relationship between these powers and the right to peaceful protest. While it will always be possible that protesters may be engaged in terrorist activities and so be subject to the powers, there has been concern regarding the use of the powers against protestors (as in Gillan) and the potential chilling effect on peaceful protest.

Unlawful discrimination

26. The Commission also welcomes the attempts in the Code to address the issue of unlawful discrimination. However, the Commission believes that the effect of these provisions will be discriminatory in practice.

27. Counsel has advised that:

> "In our view, that breaches of Article 14[7] are likely to arise in connection with the operation of S&S without reasonable suspicion under the proposed regime, as under its predecessor."

28. The Commission is concerned that under the previous section 44 regime use of power was six times as frequent for the black population as the white population in England and Wales, and

[7] Article 14 of the Convention contains a prohibition of discrimination.

nearly six times as frequent for the Asian population as for the white population.[8]

29. These figures are particularly stark in view of the Independent Reviewer of counter terrorism's suggestion that there has been a practice of stopping and searching white people purely to produce greater racial balance in the statistics.[9]

30. The Commission is due shortly to publish research on the impact of counter-terrorism measures on Muslim communities.[10] For many Muslims in the research, particularly young men, being stopped and searched in the street has become their most frequent and regular contact with the police. Our research suggests that for some this contributes to a sense of alienation and fuels perceptions of racial and religious discrimination. These dangers were recognised by police officers and policy makers.

31. The Commission would suggest measures should be taken to address concerns regarding the potential for discrimination in the use of stop and search powers. This may be done through the legislation itself, in the Codes of Practice, or through training and other guidance.

About the Equality and Human Rights Commission

32. The Equality and Human Rights Commission is an independent statutory body established under the Equality Act 2006. The Commission works to reduce inequality, eliminate discrimination, strengthen good relations, and promote and protect human rights. As a regulator, the Commission is responsible for enforcing equality legislation on age, disability, gender, race, religion or belief, sexual orientation or transgender status, and encouraging

[8] House of Commons library research paper 11/20

[9] Report on the operation in 2009 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006, by Lord Carlile of Berriew Q.C. July 2010

[10] Choudhury, T. (forthcoming 2011) The impact of counter terrorism measures on Muslim communities. Manchester: EHRC

compliance with the Human Rights Act. The Commission has achieved ‘A’ status accreditation as a National Human Rights Institution, enabling us to participate in the United Nations Human Rights Council, and to undertake monitoring of the UK’s human rights obligations.

Annex 2

IN THE MATTER OF:-

THE TERRORISM-RELATED STOP AND SEARCH POWER PROPOSED BY THE PROTECTION OF FREEDOMS BILL 2011

ADVICE

INTRODUCTION

1. We have been asked to advise the Equality and Human Rights Commission ("the Commission") on the compatibility with the European Convention on Human Rights (and other relevant law) of the stop and search ("S&S") powers in the Terrorism Act 2000 proposed in the Protection of Freedoms Bill 2011 ("the Bill"), ss.58-61. In short, for the reasons set out below, we advise that the amendments proposed to the current regime by the Bill, although an improvement, are insufficient to prevent breaches of the Convention, of the Equality Act 2010 and of international law.

2. In particular, it is our view that coercive S&S of the nature contemplated by the 2000 Act involves "detention" for the purposes of Article 5 of the Convention, and that the inherently arbitrary nature of S&S without the need for reasonable suspicion is irredeemably incompatible with that provision. It is, further, our view that the proposed amendments to the Terrorism Act, although they do represent an improvement on the present situation, do not meet all of the criticisms on the basis of which the European Court of Human Rights ruled in *Gillan & Anor v UK* [2009] ECHR 28 that the current law governing S&S was not of sufficient quality to provide a basis for a 'lawful' interference under Article 8(2) of the Convention. A number of the criticisms made by the ECtHR are met by

the proposed amendments to the Act contained in the Bill but, in our view, neither the proposed amendments nor any other changes short of a requirement for reasonable suspicion on the part of the person selecting for S&S is likely to go far enough to provide in the 2000 Act's S&S provisions a sufficient legal basis for interferences with Article 8. We are also of the view that the proposed regime, like its predecessor, carries the serious risk that it will result in breaches of Articles 10, 11 and 14 of the Convention, the latter because of an absence of control as regards discrimination on grounds or race and/or perceived religion in selection for S&S.

BACKGROUND

3. A variety of different legal provisions currently govern S&S. Our present Advice is concerned only with those carried out under the Terrorism Act 2000, in particular those carried out under authorisations granted, prior to March 2011, under s.44 of that Act. Prior to its amendment by a remedial order passed under section 10 of the Human Rights Act 1998, pending the intended implementation of the Bill, the 2000 Act provided for S&S on "reasonable suspicion" (s.43) and for S&S without any requirement for "reasonable suspicion" under "authorisations" issued under s.44 of the Act. A senior police officer could issue an authorisation where s/he "consider[ed] it expedient for the prevention of acts of terrorism".[11] Such an authorisation, which could be issued orally if confirmed in writing "as soon as is reasonably practicable" thereafter (s.44(5)), "authorise[d] any constable in uniform to stop" a pedestrian or vehicle "in an area or at a place specified in the authorisation and to search" the pedestrian, driver and/or passenger; the vehicle and its contents (in the case of a vehicle stop); and anything carried by the pedestrian, driver and/or passenger (s.44(1), (2)).

4. Authorisations could cover "whole or part of a police area outside Northern Ireland", the whole or part of Northern Ireland, the metropolitan police district or the City of London, the police officers with power to issue authorisations

[11] S.44(3), emphasis added.

being those of the rank at least of assistant chief constable or, in the case of the metropolitan police district or the City of London, commander of the relevant area (s.44(4)). They could last for up to twenty-eight days, the date of their expiry to be specified in the authorisation, and confirmed by the Secretary of State within 48 hours if they were to remain valid beyond that time (s.46(4)). They were subject to renewal, as happened in the Greater London area where a rolling authorisation applied to S&S between 2001 and the suspension of s.44 S&S in the wake of the ECtHR decision in *Gillan* (see further below) and the rejection by the Grand Chamber in July 2010 of the UK's application for a reference from the Chamber.

5. Section 47 made it an offence to fail to stop a vehicle when required to do so by a constable in the exercise of the power conferred by an authorisation under s.44(1) or (2) or wilfully to obstruct a constable exercising the power conferred by an authorisation under s.44(1) or (2), and provided for maximum penalties for such offences.

6. The significance of authorisations granted under s.44 of the Terrorism Act 2000 was that they were free from the normal "reasonable suspicion" requirement for S&S carried out for the purposes of (s.45(2)(a)) "searching for articles of a kind which could be used in connection with terrorism". The requirement for reasonable suspicion and the associated requirement for objective grounds for such suspicion were introduced in "ordinary" S&S by the Police and Criminal Evidence Act 1984 and Code of Practice A issued thereunder, this in the wake of the abolition of the infamous "sus" laws (ss.4 and 6 of the Vagrancy Act 1824), which permitted arrest and prosecution for frequenting or loitering in a public place with intent to commit an arrestable offence, and which were used disproportionately against Black men.

7. In *Gillan & Anor v UK* [2009] ECHR 28, the ECtHR ruled that S&S carried out under s.44 authorisations had breached the Applicants' rights under Article 8 ECHR. The Court drew attention to the fact that the S&S powers allowed individuals to be stopped anywhere, at any time, without notice and without any

choice as to whether or not to submit, and that the searches permitted under s.44 extended to the required public removal of headgear, footwear, outer clothing and gloves, and the searching by hand of pockets, hair, and the inside of collars, socks and shoes, and that "the public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment" [63]-[64]. As to the question of justification, Article 8(2) required not only that "the impugned measure … have some basis in domestic law" but also that it "be compatible with the rule of law" which required in turn that the law be "formulated with sufficient precision to enable the individual—if need be with appropriate advice—to regulate his conduct" [76].

> 77… In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the convention, for a legal discretion granted to the Executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise …

8. In *Gillan* the Court accepted that the S&S power had a basis in domestic law (ss 44–47 TA 2000 and the accompanying Code of Practice which "sets out details of the manner in which the constable must carry out the search" [78]). But notwithstanding the "eleven constraints on abuse of power"[12] identified by Lord Bingham in the House of Lords, "the safeguards provided by domestic law had not been demonstrated to constitute a real curb on the wide powers afforded to the Executive so as to offer the individual adequate protection against arbitrary

[12] *R (Gillan & Anor) v Commissioner of Police for the Metropolis & Anor* [2006] UKHL 12, [2006] 2 AC 307, [14]: authorisations (1) "may be given only if the person giving it considers (and, it goes without saying, reasonably considers) it expedient 'for the prevention of acts of terrorism'"; (2) "may be given only by a very senior police officer"; (3) "cannot extend beyond the boundary of a police force area, and need not extend so far"; (4) are "limited to a period of 28 days, and need not be for so long"; (5) "must be reported to the Secretary of State forthwith"; (6) "lapse[] after 48 hours if not confirmed by the Secretary of State". (7) "the Secretary of State may abbreviate the term of an authorisation, or cancel it with effect from a specified time" (8) "a renewed authorisation is subject to the same confirmation procedure", (9) "the powers conferred on a constable by a [s.44] authorisation … may only be exercised to search for articles of a kind which could be used in connection with terrorism"; (10) "Parliament made provision in s 126 for reports on the working of the Act to be made to it at least once a year, which have in the event been made with commendable thoroughness, fairness and expertise by Lord Carlile of Berriew QC"; and (11) "any misuse of the power to authorise or confirm or search will expose the authorising officer, the Secretary of State or the constable, as the case may be, to corrective legal action.

interference [79]. The ECtHR based its conclusions on the lack of justification for the Article 8 interferences there at issue on the following:

1. The test of "expediency" applicable to the issue of authorisations;
2. The absence of any power on the part of the Secretary of State to alter the geographical coverage of an authorisation;
3. The fact that the Secretary of State had never in fact refused to confirm an authorisation, and had never substituted an earlier time of expiry;
4. The fact that, although authorisations were time-limited, they were subject to renewal;
5. The potential geographical width of authorisations;
6. The fact that a rolling authorisation had been in place for the Metropolitan Police District since the powers were first granted, which suggested an absence of Parliamentary constraints on the exercise of s.44 authorisations;
7. The fact that the powers of the independent reviewer were limited to reporting on the general operation of the statutory provisions and did not extend to the cancellation or alteration of authorisations;
8. The breadth of the discretion conferred on the individual police officer whose decision to S&S was unrestricted by the code or otherwise and was "based exclusively on the 'hunch' or 'professional intuition' of the officer concerned";
9. The fact that constables engaged in s.44 S&S did not have to "demonstrate the existence of any reasonable suspicion" or "even subjectively to suspect anything about the person stopped and searched. The sole proviso is that the search must be for the purpose of looking for articles which could be used in connection with terrorism, a very wide category which could cover many articles commonly carried by people in the streets";
10. The disparity between the number of s.44 S&S and the absence of any convictions flowing therefrom;
11. The examples provided to the Court of inappropriate use of s.44 S&S;
12. The risk of race discrimination arising from the broad discretion provided to police constables by s.44 S&S authorisations;

13. The risk of misuse of s.44 S&S authorisations against demonstrators and protestors in breach of Articles 10 and/or 11 of the Convention;
14. The difficulty of showing that an individual s.44 S&S was improper.

9. The Court also expressed concern ([85]) as to the "risk that such a widely framed power" as that provided to police constables under s.44 authorisations "could be misused against demonstrators and protestors in breach of art 10 and/or art 11 of the Convention". Very importantly, the Court stated, in response to the Applicants' complaint of breach of Article 5, that:

> "[t]he difference between deprivation of and restriction upon liberty is … merely one of degree or intensity, and not one of nature or substance" and "although the length of time during which each applicant was stopped and search did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of art 5(1)" [56]-[57].[13]

10. Having determined that the Applicants' rights under Article 8 had been breached, the Court did not find it necessary to reach any conclusions on Articles 5, 10 or 11. It is clear, however, from the extract cited immediately above that S&S is likely to bring Article 5 into play. The implications of this are considered further below.

THE PROPOSALS

11. The Bill provides, so far as relevant, for the repeal of ss.44-47 of the Terrorism Act 2000 (clause 58) and the enactment of replacement powers by clauses 59-61 (leaving aside S&S in Northern Ireland). In short, the Bill, if enacted, would expand what is currently s.43 of the Terrorism Act 2000, providing for "reasonable suspicion" S&S of vehicles as well as persons (proposed new s.43(4B) and 43A), and would remove the current requirement that s.43

[13] Citing *Foka v Turkey* [2008] ECHR 28940/95 at paras 74–79

searches be carried out by persons of the same sex (currently s.43(3)). The scope of "authorisations" for S&S without the requirement of reasonable suspicion would be provided (cl.60 of the Bill) by proposed new s.43B "Searches in specified areas or places" which provides as follows:

> (1) A senior police officer may give an authorisation under subsection (2) or (3) in relation to a specified area or place if the officer—
>
> (a) reasonably suspects that an act of terrorism will take place; and
>
> (b) considers that—
>
> (i) the authorisation is necessary to prevent such an act;
>
> (ii) the specified area or place is no greater than is necessary to prevent such an act; and
>
> (iii) the duration of the authorisation is no longer than is necessary to prevent such an act [emphasis added].

12. An authorisation would authorise "any constable in uniform" to stop any vehicle or pedestrian "in the specified area or place" and to search the vehicle, driver, passenger and/or "anything in or on the vehicle or carried by the driver or a passenger", or the pedestrian and/or anything carried by the pedestrian.[14] Such powers must be exercised "only for the purpose of discovering whether there is anything which may constitute evidence that the vehicle concerned is being used for the purposes of terrorism" or that the person "is or has been concerned in the commission, preparation or instigation of acts of terrorism".[15] But (proposed s.43B(5), emphasis added): "the power conferred by such an authorisation may be exercised whether or not the constable reasonably suspects that there is such evidence".

13. The Bill would also insert a new Schedule 6B into the Terrorism Act 2000 which would, *inter alia*, provide a maximum period of authorisation of 14 days and confer powers of confirmation, rejection, amendment and cancellation on the Secretary of State, and powers of cancellation and reduction (geographical and

[14] Proposed new s.43B(2) and (3) respectively.

[15] Proposed new s.43B(4) and Terrorism Act 2000, s.40(1)(b).

temporal) on the police officer who issued the authorisation. It remains the case, however, that (proposed Sch.6B, para 11) "The existence, expiry or cancellation of an authorisation does not prevent the giving of a new authorisation". In other words, there could still be a rolling authorisation.

14. Clause 60 provides that the Secretary of State (proposed new s.43C of the 2000 Act) must, after consultation with the Lord Advocate "and such other persons as [s/he] considers appropriate", issue a Code of Practice containing guidance not only about the exercise of the powers conferred by ss.43, 43A and by authorisations issued under s.43B (proposed new s.43C(1)(a), (c))) but also about "the exercise of the powers to give an authorisation under s.43B(2) or (3)" (proposed new s.43C(1)(b)). Such a code of practice must (proposed new s.43D) be laid before Parliament for affirmative resolution and must (proposed new s.43F) be published (proposed new s.43E) and be kept under review by the Secretary of State with a view to alteration where appropriate in line with the procedure for issue of the code. Proposed new s.43G requires constables to "have regard to the search powers code when exercising any powers to which the code relates" but provides that failure to comply with the code "does not of itself make that person liable to criminal or civil penalties".

15. On 17 March 2011 it was announced that a remedial order would be made under s.10 of the Human Rights Act 1998 to amend the Terrorism Act 2000 by replacing ss.44-47, on a temporary basis, with a new s.47A which is identical to proposed new s.43B, and which brings Sch.6B into effect on a temporary basis.

16. The remedial order came into effect on 18 March 2011[16] together with a "Code of Practice for the Authorisation and Exercise of Stop and Search Powers Relating to Section 47A [and] Schedule 6B to the Terrorism Act 2000". The Code emphasises that the powers in s.47A and sch.6B "entirely replace those previously found in sections 44-47 of the 2000 Act and are not simply a

[16] It will cease to have effect is not approved within 120 days by resolution by both Houses, the calculation of "days" not including any time during which Parliament is dissolved or prorogued, or both Houses are adjourned for more than four days.

modification of those provisions" (para 1.1.2) and that the purpose of the Code is "[t]o provide clarity that the threshold for making an authorisation is higher under the new powers and the way in which the powers may be exercised is also different. There is far greater circumscription in the use of these powers and the manner in which these powers are to be implemented by the police." The provisions of the Code will be referred to below where relevant as they might reasonably be regarded as indicative of the contents of any Code of Practice to be issued under Clause 60 of the Bill.

THE ISSUES

17. We are asked whether the Bill's proposed new provisions are compatible with the ECHR (Articles 5, 8, 10 and 11), in particular, whether the provisions satisfy the requirements of legal certainty as set out by the ECtHR in *Gillan & Quinton v UK*, and whether they are in accordance with equality legislation, or whether changes are needed to ensure such compliance. We are further asked to make proposals for any tightening of the proposed legislation that may be needed/desirable to make the legislation compatible with the ECHR or at least improve its guarantees against potential misuse.

THE RELEVANT LAW

18. Articles 5, 8, 10, 11 and 14 of the ECHR provide as follows:

Article 5

Right to liberty and security

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so...

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Article 8

Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or

the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10

Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

Freedom of assembly and association

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

19. The conformity of the proposed new S&S powers with the Convention rights is considered below. Also relevant is domestic anti-discrimination which provides, so far as relevant, as follows:

Equality Act 2010

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others...

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

29 Provision of services, etc.

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

20. The Human Rights Act 1998, to which the Convention rights set out above are scheduled, provides, so far as relevant, that:

> 2 Interpretation of Convention rights
> (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights...
>
> whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

21. Finally, the Convention on the Elimination of all Forms of Race Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR)[17] provide, so far as relevant, as follows:

> CERD, Article 2
>
> 1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
>
> (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation...
>
> (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
>
> (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization...
>
> ICCPR, Article 26
>
> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law

[17] Although these treaties have not been incorporated into domestic law, they are binding on the UK as a matter of international law.

> shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ARTICLE 5

22. In *Gillan v Commissioner of Police for the Metropolis* Lord Bingham, with whom the rest of their Lordships agreed, stated [25] that S&S under s.44 "will ordinarily be relatively brief. The person stopped will not be arrested, handcuffed, confined or removed to any different place. I do not think, in the absence of special circumstances, such a person should be regarded as being detained in the sense of confined or kept in custody, but more properly of being detained in the sense of kept from proceeding or kept waiting. There is no deprivation of liberty". The ECtHR, however, took a different view, suggesting (in the passage cited at para 9 above) that S&S amounted, or was at least capable of amounting, to, a deprivation of liberty for the purposes of Article 5. In so doing the Court emphasised that during the period of S&S, however brief (no more than 30 minutes) the Claimants "were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges… This element of coercion is indicative of a deprivation of liberty within the meaning of art 5(1)" [57].

23. In our view, the emphasis placed by the ECtHR in *Gillan* on the coercive nature of the section 44 S&S suggests that this element, rather than questions of duration or location, is likely to be decisive as regards the applicability of Article 5. In this, the ECtHR differed from the House of Lords in which the emphasis was on the brevity of the procedure and the absence of "arrest[], handcuff[ing], confine[ment] or remov[al] to any different place".

24. It was the element of coercion which caused the ECtHR in *Gillan* to distinguish s.44 S&S from the subjection to S&S of, for example, persons wanting to enter airports or other public buildings, declaring itself "unpersuaded by the analogy

drawn" by the UK Government, referring (in the context of Article 8) to the fact that:

> "An air traveller may be seen as consenting to such a search by choosing to travel. He knows that he and his bags are liable to be searched before boarding the aeroplane and has a freedom of choice, since he can leave personal items behind and walk away without being subjected to a search. The search powers under s 44 are qualitatively different. The individual can be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search".

25. Section 57 of, and Schedule 7 to, the Terrorism Act 2000 permit police, immigration and designated customs officers to detain travellers for up to 9 hours at airports and ports for the purposes of S&S. It seems clear to us, however, that what the Court had in mind in the extract immediately above was the routine security screening that those entering airports and other public places including the courts undergo as a condition of entry. In our view, the S&S of a prospective spectator wishing to attend (for example) Wimbledon or the London Olympics will not amount to a "detention" for the purposes of Article 5 so long as the person is free to decline the search, albeit at the cost of not being able to enter the venue. This is quite different from Terrorism Act cases where, as the Court in *Gillan* recognised, the individual selected for S&S is not free to determine whether or not he or she submits. For the avoidance of doubt, we do not suggest that mere awareness of the possibility of S&S (or, in another context, of "kettling") would make subjection to such treatment "voluntary" such as to prevent its amounting to "deprivation of liberty" for the purposes of Article 5.

26. The difference in approach between the domestic courts and the ECtHR to the interpretation of detention is evident from the contrasting conclusions drawn by the House of Lords and the European Court in *Gillan*. We are aware that there is before the ECtHR a challenge to the decision of the House of Lords in *Austin v Commissioner of Police of the Metropolis* [2009] AC 564, in which their Lordships ruled that "kettling" for up to 7 hours did not amount to deprivation of liberty under Article 5 because its purpose was crowd control rather than detention. Whatever the outcome of the ECHR challenge in that case, it is our view that it is

unlikely to call into question the ECtHR's view in *Gillan* as to the applicability of Article 5 to S&S under the Terrorism Act 2000.

27. The domestic courts are bound by section 2 of the Human Rights Act 1998 to "take into account" the decision in *Gillan* "so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen". The House of Lords (and now the Supreme Court) has repeatedly ruled that, though the domestic courts are not as such bound by the decisions of the ECtHR and other Convention organs, "clear and constant" jurisprudence of the Court should be followed in the absence of special circumstances.[18] Thus, for example, in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20], Lord Bingham stated that "a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right…"[19]

28. The House of Lords and Supreme Court have accepted that, where ECtHR decisions are based on misunderstandings as to English law, they need not be followed.[20] Otherwise, however, there is very limited scope for domestic courts not to apply ECHR jurisprudence, certainly where decisions of the ECtHR are of

[18] This is subject to the domestic law doctrine of precedent but, even then, the Supreme Court is at liberty to depart from an earlier decision of the House of Lords in order to give effect to a judgment of the ECtHR.

[19] Approved by the House of Lords in *R (S) v CC of South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196 [27], *per* Lord Steyn; *N v SSHD* [2005] UKHL 31, [2005] 2 AC 296[24], *per* Lord Hope; *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465 [87], *per* Lord Hope; *SSWP v M* [2006] UKHL 11, [2006] 2 AC 91 [129], *per* Lord Mance; *R (Al-Skeini) v SSD* [2007] UKHL 26, [2008] 1 AC 153 [90], *per* Baroness Hale and [105], *per* Lord Brown; *Huang v SSHD* [2007] UKHL 11, [2007] 2 AC 167 [18], *per* Lord Bingham for the Committee; *SSHD v JJ* [2007] UKHL 45, [2008] 1 AC 385 [83], *per* Lord Carswell, and [106], *per* Lord Brown; *Whaley v Lord Advocate* [2007] UKHL 53, 2008 SC (HL) 107 [18], *per* Lord Hope; *R (Animal Defenders International) v SSCMS* [2008] UKHL 15, [2008] 1 AC 1312 [37], per Lord Bingham, and [53], *per* Baroness Hale; *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] 3 All ER1 [56], *per* Baroness Hale; *Re G (adoption: unmarried couple)* [2008] UKHL 38, [2008] 3 WLR 76 [30], *per* Lord Hoffmann, [50], *per* Lord Hope [79] *per* Lord Walker, [120], *per* Baroness Hale, and [127], *per* Lord Mance.

[20] *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976 [46], *per* Lord Hoffmann; *Doherty v Birmingham CC* [2008] UKHL 57, [2008] 3 WLR 636 [88], *per* Lord Scott; *R v Horncastle & Anor, R v Marquis & Anor; R v Carter* [2010] 2 AC 373.

recent vintage.[21] While the House of Lords retained the possibility of refusing to follow Convention jurisprudence where it was "unsound",[22] this does not happen in practice as a result of disagreements between the domestic courts and Strasbourg on the interpretation of Convention rights, as distinct from their application in the domestic context. As Lord Hoffmann recognised in *Secretary of State for the Home Department v AF & Ors* [2010] 2AC 269, a case in which he agreed with the rest of the Appellate Committee that the decision of the ECtHR in *A v UK* (Application No 3455/05) should be followed notwithstanding his view that ([70]) that the judgment:

> "was wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism. Nevertheless, I think that your Lordships have no choice but to submit. It is true that s 2(1)(a) of the Human Rights Act 1998 requires us only to "take into account" decisions of the ECtHR. As a matter of our domestic law, we could take the decision in *A v United Kingdom* into account but nevertheless prefer our own view. But the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention. I can see no advantage in your Lordships doing so.

29. Lord Carswell similarly stated [108] that "[w]hatever latitude" section 2 "may permit, the authority of a considered statement of the Grand Chamber is such that our courts have no option but to accept and apply it. Views may differ as to which approach is preferable, and not all may be persuaded that the Grand Chamber's ruling is the preferable approach. But I am in agreement with your Lordships that we are obliged to accept and apply the Grand Chamber's principles in preference to those espoused by the majority in *MB*".

30. In view of the above, it is our view almost inevitable that, notwithstanding the binding nature of the decision of the House of Lords in *Gillan* on the lower courts,

---

[21] *SSWP v M* [2006] UKHL 11, [2006] 2 AC 91 [131], *per* Lord Mance; *Jones v Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270 [18], *per* Lord Bingham for the Appellate Committee.

[22] *Jones v Saudi Arabia*, *ibid*, [18]; *R v Spear* [2002] UKHL 31, [2003] 1 AC 734, [12]–[13], *per* Lord Bingham, and [65]–[66], *per* Lord Rodger.

the Supreme Court would accept that S&S under the Terrorism Act amounts to detention for the purposes of Article 5. It does not appear to us to be open for the Court to distinguish S&S under any amended Terrorism Act regime on the basis that it is of very short duration, or that the conditions under which authorisations are granted are stringent. In our view, the distinction between "deprivation of liberty" and mere "restriction of liberty" in this context turns on the element of legal coercion: unless the person subject to S&S is free to walk away, detention for the purposes of Article 5 is in issue.

31. That being the case, the questions upon which the conformity of detention with Article 5 rest are as set out by Lord Hope in *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] AC 19, 38B-E:

> 1. "The first question is whether the detention is lawful under domestic law. Any detention which is unlawful in domestic law will automatically be unlawful under art 5(1)";
> 2. "The second question is whether, assuming that the detention is lawful under domestic law, it nevertheless complies with the general requirements of the Convention. These are based on the principle that any restriction on human rights must be prescribed by law ... They include the requirements that the domestic law must be sufficiently accessible to the individual and that it must be sufficiently precise to enable the individual to foresee the consequence of the restriction";
> 3. "The third question is whether, again assuming that the detention is lawful under domestic law, it is nevertheless open to criticism on the ground that it is arbitrary because, for example, it was resorted to in bad faith or was not proportionate."

32. In addition, the detention must be for a purpose set out in Article 5(1)(a)-(g).

33. Detention under an S&S regime authorised by domestic law will satisfy Lord Hope's first requirement. But, as he recognized, the lawfulness of detention under domestic law is not decisive. In *Khudoyorov v Russia* (2005) 45 EHRR 144, for example, the Court ruled that, while ([124]) "the expressions 'lawful' and 'in accordance with a procedure prescribed by law' in art 5(1) essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof... [t]he Court must in addition be satisfied that

detention during the period under consideration was compatible with the purpose of art 5(1) of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion:

> 125… where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of 'lawfulness' set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail …

34. The imposition of requirements to publicise the existence of an authorisation, strict limitations on the geographical or temporal limitations of authorisations or (in the latter case) of S&S may well, in our view, have the result that the second limb of Lord Hope's three stage test would be satisfied. But in our view, detention for the purposes of S&S under the proposed new regime, as under authorisations issued under s.44 of the Terrorism Act 2000, cannot satisfy the third limb of his Lordship's test.

35. In *Winterwerp v Netherlands* (1979) 2 EHRR 387 the Court stated [37] that "the object and purpose of Article 5(1) was "to ensure that no one should be dispossessed of his liberty in an arbitrary fashion",[23] further [39] that "no detention that is arbitrary can ever be regarded as 'lawful'".[24] In V*an Droogenbroeck v Belgium* (1982) 4 EHRR 443 the Court referred ([40]) to "a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5" (emphasis added). And in *Bozano v France* (1987) 13 EHRR 428 the Court characterised the purpose of Article 5 [54] as "to protect the individual from

---

[23] Citing its earlier decisions in *Lawless*, Series A no. 3, p. 52, p. 52, and *Engel and others* judgment of 8 June 1976, Series A no. 22, para. 58.

[24] Citing its earlier decisions in *Golder*, Series A no. 18, pp. 16-17, para. 34, and *Klass and others*, Series A no. 28, p. 25, para. 55.

arbitrariness".[25] Similarly, the US Supreme Court recognized in *Grayned v City of Rockford* 408 US 104 (1972) that:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application... [26]

36. Detention for the purposes of S&S under the proposed new regime, as under authorisations issued under s.44 of the Terrorism Act 2000, cannot satisfy the third limb of Lord Hope's test as it is (in our view) inherently arbitrary. The very essence of the authorisation regime, although an improvement on the current position, is that it permits detention of an individual <u>without reasonable suspicion</u>, indeed without any requirement for suspicion of that person at all. It is the case that the proposed regime, like the s.44 regime, requires that S&S powers must be exercised for the purposes specified in the legislation. But under the proposals, as under the current regime, an officer who exercises S&S powers granted by authorisation and is challenged (for example in a claim for false imprisonment) as to the reason for the Claimant's <u>selection</u> for S&S may lawfully answer that there was no reason. Such an answer would have the effect of satisfying the court that the S&S was in conformity with the 2000 Act (assuming that the authorisation was properly granted). It would, however, in our view, amount to an acceptance that the individual had been subject to <u>arbitrary detention</u>, the very evil Article 5 is intended to prohibit.

---

[25] Citing its decision in *Ashingdane v UK* (1985) 7 EHRR 528 [44].

[26] 108-109.

37. The final requirement for detention to be lawful under Article 5 is that it is for a reason set out in Article 5(1)(a)-(g) ECHR. As Lord Hope recognized in *Austin v Commissioner of Police for the Metropolis* [13]: "The list in sub-paragraphs (a) to (f) of the cases where deprivations of liberty are permitted is exhaustive and is to be narrowly interpreted, as the European Court of Human Rights has repeatedly emphasized".[27] Leaving aside those cases in which detention follows conviction (5(1)(a) or lawful arrest (5(1)(b)), or concerns minors (5(1)(d)), "persons of unsound mind" etc (5(1)(e)) or those whose immigration status is at issue (5(1)(f)), the only conceivable basis for detention is Article 5(1)(c) which requires that it be "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so". However, no reasonable suspicion is required under the current regime or proposed regime.

38. It would not in our view be possible to meet the reasonable suspicion requirement in Article 5(1)(c) in relation to the selection for S&S of an individual, on the basis that there was a reasonable suspicion that someone unknown had committed, or was likely to commit, an offence, and that the detention was reasonably necessary to prevent the commission of that offence or the escape of the perpetrator. In our view, Article 5(1)(c) requires the selection of the individual to be justified on the basis of reasonable suspicion pertaining to that individual. Nor would a requirement for subjective suspicion on the part of the police officer make good the breach of Article 5 which requires on its terms reasonable suspicion as detailed above.

Article 5 Conclusion

39. For the reasons set out above, we conclude that any S&S regime under which individuals may be deprived of their liberty and selected for S&S in the absence of a requirement for reasonable suspicion of that individual will inevitably

[27] Citing *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 [57]; *Kurt v Turkey* (1998) 27 EHRR 373 [122]: *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, [2008] 1 AC 385, [5] *per* Lord Bingham of Cornhill.

breach Article 5 of the ECHR, regardless of any limitations on the circumstances under which the use of such arbitrary power can be exercised.

ARTICLE 8

40. In our view, an S&S carried out under the proposed new authorisation is as likely to amount to an interference with the individual's Article 8(1) rights as was the case under s.44 S&S. The question is whether the changes proposed by the Bill will be sufficient to provide justification for any interferences under Article 8(2) such as was found to be absent in *Gillan*. As outlined at para 8 above, the ECtHR in *Gillan* made 14 criticisms of the purported justification for the interference with privacy entailed by S&S. Taking these each in turn, criticism 1 has been addressed by proposed new s.43B which requires (a) reasonable suspicion on the part of the senior officer "that an act of terrorism will take place" coupled with his or her view that (b) "the authorisation is necessary to prevent such an act"; (c) the specified area or place is no greater than is necessary to prevent such an act; and (d) the duration of the authorisation is no longer than is necessary to prevent such an act.

41. No objective element is proposed as to the senior officer's view that the authorisation is necessary to prevent such an act, or that it extends to no greater an area or period of time than is necessary to prevent such an act. This in our view would not be unduly damaging to a defence against criticism 1 if the provisions of the Code of Practice issued under the amendments made by the remedial order to the 2000 Act were to find their way into a Code of Practice issued in connection with proposed new s.43B powers. In particular, under the terms of that Code the senior police officer granting the authorisation not only has to provide to the Secretary of State with an explanation of the basis for the reasonable suspicion of a terrorist threat particular to the geographical area in respect of which the authorisation is granted, but must explain how the use of the authorisation powers is considered an appropriate and necessary response to the circumstances and why other measures are regarded as inadequate. The explanatory notes state that the authorisation will be expected to contain an "explanation of how the authorisation will counter the threat i.e. why the

stopping and searching of individuals and/or vehicles without suspicion is necessary to prevent the suspected act of terrorism".

42. New s.47C of the 2000 Act provides (as will proposed new s.43C) that:

> (1) A constable must have regard to the search powers code when exercising any powers to which the code relates.
> (2) A failure on the part of a constable to act in accordance with any provision of the search powers code does not of itself make that person liable to criminal or civil proceedings.
> (3) The search powers code is admissible in evidence in any such proceedings.
> (4) A court or tribunal may, in particular, take into account a failure by a constable to have regard to the search powers code in determining a question in any such proceedings.

43. No mention is made of the impact of the Code on the senior officers issuing authorisations. But failure to comply with it would (and certainly should) impact on the Secretary of State's approval and it may be the case that disregard for the Code could found public law challenges to authorisations and their approval (though this would be subject to the availability of information as to the existence of authorisations).

44. Criticism 2 is met by the new powers proposed for the Secretary of State. As to criticism 3, the robust requirements in the Code of Practice regarding the content of authorisations (in particular, that they include the basis for the police officer's apprehension of terrorist threat and his or her justification for the geographical and temporal extent of the authorisations), is likely to go a significant way to reducing the scope for this criticism (this because the requirements governing the authorisations are more likely to result in approval being withheld than was previously the case).

45. Criticisms 4 and 6 relate to temporal restrictions on authorisations. The amendments in the Bill permit the re-issue of authorisations, though such

authorisations are for shorter time periods in the first instance than was the case under the original s.44. It remains to be seen whether the temporary Code of Practice's insistence that 14 days is a maximum and not a norm is given effect to in practice. In circumstances where (1) the length of an authorisation has to be justified, (2) an authorisation must be withdrawn when it is no longer necessary and (3) authorisations can be re-issued, the benefit of shorter authorisation periods could be questioned. Having said this, imposing the onus on a senior police officer to make a fresh authorisation, which in turn requires approval, may be a better discipline than allowing authorisations of up to 14 days. For this reason we would favour shorter periods.

46. It remains the case that authorisations can be renewed prior to or on expiry. Despite the emphasis in the Code of Practice that this is not to be regarded as akin to "rolling" authorisations it remains a matter of real concern that the executive can, without judicial supervision, maintain a regime of arbitrary S&S. It is hard to say how the power to reissue authorisations could be tightened up so as to avert criticisms 4 and 6 of the ECtHR in *Gillan*, absent judicial involvement, without seeing over time how these powers are actually operated in practice.

47. The amendments proposed by the Bill will not prevent authorisations covering wide geographical areas (criticism 5) and (as pointed out above), there is no objective element to the senior officer's requirement to address his or her mind as to the necessity for the geographical extent of an authorisation. Having said this, the robust requirements in the temporary Code of Practice, if replicated in any subsequent Code, are likely to go some way to addressing criticism 5 on the basis that approved authorisations are likely to be fairly narrow. The inclusion of absolute geographical limitations might improve matters further but it could be said that such absolute limitations have an element of arbitrariness about them which is absent from an obligation to explain and defend the geographical scope of an authorisation (assuming that police officers' assertions in authorisations will actually be critically tested by the Home Secretary).

48. The position would be improved in our view, if authorisations required judicial approval, thus increasing the likelihood of robust – and independent – scrutiny of the necessity for them. The fact that the s.44 regime, despite its requirement for authorisations, operated in such a way that the Home Secretary herself, in a written Ministerial Statement issued on 17 March 2011, referred to it as "discredited, ineffective and unfair" does not suggest that the executive is necessarily to be trusted to keep in check police enthusiasm for arbitrary S&S powers which resulted in a rolling authorisation being in place across the whole of London for almost a decade.

49. Criticism 7 is as yet unmet by the proposals, and the previous reviewer of the legislation (Lord Carlile QC) was critical of the use of s.44 powers. This criticism could be addressed by an increase in the powers of the independent reviewer, alternatively by increased provision for judicial involvement. Nor are any primary legislative changes proposed (criticisms 8 and 9) to the broad discretion provided to police constables by authorisations to be granted under the proposed new provisions.

50. The temporary Code of Practice issued in connection with (temporary) s.47A of the 2000 Act states the following:

> 4.1. General Use
>
> 4.1.1 When exercising section 47A powers, officers should have a basis for selecting individuals or vehicles to be stopped and searched. This basis will be either objective factors (based on the intelligence available and in accordance with the officer's briefing) or the selection of individuals or vehicles at random within the parameters set out in the authorisation (for example, the stopping of vehicles at random travelling down a particular road towards a potential target). If stops and searches are being conducted on the basis of objective factors, constables should still consider whether powers requiring reasonable suspicion are more appropriate and should only use the powers conferred by a section 47A authorisation, if they are satisfied that they cannot meet a threshold of reasonable suspicion sufficient to use other police powers…
>
> 4.1.3 When selecting individuals to be stopped and searched, officers should consider the following:
>
> Deciding which power to use – If a section 47A authorisation is in place,

the powers conferred by that authorisation may be used as set out in paragraph 4.1.1. above. However, if there is a reasonable suspicion that a person is a terrorist, then powers requiring reasonable suspicion in section 43 of the Terrorism Act 2000 should be used as appropriate instead.

Selecting an individual or vehicle using indicators:

a. Geographical Extent – What are the geographical limits of the authorisation and what are the parameters within which the briefing allows stops and searches to be conducted?

b. Behaviour – is the person to be stopped and searched acting in a manner that gives cause for concern, or is a vehicle being used in such a manner?

c. Clothing – could the clothing conceal an article of concern, which may constitute evidence that a person is a terrorist?

d. Carried items – could an item being carried conceal an article that could constitute evidence that a person is a terrorist or a vehicle is being used for the purposes of terrorism?

Selecting individuals 'at random' – what are the geographical and other parameters of the operation as set out in the authorisation?

Explanation – officers should be reminded of the need to explain to people why they or their vehicles are being searched.

51. The Code suggests that it is of the essence of s.47A (similarly s.43B) powers that they are to be exercised in the absence of reasonable suspicion (para 4.1.1) and makes it clear that, although factors such as behaviour, clothing and carried items may be used as the basis for selection for "no reasonable suspicion" S&S, individuals may also be selected at random within the geographical and other parameters of the authorisation. Presumably an individual in this position would receive, by way of an explanation of the basis of his or her selection, no more than a statement that he or she was "randomly" searched.

52. The Code makes it clear that, as far as the operation of s.47A of the 2000 Act is concerned,[28] the scope for exercise of such "random" S&S would be reduced: the authorisation is, for example, required to provide details not only (para 3.1.10)

[28] Note this is identical to proposed new s.43B, and is simply a temporary provision inserted pending the expected amendment of the 2000 Act by the Bill.

of "why the stopping and searching of individuals and/or vehicles without suspicion is necessary to prevent the suspected act of terrorism", but also (para 3.2.7) of:

> "how the powers will be used and why... whether officers will be instructed to conduct stops and searches on the basis of particular indicators (e.g. behavioural indicators, types of items carried or clothes worn, types of vehicles etc), or whether the powers will be exercised on a random basis, or exercised using a combination of these tactics. If the powers are to be exercised on a random basis, the authorising officer should indicate why this is necessary, including why searches based on particular indicators are not appropriate, and should set out the parameters of the stop and search operation.

53. It remains the case, however, that "random" selection, that is, selection on the basis of unarticulated (and therefore unchallengeable) criteria remains possible under s.47A of the 2000 Act, and would remain possible under proposed new s.43B.

54. It remains to be seen whether the proposed new authorisation provisions and Code of Practice would have any impact on the disparity between S&S and conviction rates (criticism 10) or the inappropriate use of S&S (criticism 11). The risk of race discrimination (criticism 12) appears to be unchanged, flowing as it does from the very wide discretion provided to police constables, though it is at least possible that the higher threshold for the issue of authorisations would, if honoured, ameliorate the potential impact on Articles 10 and 11 (criticism 13). Criticism 14 would appear to be unaffected given the continuing absence of any requirement for reasonable (or even subjective) suspicion on the part of the individual police constable.

55. Criticisms 8, 9, 10, 11, 12 and 14 turn specifically on the arbitrary nature of the individual police officer's decision to select for S&S. Those criticisms have not been met by the proposed legislation. There is therefore, in our view, considerable room for doubt as to whether the proposed amendments to the

authorisation regime would significantly alter the scope for findings of breaches of Article 8 of the Convention. Some of the points raised by the Court in that case have been addressed but many have not, and significant scope remains for the view to be taken that the proposals as set out in the Bill fall at the first hurdle imposed by Article 8(2) – the requirement of 'lawfulness'. This is because (*Gillan v UK* [76]) the powers of interference are not "formulated with sufficient precision to enable the individual—if need be with appropriate advice—to regulate his conduct" (citing *S v UK* (2008) 25 BHRC 557 [95]–[96]), and do not provide ([77]) an adequate "measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the convention".

56. The question is whether ([77]) the power granted to the police is "unfettered", or whether it "indicate[s] with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise". In our view, as set out above (paras 40-42) criticism 1 remains valid to the (limited) extent that no objective element is proposed as to the senior officer's views as to the necessity for the authorisation; criticisms 4-5 and 7-9 remain materially unaffected by the proposals, as do 12 and 14, it being too early to determine whether the proposals would have any impact on criticisms 3, 6, 10 or 11. Criticism 2 is met by the proposals but in our view this is unlikely to be sufficient to render an outcome different from that in *Gillan*. The same is true in respect of criticism 13, which is further addressed below.

57. The basis for the issue and approval of authorisations appears to have been tightened considerably notwithstanding the fact that the senior police officer only has to have a *subjective* view of the necessity of such an authorisation. The requirement for the senior police officer to set out the justification for his or her views of necessity is likely to operate so as to expose irrational subjective views, which would then (it is to be hoped) provoke the Secretary of State to withhold approval. However, the difficulty with requiring

anything less than reasonable suspicion (that is, a sufficient level of suspicion, based on objective grounds), to justify selection for S&S is that, unlike the authorisation (which requires approval, albeit only within 48 hours), the S&S of the individual will be long over before the police officer would be required to formulate the justification for even a subjective suspicion and the damage will have been done. In our view, there is no real alternative to a requirement for reasonable suspicion at the level of the individual police officer conducting S&S if arbitrariness, and breach of Convention rights, is to be avoided.

58. At the level of authorisations, a requirement for objective reasonableness as regards the senior police officer's view as to the necessity for the authorisation (its geographical and temporal extent etc), would facilitate subsequent legal challenge. In the absence of such a requirement it is difficult to see what judicial control could apply after the fact, since the authorisation will comply with law as long as the police officer had a reasonable suspicion of the terrorist threat (a conclusion unlikely to be challenged by the courts), and a <u>subjective</u> view of the necessity of the authorisation.

59. As to individual S&S, the only basis on which legal accountability for the decisions of individual officers can properly be secured is a requirement for reasonable suspicion. How, otherwise, is the court to test the assertion of an individual officer who states that he or she suspected that the individual was involved in terrorism because of a "feeling"/ "gut instinct", "copper's nose" or similar?

60. If, as in our view is likely to be the case, the proposed powers are found to lack the qualities required to amount to "law" of sufficient quality to pass muster

under Article 8(2), there is no room for consideration of necessity or proportionality. If, however, the proposals were to be amended to meet sufficient of the criticisms made by the ECtHR in *Gillan*, the legality of any S&S under Article would fall to be determined according to considerations of necessity and proportionality.

Necessity and proportionality

61. The necessity of an interference taking the form of an S&S under any replacement of section 44 will turn on the reason for that interference. Where everyone within a particular area was subject to S&S because of concern about (for example) a suspected explosion, it might be relatively easy to satisfy a court as to necessity. The difficulty will arise where a person is selected for S&S in the absence of an explanation as to the reason for the selection, as distinct from the search. Where, for example, a decision was made to search every fifth person walking into a building, or everyone carrying a bag, or wearing a bulky jacket, there would be some basis on which it could be argued that the particular interference was necessary – either as part of a deterrence programme (this on the basis that those subject to S&S know that they may be stopped and do not know the basis for selection on the particular occasion), or because of the enhanced possibility that an individual wearing a bag or a bulky jacket might be concealing weaponry. Where, however, selection is arbitrary in the sense of being left to the individual officer's discretion, it will be this very arbitrariness which must be shown to be "necessary".

62. Turning to the question of proportionality, the proposed additional restrictions discussed above would assist in showing proportionality, as would a further tightening of the temporal restrictions on authorisations.

63. Any additional restrictions on S&S ought in our view to appear on the face of the Act, because the provisions of a Code of Practice are not legally binding as such, and a Code is easier to amend than primary legislation.

Article 8 Conclusion

64. In conclusion, there are serious grounds for concern in our view as to whether the S&S regime proposed by the Bill will provide a legal basis for interference with the Article 8 rights of those subject to S&S, this notwithstanding the amendments to the S&S regime proposed by the Bill, and even if the provisions of the temporary Code of Practice in this area were to find their way into a Code issued under proposed new section 43D of the 2000 Act. The proposals set out in the Bill do make some improvements to the previous regime, particularly as regards the scope of authorisations and the circumstances under which they can be made. But in our view, the arbitrary nature of selection for S&S in the absence of a requirement for reasonable suspicion creates fundamental difficulties as regards compatibility with Article 8(2).

ARTICLES 10 AND 11

65. The concerns expressed by the ECtHR in *Gillan* as to the potential for breach of Articles 10 and 11 inherent in the s.44 authorisation regime were mentioned above (para 9). It is the case that the proposed new authorisation regime is somewhat narrower than that currently governed by s.44 of the Terrorism Act 2000. In particular, the test for the grant of authorisations is subject to requirements that the authorising officer "reasonably suspects that an act of terrorism will take place" and, further, that s/he (subjectively) considers the authorisation necessary (both geographically and temporally) "to prevent such an act". The fact remains, however, that the discretion provided to police officers to select individuals for S&S under proposed authorisations will be subject to no restrictions.

66. The possibility of being subject to such discretionary powers, in a case where an individual knows that an authorisation is in place, may well in our view exercise a "chilling effect" on the exercise of Article 11 rights. Where an individual is engaged in the exercise of free speech or assembly, the use by officers of these discretionary powers may entail interferences with the exercise of Article 10 and

11 rights. This being the case, such rights will be breached in the absence of justification under Articles 10(2) and 11(2) respectively.

67. Such interferences may be (Art 10(2)/ 11(2)) "in the interests of national security … or public safety [or] for the prevention of disorder or crime". But those provisions also require that such interferences be "prescribed by law and … necessary in a democratic society". The arbitrary nature of selection for S&S, coupled with the extraordinary gulf between the exercise of S&S under the 2000 Act (see further below) and the complete absence of terrorism-related convictions resulting therefrom to date must raise very serious questions over the necessity and proportionality of the interferences entailed in the exercise of Article 10 and 11 rights. As a result, it is our view that the proposed regime is likely to result in breaches of Article 10 and 11 rights. As in relation to Article 8 above, were additional protections to be enacted the possibility of justification under Articles 10(2) and 11(2) would be enhanced, although the scope for breach of Articles 10 and 11 would remain as a result of the absence of any requirement of reasonable suspicion as regards the selection of the individual for S&S.

68. A provision within the Code or statute that the S&S powers are not to be used in relation to peaceful protest is likely to be problematic because (a) there could be a reasonable suspicion that an act of terrorism will take place in the context of an otherwise peaceful process, in which case an authorisation could properly be issued within the regime, and (b) in the absence of any requirement for reasonable suspicion on the part of the officer conducting the S&S there is no way in practice of controlling the reasons for which S&S is carried out.

ARTICLE 14

69. Article 14 was not relied upon by the Applicants in *Gillan & Anor v United Kingdom*, both of whom were White. The concern expressed by the European Court as to the potentially discriminatory impact of s.44 S&S was noted above. The statistics on the racially disproportionate impact of S&S on which the Court

commented were from the Ministry of Justice (MOJ) and related to the periods 2005-06, 2006-07 and 2007-08. According to the MOJ's most recent estimate,[29] White people comprise 89.4% of the population aged over 10 in England and Wales, Black people 2.6% and Asian people 5.2%. In 2009-10 65% of s.44 S&S were carried out on White people, 13% on Black people and 16% on Asian people.[30] While the overall numbers of s.44 S&S have fluctuated (44,543 in 2005-06, 37,197 in 2006-07, 117,278 in 2007-08 and 197,008 in 2008-09), the statistics disclose a pattern of racial disproportion over time. Asian people, who account for just over 5% of the population, comprised 15% of those subjected to s.44 S&S in 2005-06 and 2006-07 and 18% in 2007-08, the figures for Black people 2.6% of the population) being 9% in 2006-06, 10% in 2006-07 and 13% in 2007-08 and for White people (89.4% of the population) being 69%, 70% and 63%.[31]

70. It is a matter of concern that the statistics for "reasonable suspicion" S&S are not markedly better, as regards racial disproportionality, than those for s.44 S&S, 71%, 17% and 9% of s.1 PACE S&S (the most numerous S&S by far) being carried out in 2007/08 on White people, Black people and Asian people respectively. As above, the figures for s.44 S&S in the same years were 63%, 13% and 18%, significantly more disproportionate for Asian people and somewhat less so for Black people. Given the additional difficulties attendant upon challenging selection for S&S in the absence of a requirement for reasonable suspicion (regardless of the extent to which those carrying out "ordinary S&S *in fact* comply with legal requirements for such suspicion), the racial disproportion in the s.44 S&S figures gives real cause for concern. This is the case notwithstanding any statistical evidence of an equivalence between S&S and arrest figures, given that arrest does not necessarily result in charges, much less in convictions, and that arrest and charge decisions may themselves be racially tainted: it remains the case today, as it was in 2009, that "none of the many

---

[29] *Statistics on Race and the Criminal Justice System 2008/09*, published June 2010

[30] *Statistics on Race and the Criminal Justice System 2008/09*, accompanying table 3.06a.

[31] *Statistics on Race and the Criminal Justice System 2006/07*, table 4.6, *Statistics on Race and the Criminal Justice System 2007/08*, table 4.6A and *Statistics on Race and the Criminal Justice System 2008/09* table 4.6a.

thousands of [s. 44] searches has ever resulted in conviction of a terrorism offence".[32]

71. It is clear that S&S carried out under s.44 has a significant disparate impact by race. It is difficult to see how such impact could be justified given the lack to date of any convictions resulting from the hundreds of thousands of S&S carried out under this provision (this on the assumption that any such impact is the result only of *indirect* rather than *direct* discrimination). There is some evidence of *direct* discrimination, at least in Lord Carlile's findings that S&S had been carried out on White people in order to "balance" the statistics. It is, further, likely that at least some of the disproportionality by ethnicity in S&S is the result of "ethnic profiling" carried out, at least at the level of a "hunch", by police constables conducting S&S under s.44 authorisations.

72. "Ethnic profiling" has been defined as "the use by law enforcement officials of generalisations based on race, ethnicity, religion or national origin, rather than individual behaviour or objective evidence, as the basis for directing discretionary law enforcement actions".[33] Dicta from Lords Brown and Hope in *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307 suggest that race or religion can be used with other factors in selecting targets for S&S under s.44 of the Terrorism Act 2000. According to Lord Hope, for example:

> 46 ... Age, behaviour and general appearance other than that relating to the person's racial or ethnic background will have a part to play in suggesting that a particular person might possibly have in his possession an article of a kind which could be used in connection with terrorism. An appearance which suggests that the person is of Asian origin may attract the constable's attention in the first place. But a further selection process will have to be undertaken, perhaps on the spur of the moment otherwise the opportunity will be lost, before the power is exercised. It is this further selection process that makes the difference between what is inherently discriminatory and what is not.

---

[32] Lord Carlile, cited in *Gillan v UK* [84].

[33] European Network Against Racism Fact Sheet 40, Ethnic Profiling *(June 2009)*, 2.

73. What might be referred to as the "Asian with a rucksack" approach advocated by Lords Brown and Hope was not commented upon by Lords Bingham, Scott or Walker, none of whom dealt with the question of discrimination (understandably as it did not arise on the facts). It is not permitted by the PACE Code of Practice in "reasonable suspicion" S&S, para 2.2 of the Code in its latest version stating explicitly (para 2.2) that "other than in a witness description of a suspect, a person's race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other, or in combination with any other factor, as the reason for searching that person". Such ethnic profiling is, further, inconsistent both with Article 14 of the ECHR and with other international law, as well as with the earlier decision on this point of the House of Lords in *R (European Roma Rights Centre & Ors) v Immigration Officer at Prague Airport & Anor* [2005] 2 AC 1 in which Baronness Hale, who delivered the leading judgment on discrimination, stated that:

> 74… The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping [emphasis added].

74. Lord Carswell, having agreed with Baroness Hale, went on to state that, while the greater degree of scepticism on the part of immigration officers towards Roma, and the resulting differential treatment of them, "may well [have been] understandable in light of the experience of the officers, that a large preponderance of asylum claims came from Roma and that there was a propensity among those people to make false claims", discrimination law prohibited the operation of what "many people would regard … as nothing more than an application of ordinary common sense" in this context.[34]

> 113. It is not legitimate to apply a stereotype and commence with the

[34] Para 112-13.

> assumption that applicants from Roma may be making false claims and that for that reason their claims require more intensive investigation... it is in law discriminatory to subject all applicants from Roma to longer and more intensive questioning because so many of them have been known in the past to merit such treatment. What the officers must do is treat all applicants, whatever their racial background, alike in the method of investigation which they carry out until in any individual case sufficient reason appears to prolong or intensify the examination.

75. As to international law, General Recommendation 30 (Non-Citizens) of the Committee on the Elimination of all forms of Racial Discrimination, which oversees the application of CERD, requires (para 10) that "any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping"[35] and General Recommendation No. 31, on the Administration of the Criminal Justice System, further requires (para 20) that: "States parties should take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person's colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion".

76. In July 2009 the UN Human Rights Committee ruled, in *Williams v Spain,* that ethnic profiling breached Article 26 of the International Covenant on Civil and Political Rights (para 21 above).[36] The claimant, a Black Spanish citizen, brought her challenge after she was singled out, as the only Black person on a railway platform, by police officers who demanded to see her identity papers. Spain's Constitutional Court ruled in 2001 that the practice of relying on physical or racial characteristics as "reasonable indicators of the non-national origin of the person who possesses them" was lawful, such racial criteria being "merely indicative of the greater probability that the interested party [is] not Spanish." The HRC disagreed, concluding that although identity checks could lawfully be

---

[35] See generally the European Network Against Racism Fact Sheet 40, Ethnic Profiling *(June 2009)*

[36] Communication No.1493/2006, *Rosalind Williams Lecraft v Spain* (Human Rights Committee*)*, UN Doc CCPR/C/96/D/1493/2006, 30 July 2009.

carried out for the purposes of preventing illegal immigration, preventing crime or protecting public safety:

> "the physical or ethnic characteristics of the persons targeted should not be considered as indicative of their possibly illegal situation in the country. Nor should identity checks be carried out so that only people with certain physical characteristics or ethnic backgrounds are targeted. This would not only adversely affect the dignity of those affected, but also contribute to the spread of xenophobic attitudes among the general population; it would also be inconsistent with an effective policy to combat racial discrimination".

77. CERD and the ICCPR are binding on the UK as Treaty obligations into which the UK has entered. Although not directly enforceable in the domestic courts, they are the expression of what was accepted by the House of Lords in *R (European Roma Rights Centre & Ors) v Immigration Officer at Prague Airport & Anor* [2005] 2 AC 1 as the norm of Customary International Law (CIL) prohibiting racial discrimination. At [46], Lord Steyn stated that:

> "The great theme which runs through subsequent human rights instruments, national, regional and international, is the legal right of equality with the correlative right of non-discrimination on the grounds of race…State practice virtually universally condemns discrimination on the grounds of race. It does so in recognition of the fact that it has become unlawful in international law to discriminate on the grounds of race… The moral norm has ripened into a rule of customary international law."

78. In *Trendtex Trading v Central Bank of Nigeria* [1977] QB 529, 553 the Court of Appeal accepted that identifiable norms or rules of CIL are "incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament". Customary international law is one of the sources of English law: *R v Jones* [2007] 1 AC 136 at [11] (Lord Bingham). It can therefore inform the common law, which (it is well-established) protects fundamental rights. It is clear from the 'principle of legality' set out in decisions such as e*x p Simms* [2000] 2 AC 115, *ex parte Leech (No.2)* [1994] QB 198 and e*x parte JCWI* [1996] 4 All ER 385 that only the clearest of primary legislation will be capable of overriding such fundamental rights.

79. It is in any event clear from the jurisprudence of the European Court of Human Rights (in particular, the decision in *Opuz v Turkey* (2009) 27 BHRC 159) that the Convention articles, which are given effect to in the UK by the Human Rights Act 1998, must be interpreted in light of [184] "the international law background to the legal question".

80. Ethnic profiling will breach Article 14 of the European Convention on Human Rights unless it is objectively justified as being necessary and proportionate. Even were such profiling not "within the ambit" of a provision such as Article 5 or 8, the difficulties often created by the parasitic quality of Article 14 ought not to apply to race discrimination, the Court having accepted in that such discrimination will generally fall within the scope of Article 3 (which prohibits, *inter alia*, "degrading treatment").[37] In *Timishev v Russia*,[38] which involved a challenge to travel restrictions imposed on persons of Chechen ethnic origin, the ECtHR ruled that discrimination on grounds of ethnicity was "a particularly invidious kind of discrimination" [56] and that "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures" [58]. This would appear absolutely to prohibit the use of ethnic profiling in a law enforcement context. Article 14 determines the interpretation of the Race Relations Act 1976/ Equality Act 2010 as a result of s.3 of the Human Rights Act 1998. Accordingly, in our view, any suggestion from dicta by two members of the House of Lords in *Gillan* that racial profiling is consistent with the Race Relations Act 1976 (now the Equality Act 2010) is unsustainable.

81. Neither s.44 nor its proposed replacement explicitly authorises racial profiling. The difficulty, in our view, however, is that the continued absence of any requirement for "reasonable suspicion", albeit within the scope of authorisations which may become less commonplace, and may (albeit on very narrow grounds)

---

[37] *East African Asians v United Kingdom* (1981) 3 EHRR 76, E Com HR, para 207; *Cyprus v Turkey* (2002) 35 EHRR 30, paras 305–311.

[38] (2005) 44 EHRR 776.

themselves be open to judicial challenge, leaves significant room for the operation in practice of such profiling. The UK is placed under positive obligations by virtue of Article 14 to take steps to avoid discrimination (*Opuz v Turkey*) even when the discrimination flows from the actions of private actors. Where, as here, the discrimination at issue would be the result of actions of agents of the state itself, it is clear in our view that the UK is obliged by Article 14 not to conduct itself in such a manner as to facilitate such discrimination.

82. The inclusion of a provision within the Code, or even on the face of the statute, that S&S may not be carried out on grounds of race/ ethnicity/ religion is in our view likely to amount to little more than lip service given the fundamental problem that, absent any requirement of reasonable suspicion as regards S&S, it is open to the officer challenged as to the reason for the selection of one person rather than another to deny (as was the case in the civil action which arose from the *Gillan* facts) that the person was selected for any reason at all.

83. The Code of Practice issued under the remedial order provides as follows:

> 1.2.4. Powers to stop and search must be used fairly, responsibly, and in accordance with the Equality Act 2010.
> 4.3. Avoiding Discrimination
> 4.3.1. The Equality Act 2010 makes it unlawful for police officers to discriminate against, harass or victimise any person on the grounds of age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage or civil partnership, pregnancy or maternity in the discharge of their powers. When police forces are carrying out their functions they also have a duty to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation, to advance equality of opportunity and to foster good relations...
> 4.3.3. Racial or religious profiling is the use of racial, ethnic, religious or other stereotypes, rather than individual behaviour or specific intelligence, as a basis for making operational or investigative decisions about who may be involved in criminal activity.
> 4.3.4. Officers should take care to avoid any form of racial or religious profiling when selecting people to search under

section 47A powers. Profiling in this way may amount to an act of unlawful discrimination, as would selecting individuals for a search on the grounds of any of the other protected characteristics listed in paragraph 4.3.1. Profiling people from certain ethnicities or religious backgrounds may also lose the confidence of communities.

4.3.5. Great care should be taken to ensure that the selection of people is not based solely on ethnic background, perceived religion or other protected characteristic. A person's appearance or ethnic background will sometimes form part of a potential suspect's description, but a decision to search a person under powers conferred by section 47A should be made only if such a description is available.

4.3.6. Following the failed attacks on the London Underground on 21 July 2005, the approximate age and visible ethnicity of the suspects were quickly identified but little else was known about them. In similar circumstances it may be appropriate to focus section 47A searches on people matching the descriptions of the suspects.

4.3.7. Terrorists can come from any background; there is no profile for what a terrorist looks like. In recent years, criminal acts motivated by international terrorism and aimed against people in the United Kingdom have been carried out or attempted by White, Black and Asian British citizens. [emphasis added]

84. It is instructive to compare this with the PACE Code of Practice A which, in its current form, states that:

2.2... Reasonable suspicion can never be supported on the basis of personal factors. It must rely on intelligence or information about, or some specific behaviour by, the person concerned. For example, other than in a witness description of a suspect, a person's race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other, or in combination with any other factor, as the reason for searching that person. Reasonable suspicion cannot be based on generalizations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity. A person's religion cannot be considered as reasonable grounds for suspicion and should never be considered as a reason to stop or stop and search an individual.

2.4 However, reasonable suspicion should normally be linked to accurate and current intelligence or information, such as information

> describing an article being carried, a suspected offender, or a person who has been seen carrying a type of article known to have been stolen recently from premises in the area... [emphasis added]

85. The s.47A Code does appear to prohibit the selection of persons for S&S on grounds of ethnicity etc except where (as under PACE Code A) the characteristic forms part of the description of a particular suspect. The difficulty lies, however, in ensuring that the Code is complied with in the absence of any requirement of reasonable suspicion as regards S&S. As stated above, in the absence of a requirement for reasonable suspicion "it is open to the officer challenged as to the reason for the selection of one person rather than another to deny (as was the case in the civil action which arose from the *Gillan* facts) that the person was selected for any reason at all". Where only subjective suspicion is required, the court is not in a position to test the assertion of an individual officer who states that he or she suspected that the individual was involved in terrorism because of "gut instinct" etc. It follows, in our view, that breaches of Article 14 are likely to arise in connection with the operation of S&S without reasonable suspicion under the proposed regime, as under its predecessor.

CONCLUSION

86. For the reasons set out above, it is our view that the proposed new regime for what might justifiably be termed "arbitrary S&S" (this by contrast with "reasonable suspicion S&S" under PACE), although an improvement on the current position, is likely to be incompatible with Articles 5, 8, 10, 11 and 14 ECHR, of the Equality Act 2010 and of international law.

87. The fundamental difficulty with the regime is that the lack of any requirement for reasonable suspicion in our view renders selection for S&S arbitrary so as to breach Article 5 to the extent that it amounts to deprivation of liberty; to create problems as regards the creation of a legal basis for interference with Articles 8, 10 and 11 of the Convention and; and to invite discrimination contrary to Article 14 of the Convention by those exercising the power of selection for S&S. The various amendments to the legislation which have been made, and which have

been suggested, while they are welcome improvements, do not remove this fundamental difficulty. The more that further enhancements of the regime were to occur as regards (for example) temporal and geographical limitations on authorisations, and in particular judicial approval of the issue of authorisations, the more likely it is that the new regime will be compatible with the Convention rights. However, in our view, it will remain the case that its operation is likely to result in breaches of Articles 5, 8, 10, 11 and 14 because of the fundamental requirement of 'lawfulness' to which we have referred in detail above,

RABINDER SINGH QC

AILEEN McCOLGAN

MATRIX

13 April 2011

Committee of Ministers Consideration of Execution of the Judgment in *Gillan & Quinton vs United Kingdom (4158/05)*

Response from the Home Office to Submissions from the Equality & Human Rights Commission

1. We acknowledge receipt of a submission from the Equality & Human Rights Commission in respect of the Council of Ministers' scrutiny of the UK Government's implementation of the European Court of Human Rights' judgment in the case of *Gillan & Quinton vs United Kingdom*. In particular, we note the EHRC's assertion that this case should be transferred to the procedure of enhanced supervision.

2. The Government does not believe that it is appropriate or necessary to transfer this case for enhanced supervision as it does not disclose major structural and complex problems. The Government has made clear that it accepts the Court's decision and would not have sought to refer the decision to the Grand Chamber (as requested by the previous administration) even if permission had been granted. The Government took immediate action to implement the Court's decision in July 2010 by suspending the "no suspicion" use of section 44 of the Terrorism Act 2000, pending a review. The Home Secretary announced the conclusions of that review to Parliament in January this year, indicating that the powers under section 44 would be repealed and replaced with a significantly circumscribed power. The relevant provisions of sections 44-46 have now been replaced temporarily by the remedial order made under the Human Rights Act 1998 laid in March this year, and will be replaced permanently by the passage of the Protection of Freedoms Bill in early 2012. We will be updating our action plan to reflect these developments shortly.

3. It is our view that the powers in the remedial order and the Protection of Freedoms Bill are compliant with the ECHR. The threshold for authorisation of the powers is significantly higher. This, along with other safeguards such as a statutory Code of Practice, powers for the Secretary of State to amend, reject or cancel authorisations, specific requirements for temporal and geographical extent of authorisations to be justified, and a reduction in the maximum period of an authorisation from 28 to 14 days, means that there is no longer a risk of the powers being used arbitrarily.

4. We note the following assertion in the EHRC's submission:

"that there may be very exceptional circumstances in which it is necessary for there to be a power to stop and search without reasonable suspicion. However, we suggest that any departure from the principle of reasonable suspicion must be only used where it is absolutely necessary, for instance, to prevent a real and immediate act of terrorism or to search for perpetrators or weapons following a serious incident."

We agree with this point and would emphasise that the circumstances in which we envisage the powers being used are indeed exceptional; where there is information to suggest an act of terrorism and the powers are necessary to prevent it. This principle is inherent in the legislation and is supported in detail by the provisions of the robust statutory Code of Practice.

5. Under both the remedial order and the provisions in the Bill, the criteria for making an authorisation under section 47A of the Terrorism Act is if the authorising officer:

   (a) reasonably suspects that an act of terrorism will take place; and
   (b) considers that –
      (i) the authorisation is necessary to prevent such an act;
      (ii) the specified place is no greater than is necessary to prevent such an act; and
      (iii) the duration of the authorisation is no longer than is necessary to prevent such an act.

6. The threshold of reasonable suspicion that an act of terrorism will take place is clearly significantly higher than the previous threshold of "expediency". It requires the authorising officer to have access to and have considered relevant evidence about the act of terrorism in question. Furthermore, the authorising officer must consider that the conditions in (b)(i) – (iii) are met, meaning that the powers (and the extent to which they are authorised) must be a necessary response to the threat.

7. In addition, the statutory Code of Practice includes detailed guidance on the circumstances in which it is or is not appropriate to make an authorisation and the information that must be provided to the Secretary of State in support. In particular, the Code of Practice is clear that authorisations cannot be made on the basis of a general high threat from terrorism, the vulnerability or risk associated with a specific site, in order to provide public reassurance or as a deterrent or intelligence-gathering tool. It also requires the authorising officer to provide:
   - a detailed account of the intelligence which has led to the reasonable suspicion that an act of terrorism will take place,

- justification of the geographical and temporal extent of the authorisation
- information on the briefing that will be provided to officers exercising the powers, and
- information about the tactical deployment of the powers.

8. The Code sets out that section 47A powers should only be authorised where other powers or measures are insufficient to deal with the threat and even where authorised, officers should consider whether other powers are more appropriate to use in specific situations (e.g. powers which can only be exercised on the basis of reasonable suspicion).

9. The Code also provides detailed guidance on the exercise of the powers, including that:

> *"When exercising section 47A powers, officers should have a basis for selecting individuals or vehicles to be stopped and searched. This basis will be either objective factors (based on the intelligence available and in accordance with the officer's briefing) or the selection of individuals or vehicles at random within the parameters set out in the authorisation (for example, the stopping of vehicles at random travelling down a particular road towards a potential target). If stops and searches are being conducted on the basis of objective factors, constables should still consider whether powers requiring reasonable suspicion are more appropriate and should only use the powers conferred by a section 47A authorisation, if they are satisfied that they cannot meet a threshold of reasonable suspicion sufficient to use other police powers.*
>
> *Searches conducted under section 47A may be carried out only for the purpose of discovering whether there is anything that may constitute evidence that the vehicle being searched is being used for the purposes of terrorism, or the individual being searched is a terrorist[1]. The search can therefore only be carried out to look for anything that would link the vehicle or the person to terrorism."*[2]

10. We consider that the new powers, as opposed to section 44, are not "arbitrary". While there is no requirement for an officer to have reasonable suspicion in conducting an individual search, each search can be considered necessary by virtue of the fact that it is conducted on the basis that a chief officer reasonably suspects that an act of terrorism will take place in that

[1] A "terrorist" in the context of these powers means a person within the meaning of section 40(1)(b) of the Terrorism Act 2000 (i.e. a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism).
[2] Code of Practice (England, Wales & Scotland) For The Authorisation And Exercise Of Stop And Search Powers Relating To Section 47A Of, And Schedule 6B To The Terrorism Act 2000: Paragraphs 4.1.1. and 4.1.2.

particular area and that particular time, and the use of the powers is necessary to prevent it.

11. The Government submits the following responses to the particular issues raised by the EHRC:

Reasonable Belief

12. The exact wording of the test for authorisations was considered during the Counter Terrorism and Security Powers Review.

13. One of the primary concerns was to draft the new powers in a way which ensured they were significantly circumscribed but remained useful. A threshold of "reasonable belief" would, in our opinion, be too high to ensure that chief officers were able to authorise the powers on the basis of the information available, especially if that information consisted of intelligence which could not be immediately corroborated but needed to be acted upon. A threshold of "suspicion" allows the chief officer to authorise the powers as long as that suspicion is reasonable. However, in order to ensure that the powers are only authorised in response to an immediate threat, the powers can only be authorised where there is reasonable suspicion that an act of terrorism "will" take place, rather than where one "may" take place. If the grounds for an authorisation cease to apply, the legislation is clear that an authorisation must be cancelled.

Geographical area and duration of authorisation

14. The remedial order makes it clear that the authorisation may only last for as long as is necessary and may only cover a geographical area as wide as necessary to address the threat.[3] The length of authorisation and the extent of the police force area that is covered by it must be justified by the need to prevent the suspected act of terrorism.

15. We are aware that in submissions to the Counter Terrorism and Security Powers Review, some correspondents, in particular Liberty, suggested that the authorisation period be as limited as 24-48 hours and for only a very small geographical area of up to 1km square. The review considered this and found that such an approach would be operationally unworkable given intelligence of an expected attack is rarely so detailed to give exact times and places. The legislation makes clear, however, that authorisations should be as time and geographically limited as possible.

16. In some respects the new proposals go further than Liberty has suggested. Liberty suggested that the police should be allowed to stop and search people in the vicinity of particularly critical or sensitive buildings or during important

[3] Section 3(1) of the Terrorism Act 2000 (Remedial) Order 2011, creating new sub-section 47A(1)(b) of the Terrorism Act 2000

events. The new powers only allow this if there was some intelligence to suggest that event or place was under threat of attack.

Prior Judicial Authorisation

17. The review of counter-terrorism and security powers considered the judicial authorisation for the use of the new terrorism stop and search powers and decided that it was not appropriate. The Government as the executive needs to be responsible for national security decisions and the judiciary should be able to review such decisions as necessary. Blurring the lines between the executive and judiciary would not be helpful.

Public Notification

18. We considered whether authorisations should be publicly notified as part of the review of Section 44 and concluded that it was not a necessary additional safeguard and that it would be counter-productive.

19. On the first point, the European Court of Human Rights in their *Gillan* judgment did not make specific mention of the lack of publication of the authorisations in their main criticisms of the Section 44 powers. We consider that the very significant steps that the Government has taken to replace Section 44 with a much more tightly defined and circumscribed power with enhanced safeguards means that the new powers comply with Convention rights. On the second point, the police advised that publishing information on when and where authorisations were in place would allow terrorists to regulate their behaviour. It would, in effect, provide them with an extra reconnaissance tool giving information about which areas were subject to authorisations, and if authorised on the basis of specific intelligence, could allow terrorists to make a connection between the areas authorised and the intelligence which the police had access to.

Provisions on the face of the Bill

20. We consider that the legislation already includes very significant safeguards and limits to ensure that the power is proportionate. This includes:

- The threshold for a senior police officer to authorise the use of the proposed powers is much higher. The senior police officer must reasonably suspect that an act of terrorism will occur and consider that the powers are necessary to prevent that act of terrorism.
- The length of time that any authorisations are in place has been halved and authorisations must be as geographically and temporally limited as possible.
- The Secretary of State has greater power to refuse and amend authorisations.
- The purpose of a search has been narrowed.
- The legislation requires a statutory code of practice.

21. Whilst the statutory Code of Practice includes important guidance and supporting information to police officers, all of the key safeguards are already on the face of the legislation. The Code sets out important restrictions and limitations on the authorisation process and use of the powers and given the amount of detail included, it would not be appropriate or feasible to include this in primary legislation. However, the Code is a statutory document, which officers are required to have regard to and is admissible in evidence. It is a clear explanation of the Government's expectation concerning the use of these powers.

22. We do not accept the EHRC's assertion that restrictions in the Code of Practice could be lifted in future "without sufficient scrutiny and debate". The Protection of Freedoms Bill is clear that the Code, and future revisions of the Code, must be subject to a full consultation.[4] On completion of the consultation process, the Code can only be approved on the basis of an order approved by both Houses of Parliament, i.e. after debates and votes in each House.

Peaceful Protestors

23. The threshold for authorisations means that the likelihood of protestors being stopped and searched under the new powers is greatly reduced. Whereas under section 44, it may have been possible for a chief officer to make an authorisation to prevent terrorists using legitimate protest as cover for hostile reconnaissance, this is no longer the case.

Unlawful Discrimination

24. The Code of Practice explicitly states that:

> *"Powers to stop and search must be used fairly, responsibly, and in accordance with the Equality Act 2010."*

25. Furthermore, in addition to the part of the Code set out at paragraph 9 above, the Code provides guidance on the type of indicators which should be used in selecting individuals to be stopped and searched where "objective factors" are to be used which fall short of reasonable suspicion.

26. We note the EHRC's report of the views of one officer that:

> *"The damage to community relations from poor treatment or profiling can occur because, when large numbers of stops are carried out, it is inevitably, 'the least experienced officers who are then asked to carry out what is, from the perspective of community policing, one of the most important tasks'.*

[4] Protection of Freedoms Bill: Clause 61

In response to this observation, we would point out that the new powers will not permit stops and searches to be carried out on anything approaching the scale experienced under section 44, and where authorisations are in place, the use of the powers is limited to officers who have been briefed about their use.

Conclusion

27. The Government took decisive steps to respond to the European Court of Human Rights' judgment in the case of *Gillan* when it became final last summer whilst the powers were reviewed. Following that review, the Government is repealing the Section 44 powers in light of the Court's judgment and because the Government considered that they were not effective or proportionate. The powers have been replaced with a much more focussed and fairer power which is subject to significantly enhanced safeguards. The Government considers that the new powers are necessary to protect the public and are fully compliant with Convention rights and, as such, there is no need for the case to be transferred to the procedure of enhanced supervision.

Annexes

1. Home Secretary statement in July 2010
2. Remedial Order made under section 10 of the Human Rights Act 1998, coming into force 18 March 2011
3. Explanatory Memorandum
4. Code of Practice
5. "Required Information" issued alongside Remedial Order
6. Equality Impact Assessment
7. Review of Counter Terrorism & Security Powers

Home Office, 30 May 2011

Note

Annexes 1 and 5 can be found below.
Annexes 2, 3, 4, and 6 can be found at:
http://www.homeoffice.gov.uk/publications/counter-terrorism/terrorism-act- remedial-order/
Annex 7 can be found at:
http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct- security-powers/review-findings-and-rec?view=Binary.

ANNEX 1

SECTION 44 TERRORISM ACT 2000- ORAL STATEMENT – 8 JULY 2010

Mr. Speaker, I would like to make a statement on stop and search powers under section 44 of the Terrorism Act 2000.

On Wednesday of last week, the European Court of Human Rights ruled that its judgment in the case of Gillan and Quinton is final. This judgment found that the stop and search powers granted under section 44 of the Terrorism Act 2000 amount to the violation of the right to a private life.

The Court found that the powers are drawn too broadly – at the time of their initialauthorisation and when they are used. It also found that the powers contain insufficient safeguards to protect civil liberties.

The Government cannot appeal this judgment – although we would not have done so had we been able. We have always been clear in our concerns about these powers, and they will be included as part of our review of counter-terrorism legislation.

I can therefore tell the House that I will not allow the continued use of section 44 in contravention of the European Court's ruling and, more importantly, in contravention of the civil liberties of every one of us. But neither will I leave the police without the powers they need to protect us.

Since last Wednesday, I have sought urgent legal advice and consulted police forces. In order to comply with the judgment – but avoid pre-empting the review of counter-terrorism legislation – I have decided to introduce interim guidelines for the police. I am therefore changing the test for authorisation for the use of section 44 powers from requiring a search to be 'expedient' for the prevention of terrorism, to the stricter test of it being 'necessary' for that purpose. And, most importantly, I am introducing a new suspicion threshold. Officers will no longer be able to search individuals using section 44 powers. Instead, they will have to rely on section 43 powers – which require officers to reasonably suspect the person to be a terrorist. And officers will only be able to use section 44 in relation to the searches of vehicles. I will only confirm these authorisations where they are considered to be necessary, and officers will only be able to use them when they have 'reasonable suspicion'.

These interim measures will bring section 44 stop and search powers fully into line with the European Court's judgment. They will provide operational clarity for the police. And they will last until we have completed our review of counter-terrorism laws.

Mr Speaker, the first duty of government is to protect the public. But that duty must never be used as a reason to ride roughshod over our civil liberties. I believe that the interim proposals I have set out today give the police the support they need and protect those ancient rights.

I commend this statement to the House.

ANNEX 5

Required information: Terrorism Act 2000 (Remedial) Order 2011 (S.I. 2011/631)

Introduction

1. This document sets out the 'required information' which is defined in paragraph 5 of Schedule 2 to the Human Rights Act 1998 (HRA) as follows:

> "*(a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and*
>
> *(b) a statement of the reasons for proceeding under section 10 and for making an order in those terms*."

Incompatibility

2. The Terrorism Act 2000 (Remedial) Order 2011, made under section 10 of the HRA ("the remedial order") removes the incompatibility of sections 44 to 46 of the Terrorism Act 2000 ("the 2000 Act") with Article 8 rights. The European Court of Human Rights ("ECtHR") found in its judgment in the case of *Gillan & Quinton v United Kingdom* (Application no. 4158/05) that the stop and search powers in sections 44 to 46 of the Terrorism Act 2000 violated Article 8. These provisions allow the police to stop and search vehicles or individuals for counter-terrorism purposes, without reasonable suspicion, in an area and for a period specified in an authorisation given by a senior police officer.

3. The ECtHR found that the powers in these provisions are "*neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse*. *They are not therefore 'in accordance with the law' and it follows that there has been a violation of article 8 of the Convention*" (paragraph 87)[5]. This judgment became final on 28 June 2010 when a panel of five judges refused the UK's request for the case to be referred to the Grand Chamber of the ECtHR.

4. The ECtHR's reasoning was as follows:

a) The statutory test for giving an authorisation is one of "expediency". There is no requirement that the stop and search power be considered "necessary". The consequence was that there was therefore no requirement of any assessment of the proportionality of the measure: (paragraph 80).

[5] The full judgment is available at www.echr.coe.int/ECHR/homepage_EN

b) The Secretary of State has no power to alter the geographical coverage of an authorisation and although she has a power of confirmation, this had never been exercised to refuse an authorisation or to substitute an earlier time of expiry: (paragraph 80).[6]

c) Although the exercise of these powers was subject to judicial review, "*the width of the statutory powers is such that applicants face formidable obstacles in showing that any authorisation and confirmation are ultra vires or an abuse of power*": (paragraph 80).

d) The temporal (a maximum of 28 days) and geographical (area of police force) restrictions on authorisations provide no real check because:

(i) authorisations could be and had been continuously been renewed;

(ii) some forces (such as the Metropolitan Police Service) covered large and densely populated areas: (paragraph 81).

e) The Code of Practice "*governs essentially the mode*" in which the powers are carried out "*rather than providing any restriction on the officer's decision to stop and search*": (paragraph 83).

f) There is nothing in the Code or the legislation providing any real check on the officer's discretion in exercising the stop and search powers. The "*sole proviso*" is that the search must be for the purpose of looking for articles which could be used in connection with terrorism. But that was "*a very wide category which could cover many articles commonly carried by people in the streets*": (paragraph 83).

g) There is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer and the risk that it could be misused – including in a discriminatory way: (paragraph 84).

<u>Reason for proceeding under Section 10 of the Human Rights Act 1998 and making an order in those terms</u>

[6] This was not factually correct in relation to the exercise of the Secretary of State's power.

5. After the *Gillan* judgment became final on 28 June 2010, the Home Secretary wanted to immediately stop the ongoing and widespread use of the section 44 powers so as to urgently give effect to the *Gillan* judgment. The Home Secretary therefore made a statement in the House of Commons on 8 July 2010, (repeated by the Minister of State for Security and Counter-Terrorism, Baroness Neville-Jones, in the Lords[7]) setting out how the powers in sections 44 to 46 of the 2000 Act were to be operated pending the review of those provisions within the government's wider review of counter-terrorism measures and legislative amendment. In short, she said that:

a) Terrorism-related stops and searches of individuals are to be conducted under section 43 of the 2000 Act (on the basis of reasonable suspicion that the individual is a terrorist). Section 44 is no longer to be used for the searching of individuals.

b) In view of the fact that there is currently no terrorism-related power to stop and search vehicles on the basis of reasonable suspicion, section 44 may continue to be used for the purpose of searching vehicles. So authorisations may continue to be given under section 44(1) of the 2000 Act, but these authorisations are to be made (and will only be confirmed by the Secretary of State) on the basis that they are "necessary" for the prevention of acts of terrorism (rather than merely "expedient" as expressed in section 44(3) of the 2000 Act).

c) Any stops and searches conducted under an authorisation under section 44(1) of the 2000 Act must be carried out on the basis that the officer reasonably suspects the presence of articles of a kind which could be used in connection with terrorism in the vehicle.

6. The Home Secretary has, therefore, already put an end, administratively, to the possibility of these powers being used in a manner which is incompatible with Convention rights. However, sections 44 to 47 of the 2000 Act remain on the statute book and the Home Secretary's guidelines on 8 July 2010 represented only an interim position (as expressed at the time) and do not represent an implementation of the *Gillan* judgment which must be carried out by amending the primary legislation. In the Parliamentary debate that followed the statements, Baroness Neville-Jones said that, in relation to the interim guidance:

> "*What we have, in effect, are non-statutory guidelines, and the law remains in place. It is not to be ruled out that, should a contingency of an extreme kind arise-and I emphasise "extreme kind"-the Home Secretary would regard it as both right and within her powers to alter the guidelines. It is very important - I come back to this - that we do not put the police in the position of acting illegally*."[8]

[7] The Home Secretary's statement is at http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100708/debtext/100708-0001.htm#10070875001177, and the Minister for Security and Counter Terrorism's is at http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/100708-0002.htm#10070878000285

[8] Column 384, Hansard

7. By suspending use of the powers without suspicion, the Home Secretary acted in a way which gave unequivocal effect to the judgment as quickly as possible. This however, leaves the police unable to use counter-terrorism stop and search powers exercisable without reasonable suspicion even to the extent that such powers are compatible with Convention rights.

8. During the counter-terrorism and security powers review, a need was identified for a counter-terrorism stop and search power that could be exercised without reasonable suspicion in tightly circumscribed circumstances. These circumstances were where the police reasonably suspect that an act of terrorism will take place and that stops and searches (of individuals or vehicles) are necessary to prevent such an act - but where the intelligence available is insufficient for such stops and searches to be conducted on the basis of reasonable suspicion. This is set out in the chapter on section 44 in the published findings from the Government's review of counter-terrorism and security powers[9].

9. As noted above, the position under the Home Secretary's current guidelines does not envisage the use of the existing powers (exercisable without reasonable suspicion) in any circumstances[10]. There is currently, therefore, an operational gap in police counter-terrorism powers. The review recommended that this gap be addressed by making provision in the Protection of Freedoms Bill. However, the review also stated:

> *"19. Given the Government will need to legislate to replace the existing section 44 powers, the review recommends that consideration is given to whether the replacement provisions can be implemented more quickly than would be possible through the Freedom Bill to fill the potential operational gap."*[11]

10. It is generally desirable for amendments to primary legislation to be made by way of a Bill. The Government has taken steps to do this through the Protection of Freedoms Bill which was introduced on 11 February and received its second reading on 1 March 2011. This Bill includes provisions to repeal sections 44 to 47 of the 2000 Act and to replace them with a new stop and search power which is far more circumscribed and which is compatible with Convention rights. These provisions are unlikely, however, to come into force until early 2012 when the Protection of Freedoms Bill is currently expected to receive Royal Assent. As an alternative, the Secretary of State has considered whether to use a short fast-track Bill to amend the 2000 Act. There is, however, no available space in the current legislative programme for such a Bill.

11. The Government also considered, as an alternative to using a remedial order, whether the Home Secretary's interim guidance of 8 July 2010 could be revised to allow the police to use the counter-terrorism stop and search powers in sections 44 to 46 of the 2000

[9] The review is available at: http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/

[10] An officer must have reasonable suspicion to exercise the powers under an authorisation given under section 44(1) of the 2000 Act.

[11] See page 19 of the review.

Act again (without reasonable suspicion) but in only circumscribed circumstances. This could have provided the police with a stop and search power to fill the operational gap quickly. However, it was considered that attempting to operate existing powers under sections 44 to 46 of the 2000 Act in a more restricted way than provided for by the legislation would be unsatisfactory, including for the following reasons:

a) it would not provide the legal certainty and clarity of legislative amendment;
b) the full range of changes considered necessary to make the existing powers Convention-compatible could not be achieved without legislative amendment; and
c) further (non-statutory) guidelines would still not implement the ECtHR's judgment.

12. In summary, there is a need to amend the legislative powers of stop and search in sections 44 to 46 of the 2000 Act to prevent unlawful interference with individuals' rights. Although the Home Secretary suspended the practical use of the powers in sections 44 to 46 without reasonable suspicion, these provisions remain in force and it remains necessary to remove this incompatibility. The counter-terrorism review identified an urgent need, for national security reasons, to provide an ECHR-compatible replacement for these powers. There is a lack of alternative suitable legislative vehicles for revising the counter-terrorism stop and search powers quickly enough for operational requirements (in particular, the Protection of Freedoms Bill is not expected to receive Royal Assent until early 2012 and there is no space in the legislative programme for a stand-alone fast-track bill). The non-legislative alternative is unsuitable. In view of this, the Home Secretary considers that there are compelling reasons for proceeding under section 10 of the HRA to make a remedial order to make such amendments she considers necessary to remove the incompatibility identified in *Gillan*.

The replacement provisions

13. The order provides that the 2000 Act is to be given effect to as if sections 44 to 47 are repealed and new provisions relating to stop and search are inserted. The Explanatory Memorandum to the Terrorism Act 2000 (Remedial) Order 2011[12] provides a detailed explanation of the provisions. But in short, the new section 47A of, and Schedule 6B to, the 2000 Act introduce a limited power for a senior officer to give an authorisation for the use of the new stop and search power to search vehicles or individuals without reasonable suspicion for counter-terrorism purposes. The new powers are compatible with Convention rights, addressing as they do, the criticisms made in the *Gillan* judgment and conferring only an appropriately constrained discretion on both authorising officers and officers exercising the powers and containing effective legal safeguards. In particular:

[12] This will be available on the Home Office website.

i. An authorisation may only be given when a senior officer reasonably suspects that an act of terrorism will take place and the senior officer considers that it is necessary to prevent such an act (this is considerably higher than the "expediency" test in section 44);
ii. An authorisation may last for a period no longer than the senior officer considers necessary and for a maximum of 14 days (as opposed to a 28 day maximum under section 46(2) of the 2000 Act);
iii. An authorisation may cover an area or place no greater than the senior officer considers necessary;
iv. The Secretary of State may substitute an earlier date or time for the expiry of an authorisation when confirming an authorisation;
v. The Secretary of State may substitute the area or place authorised for a more restricted area or place when confirming an authorisation;
vi. A senior police officer may substitute an earlier time or date or a more restricted area or place, or may cancel an authorisation;
vii. An officer exercising the stop and search powers may only do so for the purpose of searching for evidence that the person concerned is a terrorist (within the meaning of section 40(1)(b) of the 2000 Act) or that the vehicle concerned is being use for the purposes of terrorism (as opposed to the purpose under section 45(1) of searching for articles of a kind which could be used in connection with terrorism);
viii. Officers (in both authorising and using the powers) must have regard to a statutory Code of Practice which further constrains the use of those powers.

14. Article 6 of the remedial order makes a sunsetting provision so that the order will cease to have effect on the coming into force of the provisions in the Protection of Freedoms Bill. By this point, Parliament will have had the opportunity to fully scrutinise the provisions in the Protection of Freedoms Bill to similar effect to those contained in this order.

Reason for using the urgency procedure

15. Paragraph 2(b) of Schedule 2 to the HRA provides that the usual procedure for making a remedial order (approval by a resolution of each House after 60 days of a draft being laid, following the additional procedure set out in paragraph 3 which itself lasts more than 60 days[13]), does not apply if '*it is declared in the order that it appears to the person making it that, because of the urgency of the matter, it is necessary to make the order'* without that procedure being followed.

16. The Home Secretary, on the basis of advice from the police and in the light of the Government's review of counter-terrorism powers, considers that, for national security reasons, it is necessary, now, for there to be available to the police a limited form of counter-terrorism stop and search powers, exercisable without reasonable suspicion. She considers that there is currently a gap in police powers and that this cannot be sustained until the

[13] The calculation of 'days' for this purpose does not include any time during which Parliament is dissolved or prorogued, or both Houses are adjourned for more than four days.

procedure provided for under paragraph 2(a) and 3 of Schedule 2 to the HRA for making a remedial order could be completed. As the powers in sections 44 to 46 cannot be used (without reasonable suspicion) compatibly with Convention rights, the Home Secretary considers that the situation can most appropriately be dealt with by making provision to remove the incompatibility and making such provision urgently. The experience of the police since the suspension of the section 44 powers has indicated that there is a clear operational gap in responding to specific threat scenarios which cannot be met by other, existing powers. The current international terrorism threat level is assessed by the Joint Terrorism Analysis Centre as 'Severe' meaning a threat is considered highly likely. Whilst it is not possible to provide the intelligence supporting the assessment without damaging national security, the seriousness of the current threat is reflected in the Prime Minister's New Year measure that the terrorism threat is "*as serious today as it ever has been*".[14] This remains the case.

17. The Home Secretary considers that having such an ECHR-compatible counter-terrorism stop and search power on the statute book now is in the interests of national security and it therefore appears to her that, because of the urgency of the matter, she must make the remedial order under the procedure prescribed in paragraph 2(b) of the Schedule to the HRA.

17 March 2011

[14] http://www.number10.gov.uk/news/speeches-and-transcripts/2010/12/new-year-podcast-58413