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Réunion :	1164 réunion DH (5-7 mars 2013)
Référence du point :	Communication d'une ONG (Open Society Justice Initiative) (23/11/12) dans l'affaire Gillan et Quinton contre Royaume-Uni (Requête n° 4158/05) et réponse des autorités (30/11/12)

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.

SUBMISSION

Gillan and Quinton v. United Kingdom

Committee of Ministers' 1157th CM-DH Meeting, Council of Europe

NOVEMBER 2012

Introduction

1. The Open Society Justice Initiative ("the Justice Initiative") tenders this submission contending that the United Kingdom has failed to implement the European Court of Human Rights (ECtHR) judgment on *Gillan and Quinton v. the United Kingdom* (hereafter "*Gillan*"). This judgment, delivered in January 2010, found that UK terrorism laws, which permitted people and vehicles to be stopped and searched without any reasonable suspicion for items which could be used for terrorism, breached the rights to privacy and liberty under the European Convention of Human Rights. While the UK is requesting the Committee of Ministers to close the judgment, we urge the Committee to ensure that the case remains open and under its supervision until the judgment is fully implemented.

2. The Open Society Justice Initiative – a human rights law reform organization and public interest litigator -- has monitored stop and search practices in the UK for six years, advocating for legal and policy reform to address its discriminatory effects.

Background

3. On September 9, 2003, the *Gillan* applicants were stopped and searched by police using section 44 of the *Terrorism Act 2000*. Sections 44(1) and (2) allowed police officers to stop and search vehicles and pedestrians for articles that could be used for terrorism even without reasonable suspicion that such articles are present within an authorised area. The ECtHR found that sections 44 – 46 of the *Terrorism Act 2000* were in breach of Article 8 (the right to respect for private and family life of the European Convention of Human Rights) because they were not "in accordance with the law." The judgment found these provisions to be "neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse."[1] The Court also noted the clear risk of arbitrariness in granting of such broad discretion to police officers. It highlighted the risks of discriminatory use of such powers, given that the available statistics demonstrating that black and Asian

people were disproportionately affected by the powers.[2] The *Gillan* decision also ruled that stop and search under Section 44 amounted to a deprivation of liberty within the meaning of Article 5 § 1.[3]

4. On July 8, 2010, the UK Government announced that the powers under sections 44 – 46 Terrorism Act 2000 would be suspended in the wake of the ECtHR judgment. To address the violations, the UK Secretary of State introduced a new stop and search power, Section 47A the *Terrorism Act 2000 through a temporary Remedial Order.*[4] This was enshrined in law through the *Protections of Freedoms Act 2012*, which inserted Sections 47AA – 47AE into the *Terrorism Act*, and placed a duty on the Secretary of State to prepare a Code of Practice in relation to Sections 43 and the new section 47A of the 2000 Act. Under Section 47A, police are allowed to stop and search individuals in a defined area without reasonable suspicion, where a senior police officer reasonably suspects that an act of terrorism will take place and where the powers are considered necessary to prevent such an act. The new section provides that officers exercising he stop and search powers may only do so for the purpose of searching for evidence that the person concerned is a terrorist or that the vehicle concerned is being use for the purposes of terrorism. A senior officer must take the decision to authorize this power for as long as deemed necessary, but no longer than 14 days. The senior officer must seek confirmation from the Secretary of State who can modify the length and area the authorization covers.

5. In its "Action Report," dated October 19, 2012, the UK Government has called for the case to be closed as it considers that all the necessary steps have been taken to implement the judgment. This is based on the contention that the Government has:

- Taken steps to bring the judgment to the attention of the police and the public through announcements in the House of Commons and House of Lords, articles on their website and information disseminated through the Association of Chief Police officers.
- Undertaken a comprehensive review of counter terrorism powers as part of a wider review of counter terrorism powers, published on January 26, 2011.
- Introduced changes to the domestic legislation in the *Protection of Freedoms Act 2012 (PTA 2012),* which received Royal Assent on May 1, 2012.

Lack of Implementation

6. Despite the steps taken, the UK Government has failed to abide by the final judgment in *Gillan.* In June 2011, the UK Parliamentary Joint Committee on Human Rights (hereafter JCHR) first published concerns that the Section 47A Remedial Order in its then form did not go far enough to remove the violations identified by the ECtHR in *Gillan* and therefore risked giving rise to further breaches of Convention rights.[5] The Committee considered that more safeguards were needed to curb the degree of discretion that could lead to discriminatory application of the Order. These safeguards included the requirement for the senior officer to have, and explain, a "reasonable basis" for her belief

(as opposed to suspicion) as to the necessity of the authorization for stop and search; for authorizations to be renewed only in cases in which new or additional information or a fresh assessment of the original intelligence indicates that the threat remains immediate and credible; that prior judicial authorization of the availability of the power to stop and search without reasonable suspicion should be required; and that the Code of Practice accompanying the Order should contain stronger recording and public notification requirements to facilitate monitoring and supervision of the use of the power.

7. In July 2011, the report of the Independent Reviewer of Terrorism Legislation, David Anderson QC, assessed the operation of the *Terrorism Act 2000* including Section 47A. His report raised concerns that the discretion conferred on individual officers under both the *Remedial Order* and the accompanying *Code of Practice*, remained too broad. Such discretion, the report argued, continued to carry the risk of arbitrariness that concerned the ECtHR in *Gillan*.[6] Anderson was particularly concerned about the continued scope for random searches by police, and the lack of definition of the circumstances in which random searches are appropriate. He recommended that the *Code of Practice* accompanying the new statutory power should be revised so as to introduce full and proper guidance on the exercise of the individual officer's discretion to stop and search, in order to minimize the risk that the discretion would be used in an arbitrary manner. The Independent Reviewer concluded:

> "the *Code of Practice* is uninformative on the issue of discretion, ineffective as a constraint on the arbitrary exercise of the individual officer's power and excessive in the opportunities that it offers for random search, a concept which, in view of the judicial disapproval already expressed, will have to be more carefully defined and defended if it is wished to keep it available."[7]

8. In July 2011, the Home Secretary, Theresa May, rejected the recommendations made by the Joint Committee on Human Rights and the Independent Reviewer, and refused to amend the *Remedial Order*. A second report issued by the Joint Committee on Human Rights in September 2011 again called for a new order to bring section 47A in compliance with ECtHR[8] The JCHR recommended that the provisions be amended to make explicit on its face that the authorising officer must have a reasonable basis not only for his or her suspicion that an act of terrorism will take place, but also for his or her view that the authorisation is necessary and proportionate to prevent such an act. The JCHR also noted that the *Code of Practice* should be amended so as to remove all references to "random" searches and to make more explicit that any individual exercise of the power to stop and search must be capable of being justified by the precise nature of the intelligence about the threat. The JCHR maintained its recommendation that the *Remedial Order* be amended to require prior judicial approval for authorisations or approval within 48 hours where the authorisation has been sought in relation to imminent situations Finally the JCHR required the Home Secretary to include JCHR, Independent Reviewers and any relevant reports about, or other national scrutiny of, the Government's

proposed response to the judgment in any future Action Plan submitted to the Committee of Ministers.

9. The Government has not accepted the JCHR's recommendations. Its 'Action Report' of October 19, 2012 does not address the JCHR's concerns.

10. The Justice Initiative agrees with the JCHR. Section 47A confers powers which are not sufficiently circumscribed nor subject to adequate legal safeguards against abuse. The law should make clear that the authorising officer must have a reasonable basis not only for his or her suspicion that an act of terrorism will take place, but also for his or her view that the authorisation is necessary and proportionate to prevent such an act. The law should require judicial authorisation. The *Code of Practice* remains vague on the issue of discretion and as currently drafted is likely to be an ineffective constraint on the arbitrary exercise of the individual officer's powers. The enactment of Section 47A (PFA 2012) means that UK legislation does not abide by the *Gillan* judgment.

Failure to Amend Other National Legislation in Breach of *Gillan*

11. The enactment, and refusal as yet to amend, Section 47A, is not the only breach of the UK's obligations to implement *Gillan*. UK legislation includes other powers of similar effect to that of Section 44 of the *Terrorism Act*. Implementation of the *Gillan* judgment requires the UK Government to review the terms of these powers to ensure their compliance with the judgment. The UK has failed to do this. Schedule 7 of the *Terrorism Act 2000* provides police with stop and search powers in ports and airports where 'examining officers' are able to stop, question and/or detain people, *without the need for any reasonable suspicion*, to ascertain whether they are likely to be engaged in acts of terrorism. Individuals stopped under the power may be detained and examined for up to *nine* hours during which they may be questioned, strip-searched, have their belongings searched and have samples of their DNA and fingerprints taken. Although those detained under the power are not under arrest, they are obliged to co-operate and answer questions in the absence of a lawyer or risk being arrested for "obstruction."[9] The *Gillan* decision ruled that stops and searches under section 44 that lasted up to 30 minutes amounted to a deprivation of liberty.

12. Like Section 4, the discretion conferred by Schedule 7 has been shown to be abused by police in relation to ethnic minorities. Under Schedule 7 of the *Terrorism Act 2000* (a separate provision from Section 44 or Section 47A of the same Act), 63,902 people were stopped in 2011/12. However, the rate of people detained after a schedule 7 stop remains very low at 1.1 per cent.[10] Black and minority ethnic groups make up the majority of those subject to Schedule 7 stops even though they account for a small minority (approximately 11 per cent) of the national population. Asians accounted for 28 per cent of Schedule 7 stops (and 5 per cent of the national population), Blacks accounted for 8 per cent of stops (and 3 per cent of the population) and people from other ethnic groups

(including Chinese and 'mixed race') accounted for 21 per cent of stops (but only 3 per cent of the population). The targeting of black and minority ethnic groups continues to be even more marked when we consider the most intensive Schedule 7 stops. Of those stops which lasted over an hour, 36 per cent were of Asians, 14 per cent were of blacks and 27 per cent were of 'other' ethnic groups. Fewer than 12 per cent of stops were of whites.[11]

13. Section 60 of the *Criminal Justice and Public Order Act 1994* also fails to meet the *Gillan* judgment. This provision allows for police to be authorized to search any person or vehicle for weapons in a specified area where serious violence is reasonably anticipated. This authorization lasts 24 hours and can be extended by another 24 hours. Although the legislation limits "stop and search" to a specific time and place, it does not require police to have any basis of reasonable suspicion for a stop and search.[12]

14. Like Section 44 and Schedule 7 of the *Terrorism Act 2000*, Section 60 is used in a racially discriminatory way. According to the most recent available data, the rate of stops and searches conducted under Section 60 for black people is 37 times the rate for white people, and for Asian people it is ten times the rate for whites.[13] In addition, an investigation conducted by the Independent Police Complaints Commission (IPCC) into the use of Section 60 stop and search powers in the West Midlands in 2007 confirmed concerns that Section 60 was being used inappropriately to deal with routine crime problems with no justifiable reason why normal police powers based on a reasonable suspicion were not being used.[14] Continuous repeat authorisations have been issued meaning that within the area affected there is an indefinite power to stop and search without reasonable suspicion. This is a further violation common to those found in *Gillan.*

15. By failing to amend Schedule 7 TA 2000 and Section 60 CJPO 1994 to circumscribe these powers, the UK Government has failed to implement the *Gillan* judgment.

Recommendations

16. In summary, the Committee of Ministers should resolve:

    a. That UK legislation is not yet in compliance with the UK's obligations under the *Gillan* judgment;
    b. That the UK Government should
        i. amend UK legislation to
            1. ensure that the law should make clear that the authorising officer must have a reasonable basis not only for his or her suspicion that an act of terrorism will take place, but also for his or her view that the authorisation is necessary and proportionate to prevent such an act; and
            2. to require judicial agreement over all authorizations made and

ii. redraft the Code of Practice to ensure it is an effective constraint on the arbitrary exercise of the individual officer's powers.

c. That the UK Government should amend UK legislation conferring powers to stop and search without reasonable suspicion, including in particular Schedule 7 (TA 2000), Section 60 (CJPO 1994), to bring that legislation into conformity with the *Gillan* judgment;
d. That, pending review, the UK Government should suspend the powers conferred by the relevant pieces of legislation;
e. That this matter will be kept under review.

References

[1] ECtHR, *Gillan and Quinton v. the United Kingdom*, Application no. 4158/05, judgment of January 12, 2010, at 87.
[2] Gillan and Quinton v. the United Kingdom, at 85.
[3] Gillan and Quinton v. the United Kingdom, at 57.
[4] *Remedial Order 2011* introduced in parliament on March 18, 2011.
[5] Parliamentary Human Rights Joint Committee, *Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion (Fourteenth Report)*, 7th June 2011.
[6] *Report on the Operation in 2012 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* (July 2011) Presented to Parliament pursuant to s.36 of the Terrorism Act 2006.
[7] *Report on the Operation in 2012.*, paras. 8.34-8.37.
[8] Parliamentary Human Rights Joint Committee, *The Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion (second Report)*, 6thSeptember 2011.
[9] Schedule 7of the Terrorism Act 2000 and accompanying Codes of Practice allow a person detained under this power the right to request the presence of a solicitor, but the police are not obliged to wait for their arrival and, as is often the case ,the police can press on with the search and questioning of the individual. Since it is an offense for the detained individual to refuse to cooperate with the search and questioning they are automatically deprived from their right to legal representation during the encounter. Ironically, the right to legal representation is afforded to actual terrorist suspects arrested under Section 41 of the Terrorism Act 2000 but not for innocent people detained at UK ports and airports under Schedule 7 even though they are never suspected of being involved in acts of terrorism.
[10] Home Office (2012) Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, Outcomes and stops and searches, Great Britain 2011/12. There are no publicly available figures on the numbers of arrests coming out of these detentions.
[11] Home Office (2012).
[12] Section 60 of the Criminal Justice and Public Order Act 1994 as amended by Section 8 of the Knives Act Subsection 3 allows a superintendent to extend this authorization for a further 24 hours.
[13] Equality and Human Rights Commission (2012*) Race disproportionality in stops and searches under Section 60 of the Criminal Justice and Public Order Act 1994.*
[14] Independent Police Complaints Commission (2007) *Report into West Midlands Police Misuse of Section 60 Powers.*

Gillan & Quinton v the United Kingdom (application no. 4158/05; judgment final on 28 June 2010)

The UK Government Action Report of 19 October 2012 sets out the remedial action that has now been taken to fully implement the judgment of the European Court of Human Rights in the case of *Gillan & Quinton v UK*.

Response to the Open Society Justice Initiative ("the Justice Initiative") Submission (November 2012)

The Justice Initiative's submission refers to the reports of the Joint Committee on Human Rights (JCHR) of June 2011[1] and September 2011[2] and also to the 2011 annual report of the Independent Reviewer of Terrorism Legislation, David Anderson QC[3], to assert that the UK Government has failed to fully implement the *Gillan* judgment. The Justice Initiative appears, incorrectly, to consider the acceptance of the recommendations in these reports as a requirement for implementation of the *Gillan* judgment.

The UK Government responded to the JCHR's report on 19 July 2011[4] and 28 September 2011[5], respectively. In our responses, we addressed each of the concerns raised, with particular reference to issues raised in respect of prior judicial authorisation, the authorisation process, the Code of Practice and reference to 'random' stop and search.

The UK Government consulted on revised draft Codes of Practice for Great Britain and Northern Ireland between 6 February 2012 and 1 April 2012. The draft Codes of Practice which formed the basis of the consultation incorporated and built on the earlier interim Codes of Practice for section 47A powers that were published alongside the Terrorism Act 2000 (Remedial) Order 20111. Careful consideration was given to the representations received in developing the Codes, including representations from the consultation, the JCHR's scrutiny of the Remedial Order and associated Codes of Practice, David Anderson QC's annual review of the Terrorism Act of 2000 and 2006, and from engagement with stakeholder such as

[1] Joint Committee on Human Rights (Fourteenth Report), Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion, 7th June 2011
[2] Joint Committee on Human Rights (Seventeenth Report), Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion (second Report), 6th September 2011
[3] Report on the Operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006, David Anderson QC, July 2011
[4] Written Ministerial Statement to Parliament made by the Secretary of State for the Home Department, Hansard: HC Debate 18 July 2011 col 85ws
[5] Letter from James Brokenshire MP to the Chair of the Joint Committee on Human Rights, available at: http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/remedial-orders/terrorism-act-2000-/

photography and journalist groups. A number of changes were made to the Codes as a result.

The Justice Initiative submission fails to refer to David Anderson QC's most recent annual report, published in July 2012[6]. In that report, David Anderson QC comments that:

"In relation to section 47A, the Code of Practice was amended from the version that accompanied the remedial order so as to address the concerns raised in my last report, echoed by the JCHR, regarding 'random' searches, and so as to reflect comments from the police and from the Royal Photographic Society"[7].

He goes on to say:

"...there is always a political risk in scaling back powers designed to protect the public. By taking that step, the Coalition Government is to be congratulated for delivering on its rhetoric and making a 'genuine correction in favour of liberty'"[8].

David Anderson QC's report confirms that he will continue to report on any use of section 47A in the future.

The Justice Initiative also suggest that implementation of the *Gillan* judgment requires the UK Government to review the terms of other powers, such as Schedule 7 to the Terrorism Act 2000 and Section 60 of the Criminal Justice and Public Order Act 1994, to ensure compliance with the judgment. We consider that this assertion is incorrect. The ratio of *Gillan* related specifically to sections 44 – 46 of the Terrorism Act 2000, which the Court found to be in breach of Article 8 (the right to respect for private and family life). This incompatibility has been fully addressed by the changes made to UK primary legislation through the Protection of Freedoms Act 2012, the details of which are set out fully within the UK Government Action Report. The powers under Schedule 7 and the manner in which they are applied in accordance with its Code of Practice are not analogous to the powers subject to the ratio of *Gillan*.

Whilst these matters are outside of the scope of the *Gillan* judgment, the UK Government has recently launched a consultation on proposals to review the operation of Schedule 7 to the Terrorism Act 2000, the power to stop and examine persons at port or border controls with a view to potentially reinforcing the safeguards for civil liberty already in place. This consultation will close on 6th

[6] Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006, David Anderson QC, June 2012. Available at: http://terrorismlegislationreviewer.independent.gov.uk
[7] Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006, David Anderson QC, June 2012, at 8.19
[8] Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006, David Anderson QC, June 2012, at 8.29

December. The case of *Malik v UK*[9] centres on a challenge to Schedule 7 powers. This case, in which the UK Government will set out in full its position regarding Schedule 7, is currently before the Court.

Conclusion:

For the reasons previously stated and set out above, it is the UK Government's view that the powers in the Protection of Freedoms Act 2012 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.

The UK Government considers that all necessary steps have been taken to implement the judgment, and that the case should be closed.

29 November 2012

[9] Application number 32968/11