

## Section 44: Repeal or Reform? A Home Secretary's Dilemma

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### Abstract

Stop and Search without suspicion is a crucial measure in the prevention and deterrence of terrorism. In *Gillan v. UK*, the European Court of Human Rights' ruling that Section 44 of the Terrorism Act 2000 is incompatible with Article 8 of the Convention caused a predicament for the Government by creating a lacuna in the anti-terrorism legislative framework. As such, the Government is presented with a dichotomy between protecting the safety of the public in the face of a terrorist threat and upholding the virtuous maxims of civil liberties. On the one hand, the executive is reluctant to be in breach of the European Court of Human Rights ruling every time a citizen is stopped and searched. Yet, on the other, it would take a bold Home Secretary to concede that stop and search without suspicion is not required. There is a pressing need for a compromise in order to adequately protect the safety of public, but also to respect their hallowed civil liberties. This paper examines the history of Section 44, its application and resultant legal challenges, and suggests a compromise capable of bridging the paradox between protecting the public and civil liberties.

It is an old and cherished tradition of our country that everyone should be free to be about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence. So jealously has this tradition been guarded that it has almost become a constitutional principle. But it is not an absolute rule.<sup>1</sup>

'Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms.'<sup>2</sup>

On 12 January 2010, the European Court of Human Rights (ECtHR) handed down its judgment, *Gillan and Quinton v. UK*,<sup>3</sup> in which it found Section 44 of the Terrorism Act 2000 to be incompatible with Article 8 of the European Convention on Human Rights. The offending Section 44, which granted stop and search powers on the police in the absence of any suspicion of wrong doing, was extremely controversial since its inception. It is evident

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<sup>1</sup> *R (on the application of Gillan (FC) and another (FC) v. Commissioner of Police for the Metropolis and another* [2006] United Kingdom House of Lords 12 [1] per Lord Bingham.

<sup>2</sup> *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department* [2004] United Kingdom House of Lords 56 [94] per Lord Hoffman.

<sup>3</sup> *Gillan and Quinton v. the United Kingdom*, application no 4158/05, (2010) *European Human Rights Reports* 50(45).

that the power was over used by the police and in circumstances for which it was not intended.<sup>4</sup>

Despite hundreds of thousands<sup>5</sup> of stop and searches in a period lasting nearly a decade, Section 44 was not responsible for a single terrorist-related arrest.<sup>6</sup> Consequently, the current Home Secretary announced that the police are resigned to only stopping and searching those who they reasonably suspect to be carrying articles which are related to terrorism.<sup>7</sup> Whilst civil liberties campaigners are rightfully pleased with their legal and moral victory,<sup>8</sup> this has raised particular chagrin for politicians and the policing authorities.<sup>9</sup> They are concerned that they will now be ill-equipped to deal with terrorist threats. In particular, there is a danger that the police would not be able to proactively safeguard the public at large public gatherings, such as during the Olympics. It is the finely struck balance between protecting the public on the one hand, and preserving their civil liberties on the other, which has caused such a problematic complication in formulating anti-terror legislation.

It is clear that Section 44 can no longer be used in its current form without incurring rebuke and damages from the ECtHR, yet to repeal the measure entirely might leave the police ill-equipped to deal with emergency situations. The need for reform is clear, although finding a clear solution is far from certain. The most sensible compromise is to reform the current powers, with much more stringent procedural safeguards so that they are used in the most strictly defined emergency situations as a special measure coupled with a more sophisticated level of understanding and training for those officers who will be expected to use the power. It would be a total misnomer to repeal the stop and search power completely, leaving the police unable to stop and search on the receipt of intelligence or in the aftermath of a terrorist act. This paper will examine the history of Section 44, its troubled application, the legal challenges it presents and finally suggest a compromise capable of bridging the dichotomy between protecting public and civil liberties.

## 1. A Brief History

Controversial anti-terrorism laws are nothing new: a crude analysis would suggest that they are probably as old as terrorism itself. The United Kingdom has had lengthy experience of acts of terrorism on the mainland and in Northern Ireland as well as experience in developing laws and social policy to both negate the effects of terrorism and safeguard the public. One of the principal constraints on how the executive is able to formulate counter-terrorism

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<sup>4</sup> See for example the use of Section 44 by the police in dealing with a heckler, Walter Wolfgang at the Labour party conference in 2005, 'Labour issues apologies to heckler', *BBC News website*, 28 September 2005. Available at <http://news.bbc.co.uk/1/hi/4291388.stm>. Last accessed 6 February 2011.

<sup>5</sup> There were 269,244 stops in the year ending April 2009 alone: Human Rights Watch, 'Without Suspicion.' Available at <http://www.hrw.org/en/node/91417/section/2>. Last accessed 6 February 2011.

<sup>6</sup> Lord Carlile, 'Terrorism: Pragmatism, Populism, and Libertarianism – The Inaugural John Creaney Memorial Lecture', March 3, 2010. Available at [http://www.policyexchange.org.uk/assets/Carlile\\_Transcript.pdf](http://www.policyexchange.org.uk/assets/Carlile_Transcript.pdf). Last accessed 6 February 2011.

<sup>7</sup> Vikram Dodd, 'Police Demand New Powers to Stop and Search Terrorists', *The Guardian*, 29 December 2010. Available at <http://www.guardian.co.uk/uk/2010/dec/29/police-stop-and-search-powers?INTCMP=SRCH>. Last accessed 6 February 2011.

<sup>8</sup> Corinna Ferguson, 'Scrapping Section 44 is a relief to all', *The Guardian*, 9 July 2010. Available at <http://www.guardian.co.uk/commentisfree/libertycentral/2010/jul/09/scrapping-section-44-relief-stop-and-search?INTCMP=SRCH>. Last accessed 6 February 2011.

<sup>9</sup> Ferguson, 'Scrapping Section 44'. See fn. 8.

legislation is the European Convention on Human Rights (ECHR). Since 1950, Britain has been a signatory to the Convention and has had an obligation to observe and comply with the rulings of the ECtHR. Most pertinently, by virtue of the ECHR, Britain is unable to sanction the unlawful killing of terrorists<sup>10</sup> or the torture of terrorists.<sup>11</sup> It is often conveniently forgotten, or worse ignored, by the right-wing press and media that rights have universal application, even to the most callous and egregious terrorists. After all, to deny them human rights would be tantamount to denying the existence of human rights completely. Instead, the executive must work within the ‘qualification’ of the rights and ensure that the measures that are taken are proportionate, necessary and in accordance with a procedure prescribed by law.

Although the Stop and Search powers of Section 44 were introduced in the Terrorism Act 2000, the legal power to stop and search in the absence of reasonable suspicion predates this. The Terrorism Act 2000 repealed and provided a permanent replacement for the Prevention of Terrorism (Temporary Provisions) Act 1989, which had to be renewed by Parliament every year. This contained powers under Sections 13(A) and 13(B) to stop pedestrians and search for articles which could be used in the commission of acts of terrorism, providing authorisation by a senior police officer was in force.<sup>12</sup> The Terrorism Act 2000 was introduced in order to provide permanent statutory counter-terrorist provisions.

The Act was approved by Parliament and received royal assent on 20 July 2000. Crucially, the Terrorism Act was bold enough to include a statutory definition of terrorism:

In this Act ‘terrorism’ means the use or threat, for the purpose of advancing a political, religious or ideological, course of action which –

- a. Involves serious violence against any person or property,
- b. Endangers the life of any person, or
- c. Creates a serious risk to the health or safety of the public or a section of the public.<sup>13</sup>

The stop and search provisions under the Act can be found in two separate regimes of the Act. The first is contained in Sections 41-43, which provide for an arrest without warrant, the search of premises and the search of a person on the grounds of the reasonable suspicion of a constable that the person subject to the arrest or search is a terrorist. Yet it is the second regime found in Sections 44-47 that has provided the controversy as it is not subject to the requirement of reasonable suspicion by a constable; instead its virtue is owed to a three-stage procedure.

First, authorisation is required. Under Section 44(1), authorisation permits any constable to stop and search a vehicle or pedestrian within a place or area which is specified by the authorisation. Section 44 permits specific authorisations by an officer of no lower than the rank of Assistant Chief Constable for a fixed period of time not exceeding 28 days and limited to a specific geographical area.<sup>14</sup> This authorisation may be given where it is ‘considered to be expedient for the prevention of acts of terrorism’.<sup>15</sup>

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<sup>10</sup> *McCann v. the United Kingdom*, application no 324 (1996) *European Human Rights Reports* 21(97).

<sup>11</sup> *Ireland v. the United Kingdom*, application no 25(1979-80) *European Human Rights Reports* 2(25).

<sup>12</sup> This would ordinarily be an Assistant Chief Constable, although in respect of the Metropolitan Police, this would be a Commander.

<sup>13</sup> The Terrorism Act 2000, Section 1(1).

<sup>14</sup> See fn. 13 [44(1)-(2)].

<sup>15</sup> See fn. 13 [44(3)].

Second, under Section 46(3-7) confirmation of the authorisation must be received from the Secretary of State. The police officer who authorises the procedure must inform the Secretary of State as soon as is practicable. If the Secretary of State fails to confirm the authorisation within 48 hours, then the authorisation fails to have effect.

Finally, the third step relates to the exercise of the stop and search power. It is expressly stated that the stop and search power 'may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism'.<sup>16</sup> This is clearly designed to be a procedural safeguard to prevent constables from stopping and searching under this power out of convenience or out of a total misuse (such as a malicious stop and search). It is not difficult to envisage how useful this power could be to the police and security services following a terrorist attack, in the moments before an anticipated terrorist attack, or after one has been carried out. It is equally effortless to foresee how this is open to misuse. As the power is permitted to be used for 28 days and on a rolling basis, unless the authorisation is withdrawn, it can easily be used as a blanket stop and search power. It would be all too easy for a constable to disregard the requirement that they are using the power for the furtherance of searching for terrorist articles. For, in the absence of a reasonable suspicion requirement, it would be extremely difficult to prove that this was not the case.

The power may be 'exercised whether or not the constable has grounds for suspecting the presence of articles of that kind'.<sup>17</sup> This explicitly allows a constable to stop and search anyone within the permitted geographical area, provided there is a valid authorisation in place. However, this power is a significant departure from the usual procedure for stopping and searching suspects, found in Section 1 of the Police and Criminal Evidence Act 1984 (PACE), which is reliant on a constable having reasonable suspicion that a suspect is carrying stolen or prohibited articles.<sup>18</sup>

Where a search is carried out, a suspect may be detained for as long as is required to carry out the search.<sup>19</sup> Crucially, Section 47 makes it an offence punishable by fine, imprisonment, or both to fail to stop when required to do so. This is the compelling hook of the provision as it means that, in effect, the suspect has little choice other than to submit to the stop and search, save for the option of attempting to resist and risking a prosecution.

Under Section 66 of PACE, the Secretary of State is under a duty to issue codes of practice which govern the procedure of the exercise by constables of the statutory power to search detain and question. As such, Code A must also be considered as the procedural guideline for stop and search, even under the Terrorism Act 2000. This states that:

1.2 The intrusion on the liberty of the person stopped or searched must be brief and detention for the purposes of a search must take place at or near the location of the stop.

1.3 If these fundamental principles are not observed, the use of the powers to stop and search may be drawn into question. Failure to use the powers in the proper manner reduces their effectiveness. Stop and search can play an important role in the

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<sup>16</sup> See fn. 13 [45(1)(a)].

<sup>17</sup> See fn. 13 [45(1)(b)].

<sup>18</sup> Nevertheless, this measure is revivification of the stop and search procedure found in the Prevention of Terrorism (Temporary Provisions) Act 1989.

<sup>19</sup> See fn. 13 [45(4)].

detection and prevention of crime, and using the powers fairly makes them more effective.

2.25 The selection of persons stopped under section 44 of the Terrorism Act 2000 should reflect an objective assessment of the threat posed by the various terrorist groups active in Great Britain. The powers must not be used to stop and search for reasons unconnected with terrorism. Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers. There may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example some, international terrorist groups are associated with particular ethnic identities).<sup>20</sup>

Therefore, it is clear from the Code A guidance that there was an implicit recognition from the policing authorities that stop and search without suspicion is an exceptional power, not to be used, save in the most exceptional of circumstances. Equally evident is recognition that extreme sensitivity is required in the selection of those to be searched; that people should not simply be searched due to their ethnic origin alone, but there may be circumstances which necessitate this being taken into account. For this is one of the most awkward dichotomies in anti-terror legislation – somehow trying not to discriminate solely on ethnic appearance, yet realising, that in some instances this may be necessary rather than desirable in order to protect the public.

Additionally, the Home Office also published guidance designed to provide clarity on the proper execution of the authorisation procedure for the stop and search regime states. It recognised that 'in view of their importance, authorisations are subject to considerable scrutiny before being confirmed by the Secretary of State.' Therefore, it elucidated that 'the principles that should underpin an authorisation are intelligence, heightened security threat and target/symbolic location.' The guidance further stated that 'the authorising officer should be clear how to use the Section 44 powers that will disrupt, deter or detect terrorist action.'<sup>21</sup>

Previous Home Office Guidance had acknowledged that 'powers should only be authorised where they are absolutely necessary to support a force's anti-terrorism operations.'<sup>22</sup> In contrast, the latest stipulation is that 'powers should only be authorised where they can be justified on the grounds of preventing acts of terrorism.'<sup>23</sup> Although this somewhat lowers the requirement from 'absolutely necessary' to 'justified', both clearly depart from the wording of the Act, which only required the use of the regime to be 'expedient'. This suggests that the Home Office was aware of the danger of overusing this controversial power, which it deemed should be reserved for situations only where the use could be justified.

Evaluating the regime holistically, it can be seen that the police were afforded with wide powers to be used in exceptional circumstances, but this was not without precedent,<sup>24</sup> nor serious consideration of appropriate procedural safeguards. Although the police would be allowed to stop and search pedestrians or passengers of cars without suspicion, this power

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<sup>20</sup> Police and Criminal Evidence Act 1984 Code A, 1 April 2003.

<sup>21</sup> Home Office, Circular 22/2006, 'Authorisation to Stop and Search powers under Section 44 of the Terrorism Act 2000.'

<sup>22</sup> Home Office, Circular 0/38 2004, July 2004.

<sup>23</sup> See fn. 22.

<sup>24</sup> Stop and search without suspicion also exists under Section 60 of the Criminal Justice and Public Order Act 1994 where the incidents involving serious violence are reasonably believed to be imminent.

should be used only for the purposes of preventing terrorist acts and in situations of grave peril where it would be ‘expedient.’ On balance, *if* used only in the most exceptional circumstances, these powers would have been proportional to the threat faced by terrorists to the United Kingdom. Although it is difficult to quantify an unknown threat, as since the Act came into force, the United Kingdom has been subjected to terrorist threats from extreme groups in Northern Ireland, as well as from Islamic extremists. Sadly, these threats have on occasion been all too real. On the other hand, the perceived threat is not great enough to deprive UK citizens of their liberty on a daily basis.

## 2. Controversy

Despite the prescribed procedural safeguards, designed to ensure that the extensive powers were used solely for the purposes of preventing acts of terrorism, it became clear the powers were being overused in arbitrary and unnecessary circumstances. The figures alone make compelling reading: in the financial year ending in 2002, there were 8,505 stops;<sup>25</sup> however, by contrast in the financial year ending in 2008, there were 188,297 stops.<sup>26</sup> It is hard to imagine that all of these stops can reasonably have been considered an expedient method of preventing terrorist attacks.

Moreover, there is clear evidence that, at best, the police misinterpreted the breadth of the regime and, at worst, deliberately misused the powers out of convenience or even malice. The National Union of Journalists were concerned that the police were deliberately using the Terrorism Act 2000 to prevent journalists from leaving demonstrations and preventing photographers from filming in public.<sup>27</sup> The regime also attracted the attention of the Parliamentary Joint Human Rights Committee which highlighted concerns that it had received reports ‘of police using counter-terrorist powers on peaceful protestors.’<sup>28</sup> The forceful ejection and subsequent Section 44 search of Walter Wolfgang at the Labour Party Conference in 2004 is an example of the police clearly using anti-terrorism legislation in a wantonly reckless manner.<sup>29</sup> In particular, there were strong concerns of racial profiling in the use of stop and search powers; it was forcefully argued that over-representation of ethnic minorities in the statistics has a detrimental impact on the relationship between minority communities and the police.<sup>30</sup> On the other hand, there were counter-allegations that some white people were being stopped in order to try and redress this imbalance, which clearly would constitute a misuse of the powers and for a deceitful purpose.

Perhaps the most pertinent observations can be derived from the findings of Lord Carlile QC, whom was appointed by the Government to be an independent reviewer of counter-terrorism legislation. His observations are required to satisfy Section 126 of the Act, which requires the

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<sup>25</sup> Home Office, ‘Statistics on Race and the Criminal Justice System—2003’, July 2004. Available at <http://www.homeoffice.gov.uk/rds/pdfs04/s95race2003.pdf>. Last accessed 23 January 2011.

<sup>26</sup> Home Office, ‘Statistical Bulletin: Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops & searches’, Great Britain 2008/09, 25 November 2009. Available at <http://www.homeoffice.gov.uk/rds/pdfs09/hosb1809.pdf>. Last accessed 23 January 2011 Table 2.1, 46.

<sup>27</sup> Parliamentary Joint Committee on Human Rights, ‘Demonstrating respect for rights? A human rights approach to policing protest’, March 2009 [87].

<sup>28</sup> See fn. 27 [86].

<sup>29</sup> See fn. 27 [88].

<sup>30</sup> See for example Pantazis and Pemberton, ‘From the “Old” to the “New” Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation’ (2009) *British Journal of Criminology* 49, pp. 646-666.

Secretary of State to present a report to Parliament on the operation of the Act. Examining the regime in 2001, Lord Carlile found that:

Their use works well and is used to protect public interest, institutions, and in the cause of public safety and the state. I have been able to scrutinise the documentation used for Section 44 authorisations. It is designed to limit inconvenience to the general public, and to ensure that no authorisation is given without detailed and documented reasons.<sup>31</sup>

In 2003, Lord Carlile acknowledged that, in his opinion, the powers remained necessary; he asserted, ‘I have received many complaints, some from organisations and others from individuals’<sup>32</sup> expressing concerns arising from ‘the contents of section 45, and the difficulty faced in real-time situations by constables confronted by complex legislative decisions.’<sup>33</sup> With some considerable foresight, he adds that a Section 44 search should only be carried out:

[...] by a constable in an authorised area whether or not he has grounds for suspicion, but may only be “for articles of a kind which could be used in connection with terrorism.” This calls at least theoretically for officers to pause for thought between (a) stop, (b) commencement of search, and (c) during search. This is asking a lot of an officer who may have been briefed in short form at a testing scene.<sup>34</sup>

Clearly concerned at the lack of guidance issued and the potential for this to be misused accidentally or otherwise, he further warned that the Home Office and the Association of Chief Police Officers should produce new ‘short, clear and preferably nationally accepted guidelines for issue to all officers in Section 44 authorised areas’.<sup>35</sup>

Furthermore, in his 2005 report, Lord Carlile was moved to reiterate the need for police constables to have ‘a greater degree of knowledge of the scope and limitations of those powers.’<sup>36</sup> Also he warned, explicitly, that ‘terrorism related powers should be used for terrorism related purposes; otherwise their credibility is severely damaged’.<sup>37</sup> With some evident frustration he stated, ‘I find it hard to understand why Section 44 authorisations are perceived to be needed in some forces but not others with strikingly similar risk profiles. This view has not been affected by the events of 2005’.<sup>38</sup> Although, on balance he found that the powers remain necessary and wished to ‘emphasise that they should be used sparingly’.<sup>39</sup>

Despite his forthright observations and his clear assertion that there should be more guidance and training, that powers should be used less and with greater scrutiny by the authority, it

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<sup>31</sup> Lord Carlile, ‘Report on the Operation in 2001 of the Terrorism Act 2000’. Available at <http://tna.europarchive.org/20100419081706/http://security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/independent-review-responses/lord-carlile-report-02?view=Binary>. Last accessed 6 February 2010 [5.8].

<sup>32</sup> Lord Carlile, ‘Report on the Operation in 2002 and 2003 of the Terrorism Act 2000’ [75].

<sup>33</sup> See fn. 32 [83].

<sup>34</sup> See fn. 32 [84].

<sup>35</sup> See fn. 32 [86].

<sup>36</sup> Lord Carlile, ‘Report on the Operation in 2005 of the Terrorism Act 2000’ [92].

<sup>37</sup> See fn. 36 [92].

<sup>38</sup> See fn. 36 [97].

<sup>39</sup> See fn. 36 [100.]

seems that this advice was not adopted by the police or the Home Office. For in his 2007 report he was:

[...] sure beyond doubt that Section 44 could be used less and expect it to be used less. There is little or no evidence that the use of Section 44 has the potential to prevent an act of terrorism as compared with other statutory powers of stop and search. Whilst arrests for other crimes have followed searches under the section, none of the many thousands of searches has ever related to a terrorism offence.<sup>40</sup>

This was a particularly damaging assessment, as not only did it reiterate his previous belief that the powers were being overused but he also (implicitly, at least) was questioning the very utility of the measure.

If there was any doubt as to the direction of Lord Carlile's opinion, it was clarified by the 2008 report. He averred, 'I have evidence of cases where the person stopped is so obviously far from any known terrorism profile that, realistically, there is not the slightest possibility of him/her being a terrorist'. He went on to add that he 'believe[s] that it is totally wrong for any person to be stopped in order to produce a racial balance in the Section 44 statistics. There is ample anecdotal evidence that this is happening'<sup>41</sup> and 'the effect on community relations of the extensive use of the section is undoubtedly negative',<sup>42</sup> and concluded that 'the figures and a little analysis of them, show that Section 44 is being used as an instrument to aid non-terrorism policing on some occasions and this is unacceptable'.<sup>43</sup>

This is a damningly critical assessment on police use of their broad powers. Not only does Lord Carlile emphasise an egregious misuse of the powers, which were supposed to protect the public, it shows a reticence on the part of the police and Home Office to address shortcomings that had been highlighted over a number of years. It is telling that the language of the warnings provided by Lord Carlile becomes consistently stronger on an annual basis, and this is no doubt attributable to his justifiable frustration with the police authorities in their failure to address their substantial shortcomings. It is hard to determine whether the police were deliberately misusing the powers conferred on them, or whether this was a result of poor training and a lack of understanding of what are, admittedly, complex statutory provisions. However, the Police were, at best, wilfully blind to their failures and, at worst, deliberately acting *ultra vires*, and neither is excusable when the basis of the very power being exercised is so controversial and the liberty that they breach is so cherished. Consequently, as a result of the over and misuse of the powers conferred, it was unsurprising that the legislation would face a challenge in the courts.

### 3. The Challenge

On 9 September 2003, Mr Gillan, a PhD student, rode his bicycle to a protest against an arms fair being held in Docklands, East London. He was stopped by two police officers who searched his person and his rucksack and did not find anything incriminating. He was handed a copy of a Stop/Search Form 5090 which recorded that he had been stopped and searched under Section 44 of the Act for 'Articles concerned with terrorism'. This lasted no more than

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<sup>40</sup> Lord Carlile, 'Report on the Operation in 2007 of the Terrorism Act 2000' [130].

<sup>41</sup> Lord Carlile, 'Report on the Operation in 2008 of the Terrorism Act 2000' [140].

<sup>42</sup> See fn. 41 [149].

<sup>43</sup> See fn. 41 [147].

about 20 minutes. On the same day, Ms Quinton, a freelance journalist, covering the protests taking place outside the arms fair was also stopped by a police officer. She too was searched and on conclusion of finding nothing, was handed a Form 5090. A Section 44 Authorisation had been in place since 13 August 2003 for the whole of the Metropolitan Police district: the Assistant Commissioner of the Metropolitan Police had authorised this for 28 days, this had been confirmed by the Secretary of State and was due to lapse at 11.59 on 9 September 2003. This authorisation had been made continuously since 19 February 2001, and was due to be renewed by a further authorisation lasting until 6 October 2003. As a result of being stopped and searched, Mr Gillan and Ms Quinton sought to challenge the legality of the procedure in the Courts by way of judicial review. However, their claims were dismissed by the Divisional Court<sup>44</sup> and by the Court of Appeal.<sup>45</sup> Therefore, the applicants decided to appeal to the House of Lords.

By the time the case reached the House of Lords, the applicants had developed four particular arguments. The first argument related to the proper construction of the statute. Specifically, the applicants contended that Section 44(3) should be read as permitting an authorisation to be made only where the decision-maker had reasonable grounds for considering that the powers were necessary and suitable for the prevention of terrorism.<sup>46</sup> In essence, it was submitted that the word ‘expedient’ should be superseded with the word ‘necessary.’ Clearly this argument is deeper than mere semantic pedantry, as the meaning of either word in the context of the section would make the operation of the section distinctly different. Without wishing to labour the point, ‘necessary’ is taken to mean that action is required, whereas ‘expedient’ denotes something which, although desirable, is not a requirement.

However, when this argument was duly considered by Lord Bingham, who provided the leading judgement, it was roundly rejected, as ‘expedient’ had a meaning quite distinct from ‘necessary’.<sup>47</sup> He elucidated that, as Parliament had specifically chosen the word expedient, and this was also the word used in the construction of Section 13(A) of the 1989 Act, there was no room for ambiguity. Moreover, it is clear that Lord Bingham understood that it was not the role of the House of Lords to try and reconstruct the Section as ‘there is no warrant for treating Parliament as having meant something which it did not say.’<sup>48</sup> Rather, Lord Bingham further explained that ‘Parliament appreciated the significance of the power it was conferring but thought it an appropriate measure to protect the public against the grave risks posed by terrorism, provided the power was subject to effective constraints’.<sup>49</sup> In dismissing this reasoning, Lord Bingham outlined 10 ‘constraints’ on the use of the Section 44 power.

Secondly, the applicants raised arguments about the authorisation and confirmation of the searches. In particular, they stressed that the geographical area, being the whole of Metropolitan London, was excessive and included areas which realistically would not be the subject of a terrorist attack. In response, Lord Bingham agreed that this was not an ‘unattractive submission’,<sup>50</sup> but was swayed by the evidence in the witness statement of the Assistant Commissioner, stating that he was ‘particularly conscious that the number and

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<sup>44</sup> [2003] England and Wales Court of Appeal 2545 (Admin).

<sup>45</sup> [2004] England and Wales Court of Appeal Civ 1067.

<sup>46</sup> *R (on the application of Gillan (FC) and another (FC) v. Commissioner of Police for the Metropolis and another* (2006), United Kingdom House of Lords 12 [14].

<sup>47</sup> See fn. 46 [14].

<sup>48</sup> See fn. 46 [14].

<sup>49</sup> See fn. 46 [14].

<sup>50</sup> See fn. 46 [17].

range of particular terrorism targets in London was numerous and geographically spread throughout the entire Metropolitan Police District'.<sup>51</sup>

Indeed, it seems that Lord Bingham was equally impressed by the evidence of Catherine Byrne, a senior Home Office civil servant, who explained that is impracticable to 'attempt to differentiate between some parts of the Metropolitan area and others'.<sup>52</sup> She further added that it is important to 'ensure that any attempted attack is disrupted at an early stage, and certainly well before any serious harm could be done to members of the public'.<sup>53</sup> As Lord Bingham saw that 'there is no evidence of any kind to contradict or undermine this testimony', the 'House has before it what appear to be considered and informed evaluations of the terrorist threat on one side and effectively nothing save a measure of scepticism on the other'.<sup>54</sup> and consequently, Lord Bingham dismissed this contention.

However, the applicants further seized on the system of recurrent authorisations which had started in February 2001 and had continued until September 2003. The applicants averred that whilst it may be justifiable to have an authorisation in place for 28 days, it was an abuse of process for this to be renewed on a whim with a simple rubber stamp. Again, Lord Bingham described this is not an 'unattractive submission'.<sup>55</sup> However, Lord Bingham found that 'all the authorisations and confirmations relevant to these appeals complied with the letter of the statute'.<sup>56</sup> After all, renewal was expressly authorised by Section 46(7) of the Act. This was enough to satisfy Lord Bingham that Parliament had intended to confer these exceptional stop and search powers to be available to be exercised when a terrorist threat was apprehended. Therefore, Lord Bingham held that there was no evidence to justify a conclusion that the authorisation in place at the time of the stop and search in question was unlawful.

The third line of argument raised in the appeal was derived from alleged breaches of convention rights, namely, Articles 5, 8, 10, and 11. With relation to the Article 5 on the right to liberty and security, the applicants suggested that a stop and search under Section 44 would deprive a person of his or her liberty. Essentially, this is because a police officer has the power to compel a suspect to comply with the Stop and Search. For example, an officer has the power to detain under Section 45(4), use reasonable force under Section 144(2), or arrest a suspect for obstructing a constable. Considering this argument, Lord Bingham was persuaded by the fact that 'the procedure will ordinarily be relatively brief', and 'in any event only detained in the sense of being kept from proceeding or kept waiting'. Therefore 'there is no deprivation of liberty'.<sup>57</sup> as Article 5 is a qualified right, permitting the state to interfere with the right to liberty for the purpose of 'the lawful arrest or detention of a person for non-compliance with the lawful order of a court or to secure the fulfilment of any obligation prescribed by law'.<sup>58</sup> Considering that Section 44 is for the purpose of searching for articles which could be used for terrorism, and a detention would allow this to be facilitated, it is understandable that the applicants did not succeed on this point. Given also, that in most circumstances a stop and search will be relatively brief, Lord Bingham's reasoning is understandable.

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<sup>51</sup> See fn. 46 [17].

<sup>52</sup> See fn. 46 [17].

<sup>53</sup> See fn. 46 [17].

<sup>54</sup> See fn. 46 [17].

<sup>55</sup> See fn. 46 [18].

<sup>56</sup> See fn. 46 [18].

<sup>57</sup> See fn. 46 [25].

<sup>58</sup> European Convention on Human Rights, Article 5(1)(b).

In addition, the applicants argued that their right to private and family life under Article 8 was violated by the Section 45 stop and search. Lord Bingham explained that he was ‘doubtful whether an ordinary superficial search of the person can be said to show a lack of respect for private life.’<sup>59</sup> In essence, Lord Bingham felt that the level of intrusion was relatively minor and was analogous to the type of searches that passengers routinely submit to at airports. Yet, his Lordship did stress that the search must be necessary and proportionate for it to fit within Article 8(2), which allows interference by a public authority ‘in accordance with the law and it is necessary in a democratic society in the interests of national security, public safety [...] for the prevention of disorder or crime...or for the protection of the rights and freedoms of others’.<sup>60</sup> As such, Lord Bingham explained that providing the search was properly authorised, confirmed and carried out in accordance with Code A then it would be proportionate when attempting to counter the threat of terrorism. Furthermore, Lord Bingham briefly dismissed arguments arising from the Article 10 right to freedom of speech and Article 11 right of freedom of assembly. His Lordship, significantly, was willing to recognise that there would be a potential breach of these Articles in the case of misuse, such as being used to silence a heckler at a political meeting. Yet, providing Section 44 was used properly in compliance with Code A, this would fall within the qualified justifications under Articles 10(2) and 11(2) as a necessary and proportionate measure to protect the public.

Finally, the applicants questioned the procedural lawfulness of Section 44. Essentially, the applicants wished to explore and challenge the validity of the expression ‘prescribed by law’, which provided lawful justification for interfering with convention rights. The applicants argued that the law was not accessible, foreseeable, compatible with the rule of law, defined with precision, appropriate to the subject matter, and was without legal safeguards against abuse. In particular, they highlighted the fact that the issue of authorisations and confirmations of Section 44 powers were not made public, so the suspect would have no knowledge as to whether the constable had a legal power to exercise the stop and search.

In reply, the respondents argued that there were strong reasons for not publishing the details of authorisations, because this would necessarily reveal places where measures had been put in place. There would therefore be the danger that valuable targets would be identified for the terrorists and that any terrorist would find it easier to evade the police, knowing whether stop and search authorisations existed and for the exact duration. Indeed, the respondents also raised the issue of the discretion conferred on the constable in question, who, in theory, would only be able to stop and search for the proper purpose of finding articles relating to acts of terrorism. In effect, the constable’s discretion was ‘closely constrained by the sole purpose for which the power could properly be exercised’.<sup>61</sup> It was further advanced that if the power was incorrectly used, then the legal mechanism of judicial review or claims for damages arising from the commission of torts would be an adequate remedy.

In examining this argument, Lord Bingham was concerned with ensuring that Section 44 was not subject to arbitrariness, namely, public officials acting on a personal whim, caprice, malice, or predilection of purpose other than that for which the power was conferred, as it is this that is the antithesis of legality.<sup>62</sup> Ultimately, he found that the stop and search regime was not subject to such arbitrariness and it satisfied his test of legality. Moreover, he agreed

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<sup>59</sup> See fn. 46 [28].

<sup>60</sup> See fn. 46 [27].

<sup>61</sup> See fn. 46 [33].

<sup>62</sup> See fn. 46 [34].

with the respondent's contention that there was no requirement to inform the public of an authorisation or a confirmation under Section 44. Instead, he asserted that since both the Terrorism Act 2000 and Code A were public documents, the public was informed as it needed to be regarding the powers available.<sup>63</sup>

Lord Hope likewise acknowledged that 'informing the public of an authorisation would undermine the efficacy of the stop and search measure, as it would inform potential offenders in advance.'<sup>64</sup> In fact, Lord Bingham highlights both the crucial purpose of Section 44 and the *de facto* ratio of the judgment; 'that the measure is to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a terrorist by the fear that he could not show reasonable grounds for his suspicion.'<sup>65</sup> For this is the very justification for the regime of the stop and searches without suspicion: as without it, police officers would only be able to stop and search those whom they reasonably suspect to be a terrorist. Lord Hope, acknowledging the necessity of the stop and search powers without suspicion helpfully identified that the best procedural safeguard against the abuse of power is the supra-legal training, supervision, and discipline of the constables who are to be entrusted with its exercise.<sup>66</sup> Ultimately, the House of Lords unanimously held that despite convention rights being engaged, this was proportionate to the legitimate aims argued by the UK Government and thus dismissed the application.

The unsatisfied applicants, having lost at each appearance in the UK courts decided to appeal the decision of the House of Lords to the Chamber of the European Court of Human Rights. The judgment was duly delivered on 12 January 2010. The Court *inter alia* reviewed the previous applications in the UK courts and examined the concerns raised by Lord Carlile in his annual reports, as well as evidence from the Joint Committee on Human Rights before highlighting what it considered to be the pertinent legal issues in the case.

First, the Court considered the alleged violation of Article 5 of the Convention, namely whether the stop and search had deprived the applicants of their right to liberty. In its submission on the issue, the Government had argued that as the duration of the searches in question was no more than 30 minutes, this was clearly insufficient to amount to a deprivation of liberty in the absence of any aggravating factors. In addition, the Government had contended that the purpose of the searches was not to deprive the applicants of their liberty but rather to conduct a search, that they were not subjected to any force, that there was no confinement, and that they were searched on the spot. Furthermore, and in the alternative, the Government argued that the searches were lawful and justified under Article 51(b).<sup>67</sup>

The Court observed that 'there was a total restraint on their liberty'<sup>68</sup> and the applicants were entirely deprived of their freedom of movement.<sup>69</sup> Although, the Court accepted that 'the procedure might sometimes be relatively brief', it qualified this by adding 'that was not necessarily the case'.<sup>70</sup> Indeed, the Court found that 'the applicants had no choice as to whether or not to comply with the police officer's order and would have been liable to

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<sup>63</sup> See fn. 46 [35].

<sup>64</sup> See fn. 46 [51].

<sup>65</sup> See fn. 46 [35].

<sup>66</sup> See fn. 46 [57].

<sup>67</sup> *Gillian and Quinton v. the United Kingdom*, application no 4158/05 (2010) *European Human Rights Reports* 50(45) [55].

<sup>68</sup> See fn. 67 [54].

<sup>69</sup> See fn. 67 [57].

<sup>70</sup> See fn. 67 [54].

criminal prosecution if they had refused',<sup>71</sup> further adding, that 'this element of coercion is indicative of a deprivation of liberty within the meaning of Article 5(1)', citing the case of *Foka v. Turkey*<sup>72</sup> as its basis for this proposition. Yet, the Court curiously declined to determine this question. In effect, this has left the ruling of the House of Lords to be the settled ratio on this point. Also the Court deferred judgement on the issue of potential infringements of Articles 10 and 11. Instead, the focus of the Court's judgment was reserved for examining the alleged breach of Article 8.

The Court addressed the issue of Article 8 in two distinct stages: firstly whether there was an interference with the applicants' Article 8 right and, secondly, whether this interference could be justified 'in accordance with the law'. In relation to the alleged interference with Article 8 rights, the applicants questioned Lord Bingham's analogy between a stop and search and the kind to which passengers uncomplainingly submit at airports. Instead, the applicants averred that a person being searched at an airport is aware of the power of the officials and would accept that it is a condition of their very travelling from the airport, whereas lawful citizens could be subjected to a search of all their personal effects in any public place without any reasonable suspicion of wrongdoing. Moreover, that person has no choice in the matter: they cannot avoid the search and would be unable to resist such a coercive examination. Hence, this undermines the individual's personal autonomy, as wherever they went in public, they may be required to submit to a search without notice.<sup>73</sup>

In response, the Government did not accept that Article 8 had been breached in the present case and, although acknowledging that it may be breached by a 'particularly intrusive search', contended that a normal, respectful search under Section 45 of the Act would not amount to an interference with a person's private life.<sup>74</sup> Rather, it asserted that any interference would 'depend upon both the seriousness of the measure and upon the degree to which the person concerned had in the circumstances acted in a sphere where public life or the interests of other people were necessarily engaged'.<sup>75</sup> As such, it was further advanced that in the present case, the measures taken were proportional 'since neither applicant was asked to remove any articles of clothing, only an examination of outer garments and bags was conducted, of the type to which passengers regularly submit at airports'.<sup>76</sup> It was also highlighted that the applicants only had to provide their name, address, and date of birth, and that the intrusion was a relatively brief intervention. The Government further argued, somewhat spuriously, that the applicants had brought themselves into contact with the public sphere through their voluntary engagement with a public demonstration.

On balancing the parties' submissions on this point, the Court found that the 'search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life'.<sup>77</sup> In its judgment on this issue, the Court considered the broad definition afforded to privacy, citing the case of *Pretty v. UK*.<sup>78</sup> Whilst also recognising the Court of Appeal's acknowledgement that Section 44 has 'an extremely wide power to intrude on the privacy of members of the public'.<sup>79</sup> The Court was clearly influenced by the case of

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<sup>71</sup> See fn. 67 [54].

<sup>72</sup> *Foka v. Turkey*, application no 28940/09 (2008) [74-79].

<sup>73</sup> See fn. 67 [59].

<sup>74</sup> See fn. 67 [60].

<sup>75</sup> See fn. 67 [60].

<sup>76</sup> See fn. 67 [60].

<sup>77</sup> See fn. 67 [63].

<sup>78</sup> *Pretty v. the United Kingdom*, application. no 2346/02 (2002) 61.

<sup>79</sup> [2004] England and Wales Court of Appeal Civ 1067 [8].

*Foka* citing dicta that ‘any search effected by the authorities on a person interferes with his or her private life’.<sup>80</sup> On the other hand, the Court seems to have been unimpressed by the suggestion that the search taking place in public negated the impact on a subject’s private life. Instead the Court held that this may exacerbate ‘the seriousness of the infringement because of an element of humiliation or embarrassment’.<sup>81</sup> Most notably, the Court was unwilling to accept Lord Bingham’s airport scanner analogy, reasoning that a passenger has the freedom of choice to consent to such a search and therefore the search powers under Section 44 were qualitatively different. Having found that Article 8 was engaged, the Court then had to consider whether this interference could be justified as necessary in ‘accordance with the law’.

The applicants submitted that the purpose of the legal certainty requirement consistent throughout the Convention was to give individuals protection against arbitrary interference by public bodies. As such, it was further advanced that “‘law” must be accessible, foreseeable, and compatible with the rule of law, giving an adequate indication of the circumstances in which a power might be exercised and thereby enabling members of the public to regulate their conduct and foresee the consequences of their actions.’<sup>82</sup> It was important that the executive did not have the benefit of an unfettered discretion. Further still, the scope of the discretion available to the executive should be defined with precision with appropriate procedural safeguards preventing misuse. Although the Government had appointed an independent reviewer of the legislation, they were not bound by his findings; in fact these had been largely ignored. Indeed, as no prior judicial authorisation was necessary, the only adjudication would occur *ex post facto* and the award of damages by a county court (which would be by no means certain) was an insufficient legal safeguard.

Additionally, it was argued that the authorisation and confirmation procedure under Section 44 was not accessible to the public. Hence, a member would have no way of knowing whether a particular area was subject to authorisation and if a consequent stop and search was legally valid. Interestingly, it was further submitted that public notice of the authorisation would not compromise the utility of Section 44, but instead would strengthen the aspect of the measure which may deter would-be terrorists.

On the contrary, the Government submitted that the requirement of lawfulness was established by the legislation, citing the following: the information given to individuals following a search; the public availability of the legislation and Code A; and the availability of court proceedings for those who felt violated.<sup>83</sup> The Government also sought to rely on the clear, unambiguous nature of the legislation, as well as the carefully defined procedure of authorisations and confirmations outlined in the Act. Moreover, the Government contradicted the applicant’s submission that authorisations should be published in order to inform the public of their existence. Instead, the Government reasoned that this would undermine the purpose of the legislation as it would provide advance warning to terrorists and allow them to evade areas where this measure was in place.

In reaching a judgment, the Court reiterated the requirement that in order to be ‘in accordance with the law’, the measure must have a basis in domestic law and be compatible with

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<sup>80</sup> See fn. 72 [85].

<sup>81</sup> See fn. 67 [63].

<sup>82</sup> See fn. 67 [66].

<sup>83</sup> See fn. 67 [71].

convention rights.<sup>84</sup> The Court also opined that the law must be foreseeable and allow the individual to regulate their conduct accordingly, citing the case of *Marper v. United Kingdom*.<sup>85</sup> Accordingly, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. Ultimately, the Court found that ‘the safeguards provided by domestic law have 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 interference’.<sup>86</sup> The Court also seized on the distinction between the exercise of the power being as merely ‘expedient’, rather than ‘necessary’, noting that there was therefore no requirement that a stop and search was proportionate.<sup>87</sup> The Court noted that it seemed that the Home Secretary had never been known to refuse an authorisation and also the breadth of the statutory power made it near impossible to challenge as *ultra vires* in civil proceedings.<sup>88</sup>

Nevertheless, the Court also emphasised that, although officers are bound by Code A, in essence this prescribed the mode of the search rather than any restriction on the exercise of the stop and search.<sup>89</sup> Crucially, the Court elaborated on the fact that ‘the sole proviso is that the search must be for the purpose of articles which could be used in connection with terrorism’; however, in practice ‘the police officer does not even have to have grounds for suspecting the presence of such articles’.<sup>90</sup> It is clear that it is this breadth of discretion and power on individual constables that troubled the Court, especially given the inadequacy of civil proceedings in attempting to challenge the propriety of the measure. The Court unequivocally advocated that ‘in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult, if not impossible, to prove that the power was improperly exercised’.<sup>91</sup> It is equally evident that the Court was acutely influenced by the vast numbers of stop and searches carried out, citing some 117,278 in 2007/8, yet highlighting the absence of any terrorism-related conviction as a result. The Court concluded that ‘the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse’.<sup>92</sup> As such, they are not in accordance with the law. The Court held that there had been a violation of Article 8 of the Convention. The Government appealed the decision to the Grand Chamber, and on 30 June 2010, this application was dismissed.

#### 4. Analysis

It is in itself curious that the Court overwhelmingly overturned the unanimous judgments of English Courts. Moreover, it is equally curious that the ECtHR focused on the issue of Article 8, whereas the House of Lords had focused on Article 5: it would seem at first glance that the regime would be more likely to engage Article 5 than Article 8. In fact, it is odd that a 20-minute detention would be considered not to be a deprivation of liberty, but instead interference with a person’s private life. This raises difficulties for the reform of the regime,

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<sup>84</sup> See fn. 67 [76].

<sup>85</sup> *S and Marper v. the United Kingdom*, application no 30562/04 (2008) GC.

<sup>86</sup> See fn. 67 [79].

<sup>87</sup> See fn. 67 [80].

<sup>88</sup> See fn. 67 [80].

<sup>89</sup> See fn. 67 [83].

<sup>90</sup> See fn. 67 [83].

<sup>91</sup> See fn. 67 [86].

<sup>92</sup> See fn. 67 [87].

as it means that the police cannot simply just speed up the process, so that the individual is deprived of their liberty for a lesser period of time. Rather, it will require an overhaul of the legislative regime in order to ensure that it becomes 'in accordance with law'. As the ECtHR did not arbitrate on the issue of Article 5, it seems that the judgment of the House of Lords must be considered the established law. Yet the crucial dicta of the ECtHR's judgment is that the regime only failed because, in respect of Article 8, it was not 'in accordance with law'. It follows from the Court's reasoning that Article 8 will almost always be engaged as a result of a stop and search. Nevertheless, this measure only failed because there are inadequate procedural safeguards and this had allowed the police to overuse and misuse the measure.

Existing procedural safeguards are inadequate and this was exacerbated by the failure of previous Home Secretaries and policing authorities to heed the advice of Lord Carlile. It has been suggested that the Court's judgement here is too wide, and there is a danger that this will endanger the validity of stop and search regime under Section 1 of PACE 1984.<sup>93</sup> However, this seems unlikely: although Section 1 of PACE is not above reproach, it has proved to be a proportionate measure in apprehending suspected criminals. After all, it must be remembered that Section 1 of PACE carries a reasonable suspicion requirement and as such is much more likely to satisfy the 'in accordance with law' threshold. Equally, Buxton is incorrect to state that the statutory provisions must be either emasculated to such narrow constraints that they would be rendered nugatory or the Government must be prepared to pay damages as a result of every stop and search. On the contrary, it is perfectly possible to redraft the legislation and this is precisely what is required.

With the wide bounds of statutory discretion that had been handed to the police, they had managed to hang themselves. On 8 July 2010, the Home Secretary announced the suspension of Stop and Search Powers under Section 44. Thankfully, it is this oversight that has prompted a review of the law and provides the perfect opportunity for sensible redrafting of the law in order to readdress the balance between civil liberties and protecting the public. Consequently, Parliament may now reform the regime with the benefit of the judicial foresight of the ECtHR.

## 5. Reforming Stop and Search – The Need for Compromise

It is a given that the threat of terrorism exists. Although the July 2005 bombings and 2008 plots are the most recent, Britain has had a long history of being subject to acts of terrorism, necessitating the 1989 Act. However, there is certainly scope for disagreement as to the extent of the threat, and accusations are made that the threat is overestimated.<sup>94</sup> Yet for the sake of an argument about the unknown, it is best to assume that there will be a permanent latent terrorist threat to the United Kingdom for the foreseeable future.

Therefore, it is important that comprehensive and clearly defined mechanisms are available to the policing authorities to allow them to counter this and, by so doing, protect the liberty of the British public. It is trite that one of the fundamental liberties is the ability to live in peace,

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<sup>93</sup> Richard Buxton, 'Terrorism and the European Convention' (2010) *Criminal Law Review* 539.

<sup>94</sup> See for example Steven Greer, 'Anti-terrorist laws and the United Kingdom's "suspect Muslim community": a reply to Pantazis and Pemberton' (2010) *British Journal of Criminology* 6.

free from the threat of a terrorist attack.<sup>95</sup> On the other hand, terrorist attacks and emotive rhetoric of authoritarian politicians should not provide a basis for misconceived and illiberal laws. It serves well to remember Lord Hoffman's dicta on the subject of indefinite detention without charge, when he warned that 'the real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve'.<sup>96</sup> In essence, it is crucial that segments of society are not alienated or marginalised by a law that is supposed to protect the public as a whole. There is a genuine danger that unduly draconian laws can lead to the very feelings of fear and hatred which are synonymous with would-be terrorists.

A stop and search power on a without-suspicion basis is required to allow constables to search for articles which may be used in connection with acts of terrorism. This is a preventative measure in the first instance and an opportunity to gather evidence pursuant to a criminal trial in the second. Some human rights groups and commentators have been unrealistic on this point. For example, Human Rights Watch favour a total repeal of Section 44 and assert that Section 43 should be used instead.<sup>97</sup> There seems to be a broad body of opinion that not only is such a measure still required, but that also the exercise of this measure must be considerably narrower than the previous Section 44 power. Indeed, this has been accepted by the civil liberties pressure group, Liberty, which brought the case on behalf of the applicants. The framework of the Act requiring authorisations and confirmations is straightforward and logical, as far as primary legislation goes. In fact, it would provide an excellent framework for reforms to be made.

In January 2011, the Home Secretary, Theresa May, presented to Parliament the long awaited review of counter-terrorism legislation. The review highlights the tensions between the ECtHR's judgment and the repeated assertion of the police forces that 'there is an urgent operational need for a stop and search power which does not require reasonable (or any) suspicion'.<sup>98</sup> Additionally, the review considers the two options, namely repeal or replacement. It is recommended that the Section 44 powers are replaced with a more circumscribed power based on the conclusion 'that a power to stop and search individuals and vehicles without reasonable suspicion in exceptional circumstances is operationally justified'.<sup>99</sup> The review can be applauded for recommending a requirement that a senior police officer must reasonably suspect that a terrorist act will take place and that 'authorisation should only be made where the powers are considered necessary'.<sup>100</sup> This is clearly a welcome departure from the prior requirement for expediency. However, it is disappointing that it is suggested that authorisations should be available for 14 days. This period is too long and may lead to a repeat of authorisations remaining in force when they are not 'necessary'.

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<sup>95</sup> Tony Blair once stated 'there is no greater civil liberty than to live free from terrorist attack,' in 'Blair defends anti-terror plans', *BBC News website*, 24 February 2005. Available at [http://news.bbc.co.uk/1/hi/uk\\_politics/4329278.stm](http://news.bbc.co.uk/1/hi/uk_politics/4329278.stm). Last accessed 06 February 2011.

<sup>96</sup> Gillan and Quinton, application no 4158/05. See fn. 3 [97].

<sup>97</sup> Human Rights Watch, 'Without Suspicion', July 2010. Available at <http://www.hrw.org/en/node/91417/section/4>. Last accessed 6 February 2011.

<sup>98</sup> Home Office, Cm 8004, 'Review of Counter-Terrorism and Security Powers' January 2011. Available at <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary>. Last accessed 6 February 2011 p. 16 [5].

<sup>99</sup> See fn. 98, p. 18 [15].

<sup>100</sup> See fn. 98, p. 18 [16.1].

Equally, the stipulation that the authorisation ‘may only cover a geographical area as wide as necessary to address the threat’<sup>101</sup> seems to give an unnecessary breadth to the geographical scale of the authorisation, as well as being ambiguous. However, on reflection, this position may be defended on the basis that at times it must be hard to define a particular locality of the threat. In circumstances where intelligence suggests that a terrorist act will be committed in a metropolitan city, it does appear proportional to allow searches to cover the whole of the city in question. Interestingly, it is suggested that the purpose of the searches should be changed from looking for articles which may be used in connection with terrorism to looking for evidence that a suspect is a terrorist. This is a somewhat curious change in lexicon: presumably the purpose of this change is to demonstrate that searches should be exercised with more discretion than previously and to focus searches on people who actually look or act as if they may be terrorists, rather than simply searching indiscriminately.

In addition, it was contended that ‘robust statutory guidance on the use of the powers should be developed to circumscribe further the discretion available to the police and to provide further safeguards on the use of the power’.<sup>102</sup> It is difficult to envisage exactly what this would entail; after all, Code A already provides prescriptive guidelines regarding the use of stop and search powers. The review concludes that these changes should ‘result in a significant and permanent reduction in the volume of stop and searches compared to the use of section 44 powers’.<sup>103</sup>

However, a more suitable compromise would be a system of ‘Stop and Search Orders’ available to chief constables (or their assistants) to be confirmed by the Home Secretary for a period of no greater than 4 days. This would address the issue of having needlessly lengthy periods of authorisations and help restore public confidence in the necessity of the measure; it is clear that prior overuse of the regime has led to an erosion of confidence in the police, especially among minority and migrant communities.<sup>104</sup> It would also address the issue of arbitrariness raised by the ECtHR. These ‘Orders’ should be available to be issued following intelligence suggesting a terrorist threat or in the immediate aftermath of a terrorist act. It is important that the orders are only used when actually required, rather than as a measure of convenience for the police force.

For the ‘Order’ to be authorised by the Chief Constable, he or she must reasonably suspect that an incident of terrorist violence may be imminent. This would make the measure more analogous to Section 60 of the Criminal Justice and Public Order Act 1994, which requires reasonable belief of an imminent incident of serious violence. The Home Secretary should then only confirm the ‘Order’ if he or she considers it to be necessary, having regard to the threat posed to the public and the according need. This provides a level of executive control and diligence as well as for ministerial accountability, as it would require the Minister to have regard to whether the measure is ‘necessary’ in all the circumstances, rather than those merely considered to be ‘expedient’. Also, there should be a clearly prescribed geographical remit of either two square miles or a metropolitan borough. As an exceptional measure for Northern Ireland, an area of two miles from the Republic of Ireland should also be included. There should also be a provision for named pieces of infrastructure, such as the London Underground, certain sections of motorways or areas of strategic vulnerability such a power plants. This would prevent the ‘Order’ from being unnecessarily broad in geographical remit,

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<sup>101</sup> See fn. 98, p. 18 [16.3].

<sup>102</sup> See fn. 98, p. 18 [16.6].

<sup>103</sup> See fn. 98, p. 19 [17].

<sup>104</sup> Lord Carlile, ‘Report on the Operation in 2001 of the Terrorism Act 2000’. See fn. 31.

which was an area of concern for the ECtHR,<sup>105</sup> whilst it should also provide the policing authorities with enough geographical latitude to vitiate any terrorist threat. Where an extension in area is required, this would have to be in a separate authorisation and confirmation.

Furthermore, the ‘Orders’ should not be allowed to continue on a rolling basis without full reconsideration of the matter by the Chief Constable and Home Secretary. This would allow the regime to continue on a day by day basis, yet require the Chief Constable and Home Secretary to consider whether the measure is really required. The increase in the bureaucratic process of authorisation purpose is by no means undesirable, as the purpose is not to make it more difficult for stop and search orders to be authorised, rather it is merely an additional layer to make them more necessary and less arbitrary.

On balance, it would not be prudent to issue warnings of authorisations, as not only would this alert terrorists to the police’s suspicions, but it may also cause the public to panic unduly. This is a further unrealistic demand made by some human rights commentators.<sup>106</sup> Although their argument on this point is not without some merit, it would potentially defeat the purpose of the measure. Nevertheless, the effect of the heightened level of discretion required by the senior police officer and the Home Secretary serves to make the discretion less onerous on the individual constable. By using the measure less frequently, it makes the regime more valuable and less vulnerable to arbitrary use and consequent failing public opinion. Ultimately, this proposed alternative would be a more dynamic system, designed to be used almost immediately as soon as a terrorist threat is identified in order for it to be engaged. This is in contra-distinction to the rather cumbersome and unwieldy predecessor which bred suspicion and contempt without securing any arrests.

The issues of discrimination and profiling were raised by both the House of Lords and ECtHR, yet neither Court was willing to provide a definitive judgment on the matter. Interestingly, Lord Hope was of the opinion that even though Asians are more proportionally over-represented in the stop and search data, this does not inevitably mean that they are discriminated against.<sup>107</sup> Indeed, Lord Brown even suggested that, on the contrary, this over-representation might be taken as evidence that the regime is not being used arbitrarily. Both judges follow the reasoning that on statistical evidence, terrorists are more likely to be Asian or black than white; Lord Brown elaborating that so long as the principal terrorist remains Al-Qaida, this trend is inevitable.<sup>108</sup> This is an inconvenient truth that raises difficulties and it is unsurprising that the Lords declined the opportunity to adjudicate on the issue in a substantive manner. Similarly, the ECtHR recognised that ‘While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration’<sup>109</sup> without making any particular ruling on this issue. The issue is hyper-sensitive and requires careful consideration.

However, Human Rights Watch assert that Code A should be amended to ‘make it clear that there are no circumstances in which it is permissible to take into account a person’s ethnic

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<sup>105</sup> See fn. 67 [81].

<sup>106</sup> See for example the submissions made by the applicants in *Gillan v. UK* and Human Rights Watch, ‘Without Suspicion’, July 2010. Available at <http://www.hrw.org/en/node/91417/section/4>. Last accessed 6 February 2011 [34-35].

<sup>107</sup> See fn. 46 [40-47].

<sup>108</sup> See fn. 46 [80].

<sup>109</sup> See fn. 67 [85].

origin when determining whom to stop'.<sup>110</sup> Again, this is simply impracticable and a compromise needs to be made on the part of civil liberties campaigners. Even assuming that this idea could carry any merit, it would be unworkable in practice as individual officers would have to exercise their discretion on the ground and the simple fact that most Islamic terrorists are Asian necessitates searching people matching this profile. Equally, it is important to consider that if a terrorist threat were to come from Irish terrorists, the police would turn their attention predominantly to white males.

After all, the current guidelines in Code A urges officers to take particular care in not discriminating against certain ethnic backgrounds, yet recognising in some that taking ethnicity into account maybe a necessity in some situations. As Lord Brown recognised, these guidelines provide an adequate framework for approaching the delicate issue of race and ethnicity: it would be a nonsensical proposition for officers on the ground to be unable to take race into account at all when searching, especially on receipt of indicative intelligence. The protection for ethnic minorities is the same as for everyone else, for we are all equal before the law and under an amended regime; the stop and search powers would be used less and only when necessary. Therefore, if members of ethnic minorities, or anyone else, are stopped, it is on the basis of this being necessary, rather than expedient and is a much more proportionate interference with their privacy.

Whilst it remains to be seen exactly what the amended regime will entail when it reaches the statute books, it seems that it will be a vast improvement on its too loosely drafted and controversial predecessor. Although it is both surprising and disappointing that the police were not more receptive to the considerable criticism of the over use of Section 44, it is a mixed blessing. It precipitated a legal challenge, which ultimately has proven to necessitate a re-drafting of the law. Perhaps the criticism should not fall squarely on the police, but some of which should be reserved for authoritarian politicians and their erroneous drafting of legislation. Although the ECtHR may have drawn criticism for overruling English Courts on issues of constitutional law which are particular to the English legal jurisdiction,<sup>111</sup> the result cannot be faulted. It is unlikely that the amended regime will be any more popular; however, it is hoped it will be at least more justifiable in its application, and dare say, without compromising its ability to fulfil its stated aims. As Sharmi Chakrabarti has said 'the devil will be in the detail',<sup>112</sup> but whatever form the legislation takes, in order to avoid being incompatible with convention rights, it should not fail to be more transparent, proportionate, and purposeful than its predecessor.

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<sup>110</sup> Human Rights Watch, 'Without Suspicion', July 2010. Available at <http://www.hrw.org/en/node/91417/section/4>. Last accessed 6 February 2011 [5].

<sup>111</sup> Greer, 'Anti-terrorist laws and the United Kingdom's "suspect Muslim community"'. See fn. 94.

<sup>112</sup> Ferguson, 'Scrapping Section 44 is a relief to all'. See fn. 8.