The Right to Liberty and Privacy Right in Europe and the UK

Case Comment

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European Court of Human Rights Case

Gillan and another v United Kingdom (App. No. 4158/05) - [2010] ECHR 4158/05

The case originated by the application of two British nationals, Mr Kevin Gillan and Ms Pennie Quinton, against the United Kingdom of Great Britain and Northern Ireland alleging that the powers of stop and search used against them by the police breached their rights under arts 5, 8, 10 and 11 of the ECHR. The applicants were stopped and searched by police officers On 9 September 2003 near the site of an arms fair in east London, which was the subject of protests and demonstrations. The police officers told the applicants that they were searched under s 44 of the Terrorism Act 2000. The 1st applicant, a doctoral student, was riding a bicycle and carrying a rucksack near the arms fair, on his way to attend the protest against the arms fair. He was told that he was being stopped for articles which could be used for acts of terrorism and handed a notice to this effect. He claimed that what the police officers responded for his inquiry about the reason he was stopped was that a lot of protesters were about and the police were concerned that they would cause trouble. Despite the seized computer printouts that give information about the protest, nothing incriminating was found on the 1st claimant and he was allowed to go after around 20 minutes of detention. The second applicant, a freelance journalist, holding a camera, wearing a photographer's jacket and carrying a small bag was stopped near the arms fair after she had apparently emerged from some bushes to film the protests. She was searched and told to stop filming by a police officer notwithstanding that she showed her press cards to show who she was. She was allowed to go on her way as nothing incriminating was found. She claimed that her intention to make a documentary or sell footage of it was disrupted as she did not feel able to return to the demonstration, due to the feeling of intimidation and distress.

The claimants sought to challenge the legality of the power of the executive (the police) to stop and search that was used against them, through judicial review. First, they argued that the authorisation and confirmation in question (under section 44 of the 2000 Act) were ultra vires and unlawful on the grounds of their geographical (which covered the entire London area) and temporal (which formed part of a rolling programme for over 8 years) coverage. They claimed that the authorization is unlawful as it was not made under the ground of necessity, rather on expediency. Secondly, they complained that the deployment of the s 44 authorisation by the police to stop and search them was unlawful and against the legislative intention and that the direction given to officers was either non-existent or intentionally left to

cause the abuse of the power by the officers. Thirdly, the applicants argued that the power of authorisations under s 44 and its exercise infringed their ECHR rights under article 5, 8, 10 and 11.

On 31 October 2003, the Divisional Court rejected their claims on all grounds, and declared the powers as lawful and proportionate. The court, however, accepted the lack of guidance for police officers as to how to exercise their power to stop and search and suggested the police institute to have proper training and briefing procedures for Section 44. The applicants appealed to the Court of Appeal. On 29 July 2004, the Court of Appeal held that s 44 and 45 of the Act did not contradict with the provisions of the ECHR. The court recognized the exceptional nature of the power under s 44, but it said that the power is under a number of safeguards. The court of appeal, like the divisional court, however, pointed a suggestion for the police institute to have proper training and briefing procedures for Section 44. The applicants appealed to the House of Lords. On 8 March 2006, The House of Lords dismissed the applicants' further appeals holding that the authorisation under s 44, as well as its confirmation by the Home secretary were lawful and both the geographical scope and the duration of the authorisation were justified. The court also found that the authorisation for the use of stop and search powers to be compatible with ECHR.

Having exhausted their domestic remedies, the applicants applied to the ECtHR alleging that the police's act of stop and search against the applicants under s 44 to 47 violated their rights under arts 5, 8, 10 and 11 of the ECHR. The ECtHR held that there had been a violation of art 8 of the Convention. The court also, while declining to rule on art 5(1), stated that the coercion happened on the appellants was indicative of a deprivation of liberty within the meaning of art 5(1). The following pages will try to give explanation on article 5 and 8 and evaluate the court's approach and reasoning on the case.

The first legal issue the court analysed relates to article 5 of the convention which provides for right of liberty of a person. The right to liberty regulates state powers of detention and provides safeguards against ill treatment of detainees.[1] It seeks to prevent the arbitrary use of executive power and create a climate conducive to the realization of human rights.[2]. The ECHR, rather than simply protecting individuals against illegal and arbitrary detention, on its article 5(1), provides for an exhaustive list of grounds upon which detention is justified. If the detention is based on grounds other than listed under article 5(1), it is not justifiable and not permitted. For example, in *A and Others v United Kingdom* case, which involved the law that authorise the detention of alien terror suspects, the ECtHR held that this power of detention would fall foul of the principle that paras (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5.[3] The fulfilment of the grounds listed under article 5(1) by itself does not justify detention. Rather the detention should also be lawful and not arbitrary.

[1] Daniel Moeckli, SangeetaShah and Sandesh Sivakumaran,International Human Rights Law,2nd edn ,2014, OUP
[2] ibid
[3] A and others v UK (2009) 49 EHRR 29

In considering the possible application of Art 5, the key questions to be asked are whether or not there had been a deprivation of liberty and whether the measure passed from a restriction of movement to a deprivation of liberty. To identify the applicability of art 5, previous authority, most notably *Engel v the Netherlands*[4] and *Guzzardi v Italy*[5], states that one must start with the claimant's actual situation and consider criteria such as the type, duration, effects and manner of execution of the action. For instance, in *Guzzardi v Italy* where the applicant was subject to a compulsory residence order, requiring him to live with his wife and children on an open Mafia prison on an island off the coast of Sardinia, whilst awaiting trial, was held by the ECtHR as a sufficient limitation to invoke Art 5.[6] In deciding the case the court considers the prospect of punishment for non-compliance with the order, his opportunities for social contact, the extent of his supervision, the dimensions of the area and other facts.[7] Despite the relatively clear instructions in previous judgments with respect to the invocation criteria of art 5, the practical application seems to be complex. For example, In Raimondo v Italy[8], ten hours' curfew a day was not a breach of Liberty under Art 5, rather a restriction of liberty under Art 2 of Protocol No. 4. While a house arrest of all weekend and 12 hours per weekday in Trijonis v Lithuania [9] was held not to breach right of liberty, a restriction for minutes during taking blood sample by force was held to amount a breach of liberty under art 5.

Coming to the case at hand, although the ECtHR had declined to give a definitive judgment on the applicants claim on the breach of their right of liberty under article 5(1), the court, recalling its previous decisions, rightly stated that the coercion happened on the applicants is indicative of a deprivation of liberty within the meaning of Article 5(1). The court sufficiently explained why the applicants' situation was deprivation of liberty under article 5(1), not a mere restrictions on liberty of movement under Art 2 of Protocol No. 4 and listed the non-exhaustive criteria (their concrete situation of the time; the type, duration, effects and manner of implementation of the measure in question) which should be taken into account to determine this deprivation under article 5(1). The entire deprivation of the applicants' freedom of movement during the stop and search time and the prospect of punishment for non-compliance (arrest, police detention and criminal charge) are the core factual and legal elements that the court considered for its indicative conclusion.

The second and main legal issue that the ECtHR analysed relates to the alleged violation of article 8 of the convention. Article 8 is recognized as one of the most open-ended provisions of the Convention, covering and protecting a wide and growing number of issues that do not fit into other Convention

[4] *Engel v the Netherlands* (1979–1980) 1 EHRR 647
[5] Guzzardi v Italy App No 7367/76, Ser A 39, (1981) 3 EHRR 333, [92]
[6] ibid
[7] ibid
[8] Raimondo v Italy App No 12954/87, Ser A 281-A, (1994) 18 EHRR 237
[9] Trijonis v Lithuania App No 23333/02, 17 March 2005.

categories, with significant scope for future extension and development of the principle.[10] The ECtHR has interpreted Article 8 in a broad scope to include rights which have not even specifically set out in the article. Article 8 contains both negative and positive obligations. The state is not merely under a negative obligation to abstain from infringing Art 8, but in addition the ECtHR case law has also extended Article 8 to impose a positive duty on the state to protect the individual from the actions of other private parties. For example in the case of *X and Y v the Netherlands*[11] which involved the rape of mentally handicapped 16 year old girl whilst in a privately run residential home, the ECtHR said that the Criminal Code of the Netherlands had not provided Miss Y with practical and effective protection. The court outlined that the state failed to fulfil its positive obligation to protect Miss Y and then held that Miss y was the victim of a violation of Article 8 of the Convention.

There are four expressly protected interests under Article 8, namely: private life[12], family life[13], home[14] and correspondence. Most cases presented to and decided by the court are mainly concerned about the right to respect for private life, although they also involved incidental claim of the other three. The concept of "private life" is a broad term incapable of exhaustive definition.[15] For the purpose of article 8, the notion of "Private life" covers three broad categories, namely: a person's physical, psychological or moral integrity; his privacy and his identity.[16] Due to the broad meaning and scope of "private life", the ECtHR, through its case law, has provided instructive guidelines for its applicability under article 8. The following ECtHR case laws gives a highlight of this guidelines.

The ECtHR, in the cases of *Pretty v UK*[17] and *Goodwin v UK*[18] has underlined that article 8 is concerned not only with "private life" in the sense of privacy, but also with private life in the sense of personal autonomy, self-development, and the right to develop relationships with others. It stressed on the importance of the respect for human dignity and human freedom and the importance of personal autonomy in the application of the Convention guarantees. The court in its decisions on *Von Hannover v Germany*[19], *Niemietz v Germany*[20], *and Botta v Italy*[21] has explained that the concept of "private life" is not limited to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude the outside world. It said that respect for private life must also to a certain degree include the right to establish and develop relationships with other human beings and the outside world. The court

[10] Case law Guide on Article 8, Right to respect for private and family life European Court of Human Rights,1st edition(2016 revision)
[11] X and Y v the Netherlands (1985) 8 EHRR 235
[12] *R (Daly) v Home Secretary* [2001] UKHL 26
[13] *B v Home Secretary* [2008] UKHL 39, *EM (Lebanon) v Home Secretary* [2008] UKHL 64
[14] *R (Coughlan) v N & E Devon Health Authority*
[15] Ibid (note 10)
[16] Ibid (note 10)
[17] Pretty v UK (2002) 35 EHRR 1 [65]
[18] Goodwin v UK (2002) 35 EHRR 18 [90]
[19] Von Hannover v Germany (no 2) [GC], nos. 40660/08 and 60641/08, ECHR 2012
[20] Niemietz v Germany, 16 December 1992, Series A no 251-B
[21] Botta v Italy, 24 February 1998, Reports of Judgments and Decisions 1998-

underlined that the scope of "private life" may include activities of a professional or business nature as it is through the course of their working lives that the majority of the people have significant opportunity to develop relationships with others. In the case of *PG and another v United Kingdom*[22] the court also outlined the significance of considering a person's reasonable expectations as to privacy, in identifying whether a person's "private life" is affected by measures effected outside a person's home or private premises. It said that since there are stances when people knowingly involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive factor. The court's case law in *Foka v Turkey*[23] and *Peck v UK*[24] made it clear that an individual did not automatically forfeit his privacy rights merely by taking his personal items into a public place such as a street. In the first case, the court held that subjection of the applicant to a forced search of her bag by the authorities entails an interference to her private life.

Coming to the case at hand, like its previous decisions, the ECtHR followed a wide approach as to the meaning and scope of private life, on this case. Recalling its previous decisions, the court underlined that the meaning and scope of private life covers the physical and psychological integrity and personal autonomy; protects a right to identity and personal development, the right to establish relationships with other human beings and the outside world and include activities of a professional or business nature. As such, the court rightly held that the searches made on the applicants constitute interferences with their right to respect for private life under art 8 of the convention. The court has rejected the House of Lords erroneous comparisons of the search under section 44 with airport searches. While the travellers at airports give some degree of consent to and have prior knowledge about the search with a freedom to walk away without being searched, the court said, the search powers under section 44 are qualitatively different in such a way that the individual can be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search. Regarding the public nature of the search, the ECtHR, as opposed to the House of Lords' position, held that the search in public place, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment as the search could expose personal information to the view of a persons' companions. Taking the coercive nature of the powers as a main element to its reasoning, the court also correctly rejected the House of Lords' stand regarding non routine and no serious nature of the searches.

Once interference on the right to respect for private life under article 8 of the convention is proved, for such an interference, to be justified, it must be in the terms of article 8(2) "in accordance with the law", pursues one or more of the enumerated legitimate objectives and is necessary in a democratic society[25]. It does not only require compliance with domestic law, but it also relates to the quality of that law, requiring

[22] PG v UK [2001] ECHR 44787/98, paras 56-57
[23] Foka v Turkey [2008] ECHR 28940/09
[24] Peck v UK [2003] ECHR 44647/98
[25] VW (Uganda) v Secretary of State [2009] EWCA Civ 5, AG (Eritrea) v Secretary of State [2007] EWCA Civ 80

it to be compatible with the rule of law[26]. Generally, the principle "in accordance with the law" has three interrelated core components. The first one is that the measures must have a basis in domestic law.[27] Second, the national law must be reasonably clear[28], adequately accessible[29] and sufficiently foreseeable[30] so as to allow individuals to regulate their conduct. Domestic law must indicate with reasonable clarity and sufficient forcibility, the scope and manner of exercise of the relevant discretion conferred on the public authorities to enable individuals to act in accordance with the law and to ensure to individuals the minimum degree of protection to which they are entitled under the rule of law in a democratic society[31] . Third, the measure must be sufficiently bounded to guard against the abuse of power[32]. Domestic law must have adequate safeguards against arbitrary interferences by public authorities with an individual's Article 8 rights.

Turning to the case at hand, the ECtHR recalled its previous authority, which established that the measure must have some basis in national law and be adequately accessible and foreseeable, that is, framed with sufficient precision to enable the individual to regulate his conduct. The court rejected the House of Lords conclusion on the availability of effective control and constraints on discretion and abuse of power. The court considered the police practice in question in deciding the safeguards inadequacy. It said that the safeguards provided by domestic law could not in practice control the wide powers conferred to the executive so as to offer the individual adequate protection against arbitrary interference. The court criticized the standard requirement for authorization under section 44(4), which empower the senior police officer to authorize a constable to stop and search a pedestrian if he "considers it expedient for the prevention of acts of terrorism". The court condemned the standard of "expediency" and criticized the absence of requirement at the authorisation stage that the stop and search power be considered "necessary" which preclude any consideration of proportionality. Even though the authorisation is subject to confirmation by the Secretary of State within 48 hours, the court said, the practice of the confirmation process was little more than a rubber-stamping process; the power to modify or refuse confirmation of an authorisation had never been exercised. Addressing the non-viability of judicial review as a safe guard against misuse, the court correctly outlined that the width of the search power that did not require the officer to show reasonable suspicion would make difficult, if not impossible, to prove that any authorisation and confirmation were *ultra vires* or an abuse of power. The court also gave a realistic appraisal on the temporal and geographical limits failure on authorisations. Even though the authorization must be limited in time to 28 day (renewable) and limited in geography to the police force area, the court said, many police force areas in the United Kingdom cover extensive regions

[26] Halford v the United Kingdom, 25 June 1997, Reports of Judgments and Decisions 1997-III section 49
[27] Sunday Times v United Kingdom App No 13166/87, Ser A 217, (1992) 14 EHRR 229
[28] Piechowicz v Poland, no 20071/07, 17 April 2012, section 112
[29] Silver and Others v the United Kingdom, 25 March 1983, Series A no 61
[30] Shimovolos v Russia, no 30194/09, 21 June 2011,section 68
[31] Ibid (note 10)
[32] Huvig v France App No 11105/84, Ser A 176-B (1990) 12 EHRR 528

with a concentrated populations and the authorization has been continuously renewed in a "rolling programme" since the Terrorism Act came into force. The court then conclude that these failures in geographical and temporal limitation on authorization are demonstrative evidence for the ineffectiveness of the key safeguards in the legislation.

As for the availability of the Independent Reviewer of Terrorism Legislation as an additional safeguarding mechanism, the Court rightly outlined that the reviewer's powers are confined to reporting on the general operation of the statutory provisions and he has no right to cancel or alter authorisations. The court disagreed with the reliance of the house of lords on the availability of Code A and the statutory proviso stating that the power only be used to search for articles that could be used in connection with terrorism, as providing an efficient control on the arbitrary application of the power. The court said that the Code governs the way the police proceed after they have stopped the individual, rather than providing a guidance or any restriction on the officer's decision to stop and search. It also noted that the statutory proviso was in practice insignificant limitation as the term "terrorism" is defined wide enough to include commonly carried articles. The court finally concluded that, as 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, they are not "in accordance with the law". It followed that Article 8 of the convention was therefore violated.

The decision of the ECtHR on *Gillan v United Kingdom* has a great deal of contribution to our understanding of the relationship between state and individual in the UK, especially in the area of counter-terrorism stop and search. Before the decision, the executive was free to authorize stop and search of pedestrians and vehicles on a wide geographical and temporal coverage and the stop and search was held without the requirement of reasonable suspicion.[33] Following the decision of the ECtHR's on Gillan v United Kingdom that held the counter-terrorism stop and search power to violate article 8 of the ECHR, a series of changes and reforms has been held in the UK. After the court refused their request for appeal, the UK government has taken a number of legal reforms to satisfy the requirement of lawfulness detailed in the courts judgment.[34] First, the UK government issued an interim guidance regarding counterterrorism stop and search that restricted the use of section 44 of the terrorism act to vehicular search and raised the standard requirement of authorization to "necessary". [35] Second, the government enacted the Terrorism Act 2000 (Remedial) Order 2011[36] which repealed section 44-47 of the terrorism act 2000. Under this order, authorization of counter terrorism stop and search require the officer to reasonably suspect the occurrence of an act of terrorism and considers the authorization necessary as to

[33] John Ip, The Reform of Counterterrorism Stop and Search after Gillian v United Kingdom, (2013) 13 HRLR 729
[34] Genevieve Lennon, Stop and search powers in UK terrorism investigations: a limited judicial oversight?, (2016) International Journal of Human Rights, 20:5, 634-648, DOI: 10.1080/13642987.2016.1162410
[35] John Ip (note 33)
[36] Terrorism Act 2000 (Remedial) Order 2011, SI 2011/631

the prevention of the occurrence of terrorism act. The temporal limit of authorization is now no longer than fourteen days. Third, the government enacted the Protection of Freedoms Act in May 2012, which have permanently repealed section 44-47 of the terrorism act 2000 and has replaced the remedial order. This act basically incorporates most provisions of the remedial order. It specifically stated that the geographical and temporal coverage could not be wider than what is necessary to prevent the act of terrorism. Search is now restricted to evidence that the person is a terrorist or the vehicle is being used for terrorist purposes.[37] The current Code prohibits authorisations that cover entire police areas except in extraordinary circumstances and make the existence of a general risk of terrorism an insufficient ground for authorization.[38]It also prohibits stop and search for the purpose of deterrence, intelligence gathering or public reassurance.[39] Rolling authorisations is prohibited unless it bases on a fresh assessment of the intelligence.

These legal reforms coupled with the fact that this power has never been used in the UK after the decision, except the one in Northern Ireland[40] show the significant change in the UK on the understanding of individual's right to respect for private life, after the ECtHR judgement on *Gillan v United Kingdom*. It can be said that the court's decision has limited the extremely wide power of the state to interfere in the individual's privacy and liberty rights and increased the scope of individual civil liberties and freedoms. The extremely wide, coercive and intrusive power of the state to intrude on the private life and liberty of members of the public are now restricted. The quality of privacy laws that governs the relationships between individual and the state are improved with regard to time, place, expectation, clarity, reasonability and proportionality. The discretionary powers of the state and manners of exercise are now framed with sufficient clarity and are subject to adequate legal safeguards. The current common understanding in the UK as to the relationship between state and individual is that the state's interference into the individuals' liberty and private life is reasonable, proportional and safeguarded against abuse.

[37] Genevieve Lennon (note 34)
[38] John Ip (note 33)
[39] John Ip (note 33)
[40] Genevieve Lennon (note 34)

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