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Sample Case Note



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***R (on the application of Gillan (FC) and another (FC)) v.
Commissioner of Police for the Metropolis and another***

[2006] UKHL 12

House of Lords

Introduction

In this case, *R (on the application of Gillan (FC) and another (FC)) v. Commissioner of Police for the Metropolis and another*¹, the appellants are Mr Gillan and Ms Quinton and the respondents are the Commissioner of Police for the Metropolis and Secretary of State for the Home Department. The legal issues concern the validity of sections 44-47 of the *Terrorism Act 2000*² (Act) and the use made of those sections.

The Queen's Bench Divisional Court dismissed the appellants' applications for judicial review and the Court of Appeal made no order on the appellants' claims against the Commissioner and dismissed their claims against the Secretary of State. The House of Lords, which is not bound by any other courts except the Court of Justice of the European Communities, unanimously dismissed the appeals.

¹ *R (on the application of Gillan (FC) and another (FC)) v. Commissioner of Police for the Metropolis and another* [2006] UKHL 12

² *Terrorism Act 2000* (UK)



Facts

On 9 September 2003, a protest took place outside the ExCel Centre in London against an arms fair being held there. Mr. Gillan was stopped and searched by two officers when riding his bicycle near the Centre. He was a PhD student and had intended to participate in the protest. The officers found nothing incriminating after searching him and his rucksack. A copy of the Stop/Search Form 5090, recording that Mr. Gillan was stopped and searched under section 44 of the Act was given to him. The search was said to be for ‘Articles concerned in terrorism’. The incident lasted twenty minutes.

Ms Quinton was an accredited freelance journalist and was there on the same day to film the protest. She was wearing a photographer’s jacket and carrying a small bag and a video camera when stopped by an officer near the Centre. When asked why she had appeared out of some bushes, Ms Quinton explained that she was a journalist and produced her press passes. The officer found nothing incriminating after searching her and gave her a copy of the Form 5090 recording that the object and grounds of the search were ‘P.O.T.A.’; a reference to the Act, and that the search lasted five minutes. Ms Quinton however estimated that it lasted for thirty.

Judgment

Lord Bingham rejected the appellant’s submission that the word ‘expedient’ as found in the s 44(3) of the Act³ should mean ‘necessary’ since the two words have distinct

³ Note 2 at s44(3)



meanings and parliament chose the first, not the second⁴. He found that Parliament did appreciate the significance of the power it was conferring, providing a series of constraints.⁵ He held that an authorization might be given if it is considered likely that the authorization will be of ‘significant practical value and utility in ... the prevention of acts of terrorism’⁶. Lord Scott agreed after adding his analysis of the effect of the word ‘expedient’ in s 48(2) of the Act⁷

The witness statements of the Assistant Commissioner and a senior Home Office civil servant had two effects. Firstly, it advised Lord Bingham that potential terrorism targets are not limited to central London. The authorization, which included suburbs of outer London, was therefore not excessive⁸. Secondly, together with the fact that renewal was authorized by s 46(7) of the Act⁹, the statements led Lord Bingham to decide that the succession of authorizations from February 2001 until September 2003 was not a mere routine exercise¹⁰.

Lord Bingham considered whether a person who is stopped and searched in accordance with procedure prescribed has been deprived of his liberty as expressed in the *European Convention on Human Rights*¹¹(Convention). The court relied on *Guzzardi v Italy*¹² to determine that deprivation of liberty is a question of ‘degree or

⁴ Note 1 at para 14

⁵ Note 4

⁶ Note 1 at para 15

⁷ Note 1 at para 60

⁸ Note 1 at para 17

⁹ Note 2 at s 46(7)

¹⁰ Note 1 at para 18

¹¹ *European Convention on Human Rights* 1950 art 5(1)

¹² *Guzzardi v Italy* (1980) 3 EHRR 333



intensity, and not one of nature or substance'¹³. Also relied on was *HL v. United Kingdom*¹⁴, which held that deprivation of liberty is a question of 'type, duration, effects and manner...'¹⁵ Lord Bingham found that the stop and search is relatively brief in manner and duration that the person affected was not deprived of his liberty but merely 'kept from proceedings'¹⁶.

Next, Lord Bingham discussed whether the search of a person constituted a lack of respect for private life as expressed in the Convention¹⁷. He held that the ordinary search and intrusion of a person hardly reached the level of seriousness to engage the operation of the Convention¹⁸. He also held that the proper exercise of the power as conferred could be regarded as anything other than proportionate¹⁹. Lord Scott also found that the authorization was a proportionate one, weighing up the threat of terrorism against the 'shortlived' invasion of privacy and 'theoretical' deprivation of liberty²⁰. Lord Bingham does not rule out the possibility that the proper use of the power to stop and search may infringe the Convention rights to free expression and free assembly, but he finds it hard to conceive of such circumstances²¹.

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The appellant's last submission concerned the expressions 'prescribed by law'²² and 'in accordance with law'²³ as found in the Convention. The appellant contended that

¹³ Note 13 at para 93

¹⁴ *HL v. United Kingdom* (2004) 40 EHRR 761

¹⁵ Note 15 at para 89

¹⁶ Note 1 at para 25

¹⁷ Note 12 art 8(1)

¹⁸ Note 1 at para 28

¹⁹ Note 1 at para 29

²⁰ Note 1 at para 63

²¹ Note 1 at para 30

²² Note 12, articles 5(1), 5(1)(b), 10(2), 11(2)

²³ Note 12, article 8(2)



‘law’ in this context meant the Act as well as the authorization and confirmation²⁴. Lord Hope considered whether the authorization was sufficiently accessible and sufficiently precise to enable the individual to foresee the consequences and if so, whether the process is nonetheless arbitrary²⁵. The court considered the principle in *Malone v United Kingdom*²⁶ that ‘foreseeability cannot mean that an individual should be able to foresee when the authorities are likely to intercept... so that he can adapt his conduct accordingly’²⁷. The House also recognized the principle from *Kuijper v The Netherlands*²⁸ that ‘legislation may have to avoid excessive rigidity if it is to keep pace with changing circumstances’²⁹. Lord Hope held that ‘a system that is to be effective has to be flexible’³⁰. Lord Bingham held that the Act and Code A were both public documents and clearly describes and sets out the structure of law within which the power must be exercised. Notification was not required according to either documents and any such action would ‘stultify a potentially valuable source of public protection’³¹. In abiding by these two documents, the constable’s powers are not arbitrary.³² Lord Hope agreed with this reasoning.³³

In relation to the issue of arbitrary power, Lord Hope looked at discrimination. Lord Bingham however found this issue an ‘impossible contention on the facts’³⁴. Lord Hope looked at *R (European Roma Rights Centre) v Immigration Officer at Prague*

²⁴ Note 1 at para 32

²⁵ Note 1 at para 52

²⁶ *Malone v United Kingdom* (1984) 7 EHRR 14

²⁷ Note 27 at para 67

²⁸ *Kuijper v The Netherlands* (Unreported Application no 64848/01, 3 March 2005)

²⁹ Note 29 at pp13-14

³⁰ Note 1 at para 41

³¹ Note 1 at para 35

³² Note 32

³³ Note 1 at para 55

³⁴ Note 32



*Airport (United Nations High Commissioner for Refugees intervening)*³⁵ (Roma) and pointed out that terrorism is often linked to groups of similar racial and ethnic background³⁶. In testing whether the action was discriminatory, the *Roma* case stood for the principle that each individual should be treated as such and not a stereotyped member of the group³⁷. In reference to this case, Lord Hope held that a person's racial or ethnic background may be a first indication to the officer, but a further selection process must take place before the power is exercised. Therefore, it is possible to exercise power on persons of Asian origin in such a way that is not discriminatory³⁸.

Lord Brown also came to this conclusion using the *Roma* case, adding that the selective targeting of those regarded by the police as most likely to be terrorist is legitimate even if it leads to the targeting of one particular ethnic group and anything else would be an abuse and arbitrary use of power³⁹. Lord Scott agreed with this outcome but he did not rely on the *Roma* case. Instead, he held that the statutory authority of the Act would validate any discrimination to the degree as required by the use of stop and search powers as conferred by section 45(1) of the Act.⁴⁰

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Commentary

This case concerns one of the most controversial and contentious issues of today. We have on one-hand seemingly necessary counter terrorism legislations, and on the

³⁵ *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2005] 2 AC 1

³⁶ Note 1 at para 42

³⁷ Note 34 at para 82

³⁸ Note 1 at para 47

³⁹ Note 1 at para 92

⁴⁰ Note 1 at para 68



other, a potential encroachment on basic human rights. Lord Bingham's statement that our basic idea of freedom is mere tradition and not an absolute rule clearly sets the tone of his judgment⁴¹. He is open to the idea of statutory exceptions to this ordinary rule and is aware of the wider social implications of his judgment.

The court followed two precedents in deciding whether there was a deprivation of liberty. However, I believe that the tests from *HL v United Kingdom*⁴² and *Guzzardi v Italy*⁴³ were used broadly and the tests were so general that it provided the court with the opportunity to manipulate it. The degree and intensity of a restriction on liberty is such an objective and arbitrary decision that I feel that it would have been equally reasonable for the court to have found a deprivation of liberty.

Similarly, in relation to the issue of lack of respect for private life, I feel that Lord Bingham's personal view that the intrusions did not reach the level of seriousness to engage the operation of the Convention⁴⁴ was too subjective. The main justification for the legality of the law in question was practicality and social implications. This flexible social utility argument is sound until you consider the issue of discrimination. How is one to safeguard against abuse and discrimination when such discretionary powers are in place? As Mr. Singh submits, 'it will usually be impossible to establish a misuse of the power given that no particular grounds are required for its apparently lawful exercise'⁴⁵. I agree with this submission and feel disappointed at the court's failure to address this issue properly. Instead, Lord Brown simply illustrated how

⁴¹ Note 1 at para 1

⁴² Note 15

⁴³ Note 13

⁴⁴ Note 1 at para 28

⁴⁵ Note 1 at para 76



impossible and impractical it would be to exercise such powers with legal certainty by either searching everyone or every tenth person.⁴⁶ The other Lords gave similar reasonings based on impracticality. Although this ineffectiveness is true, I still see the problem of arbitrary power unresolved. Inability to find a better method does not justify the original method.

It is hard to achieve a balance between effective anti-terrorism law and human rights but it is definitely a sensitive issue. Not only is this judgment binding on all lower courts, the outcome is also a clear indication to the general public on where society stands on issues of human rights and discrimination. Those groups most vulnerable to arbitrary and discriminatory abuse need to feel that their rights will be enforced and upheld by the judicial system as well as the Government and they will look at this judgment as an indication. This particular judgment might not seem too controversial but I feel that it would be an important precedent for many cases in the future and could potentially lead to further compromise of human rights, especially those of Asian background. Partly, this is due to the vagueness in the Judges' reasoning which I feel is open to future manipulation by lower courts. This judgment, I believe, could potentially increase feelings of victimization for particular ethnic groups.



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⁴⁶ Note 1 at para 77