Michaelmas Term
[2015] UKSC 79
On appeal from: [2014] EWCA Civ 69

JUDGMENT

R (on the application of Roberts) (Appellant) *v* Commissioner of Police of the Metropolis and another (Respondents)

before

Lady Hale, Deputy President
Lord Clarke
Lord Reed
Lord Toulson
Lord Hodge

JUDGMENT GIVEN ON

17 December 2015

Heard on 20 and 21 October 2015

Appellant
Hugh Southey QC
Ruth Brander
(Instructed by Bhatt Murphy Solicitors)

Respondent
Jeremy Johnson QC
Georgina Wolfe
(Instructed by Weightmans LLP)

Respondent/Interested Party
Lord Keen QC
James Eadie QC
Ben Jaffey
(Instructed by The Government Legal Department)

Intervener (Liberty)
Alex Bailin QC
Iain Steele
Katherine Hardcastle
(Instructed by Liberty)

LADY HALE AND LORD REED: (with whom Lord Clarke, Lord Toulson and Lord Hodge agree)

1. In this country, we are wary of giving too much power to the police. We believe that we should be free to be out and about in public without being subjected to compulsory powers of the police, at least unless and until they have reasonable grounds to suspect that we are up to no good. We have so far resisted suggestions that we should all have to carry identity cards that the police can demand to see whenever they want. We have unhappy memories of police powers to stop and search "suspected persons" even with reasonable grounds. We are even more suspicious of police powers to stop and search without having reasonable grounds to suspect that we are committing or going to commit a crime.

2. Nevertheless, there are a few instances in which our Parliament has decided that such "suspicionless" stop and search powers are necessary for the protection of the public from terrorism or serious crime. The court can examine whether such a law is itself compatible with the rights set out in Schedule 1 to the Human Rights Act 1998. However, if it finds that it is not, the most the court can do is to make a declaration of incompatibility under section 4 of the Human Rights Act, leaving it to Parliament to decide what, if anything, to do about it. This is the primary remedy sought by Mr Southey QC on behalf of the claimant in this case. But, under section 6 of the Human Rights Act, even a compatible law has to be operated compatibly with the Convention rights in any individual case. There are many laws which are capable of being operated both compatibly and incompatibly, depending upon the facts of the particular case. The compatibility of the law itself has therefore to be judged in conjunction with the duty of the police to operate it in a compatible manner.

3. The law in question is contained in section 60 of the Criminal Justice and Public Order Act 1994. It is now common ground that the power of "suspicionless" stop and search which it contains is an interference with the right to respect for private life, protected by article 8 of the European Convention on Human Rights, although perhaps not at the gravest end of such interferences. It is also common ground that the power pursues one of the legitimate aims which is capable of justifying such interferences under article 8(2), namely the prevention of disorder or crime. The argument is about whether it is "in accordance with the law" as is also required by article 8(2). In one sense, of course it is, because it is contained in an Act of the United Kingdom Parliament. But the Convention concept of legality entails more than mere compliance with the domestic law. It requires that the law be compatible with the rule of law. This means that it must be sufficiently accessible and foreseeable for the individual to regulate his conduct accordingly. More

importantly in this case, there must be sufficient safeguards against the risk that it will be used in an arbitrary or discriminatory manner. As Lord Kerr put it in *Beghal v Director of Public Prosecutions (Secretary of State for the Home Department and others intervening)* [2015] UKSC 49; [2015] 3 WLR 344, at para 93, "The opportunity to exercise a coercive power in an arbitrary or discriminatory fashion is antithetical to its legality" in this sense.

Section 60

4. Section 60 is directed towards the risk of violence involving knives and other offensive weapons in a particular locality at a particular time. It provides:

> "(l) If a police officer of or above the rank of inspector reasonably believes -
>
> (a) that incidents involving serious violence may take place in any locality in his police area, and that it is expedient to give an authorisation under this section to prevent their occurrence,
>
> (aa) that -
>
> (i) an incident involving serious violence has taken place in England and Wales in his police area;
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> (ii) a dangerous instrument or offensive weapon used in the incident is being carried in any locality in his police area by a person; and
>
> (iii) it is expedient to give an authorisation under this section to find the instrument or weapon; or
>
> (b) that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason, he may give an authorisation that the powers conferred by this section are to be

> exercisable at any place within that locality for a specified period not exceeding 24 hours.
>
> (3) If it appears to an officer of or above the rank of superintendent that it is expedient to do so, having regard to offences which have, or are reasonably suspected to have, been committed in connection with any activity falling within the authorisation, he may direct that the authorisation shall continue in being for a further 24 hours.
>
> (3A) If an inspector gives an authorisation under subsection (1) he must, as soon as it is practicable to do so, cause an officer of or above the rank of superintendent to be informed.
>
> (4) This section confers on any constable in uniform power -
>
> > (a) to stop any pedestrian and search him or anything carried by him for offensive weapons or dangerous instruments;
> >
> > (b) to stop any vehicle and search the vehicle, its driver and any passenger for offensive weapons or dangerous instruments.
>
> (5) A constable may, in the exercise of the powers conferred by subsection (4) above, stop any person or vehicle and make any search he thinks fit whether or not he has any grounds for suspecting that the person or vehicle is carrying weapons or articles of that kind."

5. "Dangerous instruments" are defined in section 60(11) as "instruments which have a blade or are sharply pointed". "Offensive weapons" have the same meaning as in section 1(9) of the Police and Criminal Evidence Act 1984 ("PACE"), that is, any article "(a) made or adapted for use for causing injury to persons; or (b) intended by the person having it with him for such use by him or by some other person". If an incident of serious violence has already taken place (as contemplated by section 60(1)(aa)), it includes "any article used in the incident to cause or threaten injury to any person or otherwise to intimidate …".

6. Thus it will be seen that the individual police officer's powers in section 60(4) and (5) depend upon a general authorisation (a) given by an officer of the rank of inspector or above, (b) for a period of up to 24 hours, although renewable for one further period of 24 hours, (c) within a particular locality, and (d) where the senior police officer reasonably believes that one or more of the three grounds set out in section 60(1) exists. Section 60(5) makes it clear that the individual police officer operating under such an authorisation does not have to have any grounds for suspecting that the person or vehicle stopped and searched is carrying offensive weapons or dangerous instruments. But section 60(4) makes it clear that his or her purpose must be to search for such things.

7. The exercise of the powers set out in section 60 is subject to a number of safeguards and restrictions, including those contained in section 2 of PACE and in the Code of Practice for the exercise of such powers, issued under section 66 of that Act. In the Metropolitan Police area, it is also subject to the Metropolitan Police Service's published Standard Operating Procedures, both on the general *Principles for Stop and Search* and on *Section 60 of the Criminal Justice and Public Order Act 1994* in particular. It is well-established that failure to comply with published policy will render the exercise of compulsory powers which interfere with individual freedom unlawful: *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245. It is also likely to expose the individual officer to disciplinary action. It will therefore be necessary to return to these additional constraints in some detail later.

The facts

8. The events which gave rise to these proceedings took place on 9 September 2010. There was then a significant problem of gang related violence in the London Borough of Haringey, resulting from tensions between two rival gangs, and the risk that gangs from outside the borough would come to their aid. Between 1 and 9 September there were many police intelligence reports relating to violent crime and the use of firearms, knives and other offensive weapons. There was an attempted murder and a stabbing on 4 September and another stabbing on 5 September. On 8 September there were intelligence reports about the use or storage or movement of firearms. These indicated a risk of further violence on the afternoon, evening and night of 9 September. In the morning of 9 September, Superintendent Barclay, Superintendent (Operations) in the Borough of Haringey, formed the belief (under section 60(1)(a)) that further incidents of serious violence were likely to take place that day and also (under section 60(1)(aa)) that people would be travelling to Haringey in possession of weapons that had been used in the incidents which had already taken place.

9. Accordingly at 11.20 am he completed Form 5096, which constituted the authorisation. This authorised searches between 1.00 pm on 9 September 2010 and 6.00 am on 10 September in the whole Borough of Haringey apart from the wards of Fortis Green, Highgate, Bounds Green, Alexandra, Muswell Hill and Woodside. Under "Grounds" he checked the boxes corresponding to section 60(1)(a) and (aa). Under "Additional notes" was stated "There are increasing tensions at present between gangs in this borough and boroughs beyond those neighbouring ours. … A section 60 in the terms requested would support the aims of the tasked resources [to tackle Most Serious Violence, Serious Youth Violence and Knife Enabled Crime] and be a visible presence to deter the commission of offences in this borough". There followed details of the numerous intelligence reports, many to do with rivalry between the Wood Green Mob and the Grey Gang, which had led to this belief. The form concluded that "In respect of the Human Rights Act 1998 … Authorisation is Proportionate, Legal, Accountable and Necessary, in order to protect members of the public from being involved/surrounded by serious unlawful violence between opposing gang members. There is a history of violence between rival gangs on the borough which has previously resulted in serious assaults and criminal damage". Officers on duty were notified of the authorisation either in their daily briefing packs or over their radios.

10. At the time of these events, Mrs Roberts was 37 years old, and working as a support worker providing in-class support for young people with disabilities and learning difficulties. She had no convictions or cautions for criminal offences. She is of African-Caribbean heritage. On 9 September 2010, shortly after 1.00 pm, she was travelling on the No 149 bus in Tottenham. She had not paid her fare. A ticket inspector read her Oyster card and found that, not only had it not been validated for that journey, but also that it did not have enough funds on it to pay the fare. When questioned, Mrs Roberts gave a false name and address and also falsely stated that she did not have any identification with her.

11. The police were called and Police Constable Jacqui Reid attended. Mrs Roberts again denied having any identification with her. She appeared nervous and was keeping a tight hold upon her bag. PC Reid considered that she was holding her bag in a suspicious manner and might have an offensive weapon inside it. It was not uncommon for women of a similar age to carry weapons for other people. Earlier that day PC Reid had been involved in the search of such a woman who had been found to be in possession of a firearm and an offensive weapon and arrested. PC Reid explained her powers under section 60 of the 1994 Act and that she would search Mrs Roberts' bag. Mrs Roberts said that she would prefer to be searched in a police station. PC Reid said that this was unnecessary and she would do it there and then. As she went to take Mrs Roberts' bag, Mrs Roberts kept tight hold of it and began to walk away. She was restrained and handcuffed but continued to walk away. Eventually the police succeeded in restraining her. PC Reid searched her bag and Mrs Roberts gave her correct name and address. Inside the bag were bank cards in

Mrs Roberts' name and in two other names. She was arrested on suspicion of handling stolen goods, but no further action on that matter was taken once it was confirmed that the cards were indeed her own, in her maiden name, and her son's.

12. PC Reid completed Form 5090, which recorded when and where the search had taken place, and gave the following reasons:

> "Area is a hot spot for gang violence and people in possession of knives. Subject kept holding tightly onto her bag and appeared nervous and as if trying to conceal something she didn't want police to find."

Mrs Roberts was handed a copy of this form after she was arrested and interviewed at the police station for the offence of obstructing the search. She was later cautioned for that offence but the caution was quashed by consent following the institution of these proceedings.

13. Mrs Roberts explains that she did not want to be searched on the street because she was concerned that some of the young people with whom she worked might see it. But it is now conceded that PC Reid acted in accordance with section 60 of the 1994 Act, and indeed that the interference with Mrs Roberts' article 8 rights was proportionate to the legitimate aim of the prevention of crime.

14. Mrs Roberts brought judicial review proceedings alleging breaches of article 5 and of article 8 and of article 14. Both the Divisional Court ([2012] EWHC 1977 (Admin)) and the Court of Appeal ([2014] EWCA Civ 69; [2014] 1 WLR 3299) held that there was no deprivation of liberty within the meaning of article 5 (and there is no appeal against that). Both courts rejected the claim that the section 60 power was used in a manner which discriminated on grounds of race, contrary to article 14 (and there is no appeal against that). Both courts held that there was an interference with the right to respect for Mrs Roberts' private life in article 8, but that it was "in accordance with the law". That is the issue in this appeal.

The case law

15. As it is admitted that the interference with Mrs Roberts' rights was, in the circumstances, proportionate to the legitimate aim of preventing crime, her claim can only succeed if the power under which it was done is in itself incompatible with the Convention rights because it does not have the character of "law" as required by the Convention. As Lord Reed explained in *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] AC 49, at para 114, "for the

interference to be 'in accordance with the law', there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. Whether the interference in a given case was in fact proportionate is a separate question". The *T* case, as Lord Hughes explained in *Beghal*, at para 31, was concerned with a rigid rule which did not have the flexibility to ensure that interferences with article 8 rights were proportionate. In *Beghal*, as in this case, on the other hand, the court was concerned with the reverse situation, where safeguards may be required to guard against a broad discretion being used in an arbitrary, and thus disproportionate manner.

16. This is the first case in which the power in section 60 has come before this court or before the European Court of Human Rights in Strasbourg. But two other powers of "stop and search" have come before this court or its predecessor, the appellate committee of the House of Lords, and one of those cases has gone to the Strasbourg court. We will deal with these, and another relevant Strasbourg decision, in chronological order.

17. *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307, concerned the powers in sections 44 to 46 of the Terrorism Act 2000. Section 44(4) empowered a police officer of at least the rank of assistant chief constable to grant an authorisation for a renewable period of up to 28 days covering a specified area or place, which could be the whole of a police area. The practice was to grant successive 28 days authorisations covering the whole Metropolitan Police area. Under section 46(3) to (7), authorisations were subject to confirmation by the Home Secretary within 48 hours, failing which they ceased to have effect. But such confirmation had never been refused. Under section 44(3), authorisations can be given "only if the person giving it considers it expedient for the prevention of acts of terrorism", a very broad ground. "Terrorism" is widely defined in section 1 of the 2000 Act. Under section 44(1) and (2) an authorisation allowed any uniformed police officer to stop a vehicle in the area and search it, the driver and any passenger, and to stop a pedestrian in the area and search the pedestrian and anything carried by him. Under section 45(1), the power could be exercised "only for the purpose of searching for articles of a kind which could be used in connection with terrorism", but "whether or not the constable has grounds for suspecting the presence of articles of that kind". Under section 45(4), he could detain the person or vehicle for "such time as is reasonably required to permit the search to be carried out at or near the place where the person or vehicle is stopped". Two people, a student and a journalist, who had been stopped and searched on their way to a demonstration, complained of breaches of several Convention rights, including article 8.

18. In considering the Convention requirement of legality common to all the rights in question, Lord Bingham said this, at para 34:

> "The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided."

19. He went on to hold, at para 35, that the power in question did meet these requirements. That the constable need have no suspicion

> "cannot, realistically, be interpreted as a warrant to stop and search people who are obviously not terrorist suspects, which would be futile and time-wasting. It is to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion."

He had earlier, at para 14, when rejecting the argument that "expedient" must be read down to "necessary" identified 11 constraints on the abuse of the power. The other members of the committee agreed with him on this point, while adding observations of their own, in particular that race or ethnicity could never be the sole ground for choosing a person to stop and search.

20. In *Gillan v United Kingdom* (2010) 50 EHRR 1105, the Strasbourg court took a different view. The authorisation could be given for reasons of "expediency" rather than "necessity". Once given, it was renewable indefinitely. The temporal and geographical restrictions were no real check. Above all, the court was concerned at the breadth of the discretion given to the individual police officer, the lack of any need to show reasonable suspicion, or even subjectively to suspect anything about the person stopped and searched, and the risks of discriminatory use and of misuse against demonstrators and protesters in breach of article 10 or 11 of the Convention. "In particular, 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" (para 86). Hence the applicants' article 8 rights had been violated.

21. Despite this, it cannot be concluded from *Gillan* that the Strasbourg court would regard every "suspicionless" power to stop and search as failing the Convention requirement of lawfulness. In *Colon v The Netherlands* (2012) 55 EHRR SE45, it declared inadmissible a complaint about a Dutch power which in some respects was more comparable to the power at issue in this case than was the power in *Gillan*. Acting under the Municipalities Act, with the authority of a byelaw passed by the local council, the Burgomaster of Amsterdam designated most of the old centre of Amsterdam as a security risk area for a period of six months and again for a further period of 12 months. Under the Arms and Ammunition Act, this enabled a public prosecutor to order that, for a randomly selected period of 12 hours, any person within the designated area might be searched for the presence of weapons. The prosecutor had to give reasons for the order by reference to recent reports. The applicant refused to submit to a search when stopped and was arrested and prosecuted for failing to obey a lawful order.

22. The applicant's complaint that this interference with his article 8 rights was not "in accordance with the law" was limited to the ineffectiveness of the judicial remedies available, in particular that no prior judicial authorisation for the order was necessary (para 74). The court pointed out that the Burgomaster's designation had to be based on a byelaw adopted by an elected representative body, which also had powers to investigate the Burgomaster's use of the power. There was also an objection and appeal mechanism. The criminal courts could then examine the lawfulness of the use made of it. Hence the power was "in accordance with the law" (paras 75-79). The court went on to find that the interference was "necessary in a democratic society". The legal framework involved both the Burgomaster and the prosecutor, hence no single executive officer could alone order a preventive search operation. These preventive searches were having their intended effect of helping to reduce violent crime in Amsterdam. These reasons were sufficient to justify the unpleasantness and inconvenience to the applicant.

23. Mr Southey suggests that the reference, in the Dutch government's observations, to the individual police officers being "given no latitude in deciding when to exercise their powers" (para 68) must mean that they had to stop everyone in the designated area during the 12 hours in question and that therefore there was no risk of arbitrary decision-making. That cannot be right. Old Amsterdam is a sizeable area frequented by many people both for business and for pleasure purposes. His better point is that the applicant limited his complaint to the lack of prior judicial sanction. The fact remains that the Strasbourg court held that particular "suspicionless" stop and search power compatible with article 8.

24. More recently, in *Beghal*, the Supreme Court has considered a rather different power, under Schedule 7 to the Terrorism Act 2000. This allows a police or immigration officer to question a person at a port or in the border area whom he believes to be entering or leaving the United Kingdom or travelling by air within it.

It also applies to a person on board a ship or aircraft which has arrived anywhere in the United Kingdom. The object of the questioning is to determine whether the person "appears to be" a terrorist within the meaning of that part of the Act. But the officer does not have to have grounds for suspecting that he does. This "core" power is supplemented by additional powers to stop, search and detain the person for a short time, and to require the production of documents. The claimant was stopped and questioned for an hour and three quarters on returning to this country from a visit to her husband in France where he was in custody in relation to terrorist offences. She was prosecuted for refusing to answer some of the questions.

25. By a majority, Lord Kerr dissenting, the Supreme Court declined to hold that the prosecution was an unjustified interference with her Convention rights. Lord Hughes (with whom Lord Hodge agreed) pointed out that there is a distinction between port controls and street searches. The former are a lesser intrusion than the latter. We expect people to be searched at airports, for the safety of all. He listed, at para 43, a number of effective safeguards which he considered sufficient to meet the requirement of legality:

> "They include: (i) the restriction to those passing into and out of the country; (ii) the restriction to the statutory purpose; (iii) the restriction to specially trained and accredited police officers; (iv) the restrictions on the duration of questioning; (v) the restrictions on the type of search; (vi) the requirement to give explanatory notice to those questioned …; (vii) the requirement to permit consultation with a solicitor and the notification of a third party; (viii) the requirement for records to be kept; (ix) the availability of judicial review … if bad faith or collateral purpose is alleged, and also via the principle of legitimate expectation where a breach of the code of practice or of the several restrictions listed above is in issue; …"

26. Lord Neuberger and Lord Dyson agreed, adding that in considering whether the legality principle was satisfied, "one must look not only at the provisions of the statute or other relevant instrument which gives rise to the system in question but also at how that system actually works in practice" (para 86). The differences from the system in *Gillan* showed that these powers were more foreseeable and less arbitrary (para 87). They could only be exercised (i) at ports and airports; (ii) against those passing through the UK's borders; (iii) for a limited purpose (para 88). Unlike the powers in *Gillan*, they were not extraordinary; they were used against a tiny proportion of passengers; and they yielded useful results. Nor could they be used against demonstrators and protesters (para 89). They also pointed out that it was important to the effectiveness of these powers that they be exercised randomly and therefore unpredictably. If this were not permissible the valuable power would either

have to be abandoned or exercised in a far more invasive and extensive way, by questioning everyone passing through ports and airports (para 91).

27. Mr Southey points out that there are other ways of securing the benefit of random and thus unpredictable searches than leaving the choice of whom to search to individual police officers. He himself has experienced a system in Mexico where passengers were randomly given a red or a green light: those given a red light were searched, those given a green light were not. It is, however, rather hard to see how this would work with searches conducted on the street or even on the No 149 bus.

The other constraints

28. In addition to the limited scope of the power in section 60 itself, it is necessary to take into account the other constraints upon the exercise of these powers. Those constraints arise both from the legal protection of the citizen from the misuse of police powers, and from the mechanisms designed to ensure that the police are accountable for their actions.

29. In relation to legal protection, we have mentioned section 6 of the Human Rights Act, to which it will be necessary to return. In the event of a breach of that section, the victim of the unlawful act is entitled to seek a judicial remedy under section 8, which might in an appropriate case include an award of damages (as, for example, in *H v Commissioner of Police of the Metropolis (Liberty and another intervening)* [2013] EWCA Civ 69; [2013] 1 WLR 3021). But the legal protection of the citizen pre-dates the Human Rights Act. In relation to searches, the starting point is the common law, under which it is contrary to constitutional principle and illegal to search someone to establish whether there are grounds for an arrest (*Jackson v Stevenson* (1897) 2 Adam 255). Powers of stop and search therefore require Parliamentary authority. The 1994 Act is one of a number of statutes which provide such authority. Like other aspects of the relationship between the citizen and the police, however, the exercise of the powers conferred by the 1994 Act is subject to detailed statutory regulation by PACE. Where there is a failure to comply with PACE, rendering the search unlawful, the victim can in principle bring an action for damages against the chief constable (or, in the case of the Metropolitan Police, the Commissioner), who is vicariously liable for the unlawful acts committed by his or her officers (as, for example, in *O'Loughlin v Chief Constable of Essex* [1998] 1 WLR 374 and *Abraham v Commissioner of Police of the Metropolis* [2001] 1 WLR 1257).

30. Legal remedies before the courts are not, however, the only mechanism for protecting citizens against the misuse of police powers and ensuring the accountability of police officers. At a national level, a variety of powers are

possessed by the Home Secretary, including the power to issue Codes of Practice under section 66 of PACE, and the power to appoint Her Majesty's Inspectors of Constabulary and to direct them to carry out inspections and report to her, under section 54 of the Police Act 1996. A wide range of policing matters, including operational decisions by chief constables, are also examined in Parliament by the Home Affairs Select Committee.

31. At a local level, police and crime commissioners, directly elected by the communities they serve and subject to scrutiny by local police and crime panels, are responsible for holding the chief constable of their area to account for the way in which he or she, and the people under his or her direction and control, exercise their functions: Police Reform and Social Responsibility Act 2011, section 1(7). In relation to the Metropolitan Police, the equivalent function is performed by the Mayor's Office for Policing and Crime, an office occupied by the Mayor of London: section 3(7) of the 2011 Act. At the time of the events with which this appeal is concerned, a broadly similar function was performed by police authorities established under the Police and Magistrates' Courts Act 1994, and, in relation to the Metropolitan Police, by the Metropolitan Police Authority established under the Greater London Authority Act 1999.

32. In individual cases, complaints about the misuse of police powers can be made to the chief constable (or, in the case of the Metropolitan Police, to the Commissioner), to the police and crime commissioner (or, in the case of the Metropolitan Police, to the Mayor's Office for Policing and Crime), or to the Independent Police Complaints Commission, an independent body established under the Police Reform Act 2002. Provision is made under that Act for the determination of complaints and for a system of appeals.

33. That general explanation forms the background to the constraints and safeguards applying specifically to the powers with which this appeal is concerned. First there are the requirements of sections 2 and 3 of PACE, which apply to most stop and search powers, including those under section 60 of the 1994 Act. Under section 2, before the officer begins the search, he must take reasonable steps to tell the person being searched his name, the station to which he is attached, the object of the search and the grounds for making it, and that the person can only be detained for the time reasonably required to carry out the search. Breach of section 2 would render the search unlawful (*Osman v Director of Public Prosecutions* (1999) 163 JP 725). Section 3 requires the officer to make a record in writing unless this is not practicable, either as part of the custody record if the person is arrested and taken to a police station or on the spot or as soon as practicable after the search if he is not. The person searched is entitled to a copy of the record if he asks for one within three months. This was the Form 5090 handed over to Mrs Roberts after her arrest (see para 12 above).

34. Next there are the statutory Codes of Practice, issued under section 66 of PACE. Code A relates to the exercise by police officers of statutory powers of stop and search. This governs both the authorisation and the search itself. It is not practicable to cite all the relevant paragraphs of the 2009 version in force at the time of this encounter. But the flavour may be gleaned from para 1.1:

> "Powers to stop and search must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination. The Race Relations (Amendment) Act 2000 makes it unlawful for police officers to discriminate on the grounds of race, colour, ethnic origin, nationality or national origins when using their powers."

35. Mr Southey complains that this does not in terms tell police officers that they must not select people on grounds of race or ethnicity alone. But that is what discrimination means. If anything, this paragraph is clearer than the one in the current (2015) version, which has been updated to refer to all the characteristics now protected by the Equality Act 2010, without listing them. The current Code does contain a helpful paragraph, para 2.14A, which was not present in the earlier version:

> "The selection of persons and vehicles under section 60 to be stopped and, if appropriate, searched should reflect an objective assessment of the nature of the incident or weapon in question and the individuals and vehicles thought likely to be associated with that incident or those weapons. The powers must not be used to stop and search persons and vehicles for reasons unconnected with the purpose of the authorisation. When selecting persons and vehicles to be stopped in response to a specific threat or incident, officers must take care not to discriminate unlawfully against anyone on the grounds of any of the protected characteristics set out in the Equality Act 2010 (see para 1.1)."

Nevertheless, the earlier Code explains and stresses the importance of explaining and recording the reasons for the stop (paras 3.8-3.11 and section 4). Supervising officers must monitor the use of stop and search powers and "should consider in particular whether there is any evidence that they are being exercised on the basis of stereotyped images or inappropriate generalisations" (para 5.1). They must keep comprehensive statistical records so as to identify disproportionate use either by particular officers or against particular sections of the community (para 5.3).

36. As to the authorisation, both the period of time and the geographical area defined in the authorisation must be the minimum necessary to achieve the legislative aim (para 2.13 and Notes for Guidance, para 13). Thus the authorisation in this case was for less than the maximum 24 hours permitted and the area, although substantial, excluded quite large areas of the borough of Haringey. The Notes for Guidance, at para 10, stress that:

> "The powers under section 60 are separate from and additional to the normal stop and search powers which require reasonable grounds to suspect an individual of carrying an offensive weapon (or other article). Their overall purpose is to prevent serious violence and the widespread carrying of weapons which might lead to persons being seriously injured by disarming potential offenders in circumstances where other powers would not be sufficient. They should not therefore be used to replace or circumvent the normal powers for dealing with routine crime problems."

Paragraph 11 points out that authorisations require a reasonable belief that must have an objective basis, of which examples are given.

37. Then there are the applicable policies and instructions of the police force in question, in this case, the Metropolitan Police. The Metropolitan Police *Standard Operating Procedures* are published on their website. These largely repeat the requirements of the legislation and the Code, but with some additional features. They are designed to be relatively simple to use and easy to remember. The *Principles for Stops and Searches*, current at the time, contains a section on the Race Relations (Amendment) Act 2000, which extended the duties in the Race Relations Act 1976 to public authorities including the police. This reminds officers of their general duty to have due regard to eliminating unlawful discrimination. More to the point, it states that "Officers must be aware that to go beyond their powers and search somebody solely on grounds of race, colour, or otherwise treat someone unfavourably on such grounds is unlawful and the individual officer, in addition to the Commissioner, may face legal or disciplinary proceedings". The *Principles* also contain a section on Human Rights, instructing officers to apply the PLAN B checklist to all their decision making. Their actions must be Proportionate, have a Legal power or purpose, Accountable (through record keeping and scrutiny), Necessary in the circumstances and use the Best information available. The specific Standard Operating Procedures on *Section 60 Criminal Justice and Public Order Act*, current at the time, instructed senior officers giving the authorisation that these "must be justified on the basis that the exercise of the power is, in all circumstances a proportionate and necessary response for achieving the purpose for which Parliament provided the power". It reminds officers that they must have a reasonable belief in the grounds and that there must be an objective basis in intelligence or relevant information. It suggests that the use of section 60 should be considered

where there has been a significant increase in knife-point robberies in a limited area and also, for example, for gang related violence or disorder, football related violence and events such as demonstrations and music concerts that typically include a large-scale gathering of people which, combined with other factors, indicate a likelihood of violence or the commission of offences. It stresses the importance of engagement with local community groups and of feedback. Briefings should be the rule, if practicable. For individual officers carrying out the stop and search, it provides guidance on filling out Form 5090 and about the encounter. The mnemonic GOWISELY (Grounds, Object, Warrant, Station, Entitlement to a copy, Legal power, and tell the person 'You are being detained') applies, with some additional guidance.

38. These instructions are regularly reviewed. Since the encounter in question they have been updated to take account of the *Best Use of Stop and Search Scheme* ("BUSS"), issued by the Home Secretary and College of Policing in April 2014 following reports prepared by Her Majesty's Inspectors of Constabulary, under the direction of the Home Secretary, on the use of stop and search powers. Announcing this to Parliament, the Home Secretary explained that she had long been concerned about the use of stop and search by the police. Although an important police power, when misused it could be counter-productive. It was an enormous waste of police time. And when innocent people were stopped and searched for no good reason it was hugely damaging to the relationship between the police and the public. Nevertheless, adopting the scheme was not compulsory. Police forces in this country are not subject to direction from the government. They are operationally independent. But in fact all of them have adopted it, including the Metropolitan Police.

39. BUSS covers all kinds of stop and search powers, but in relation to section 60 it specifically provides: (i) that Forces in the scheme will raise the level of authorisation to Assistant Chief Constable (or the equivalent in the Metropolitan Police and City of London Police); (ii) that authorisations must only be given when the officer believes it "necessary", rather than merely expedient, for any of the statutory purposes; (iii) that in relation to future serious violence, the officer must reasonably believe that it "will", rather than "may", take place; (iv) that authorisations should be for no more than 15 hours in the first instance; and (v) that Forces must communicate with the public in the area in advance where practicable and afterwards.

40. Mr Southey argues that these improvements show that section 60 as enacted does not contain sufficient safeguards. On behalf of the Secretary of State, Lord Keen QC argues that BUSS is irrelevant. The Home Secretary's determination to seek improvements in the operation of all stop and search powers in order to promote better community relations does not prove that the previous use of the power was

not in accordance with the law. However, it is worth bearing in mind that there has been a very significant reduction in the use of these powers in recent years.

Discussion

41. Any random "suspicionless" power of stop and search carries with it the risk that it will be used in an arbitrary or discriminatory manner in individual cases. There are, however, great benefits to the public in such a power, as was pointed out both by Lord Neuberger and Lord Dyson in *Beghal* and by Moses LJ in this case. It is the randomness and therefore the unpredictability of the search which has the deterrent effect and also increases the chance that weapons will be detected. The purpose of this is to reduce the risk of serious violence where knives and other offensive weapons are used, especially that associated with gangs and large crowds. It must be borne in mind that many of these gangs are largely composed of young people from black and minority ethnic groups. While there is a concern that members of these groups should not be disproportionately targeted, it is members of these groups who will benefit most from the reduction in violence, serious injury and death that may result from the use of such powers. Put bluntly, it is mostly young black lives that will be saved if there is less gang violence in London and some other cities.

42. It cannot be too often stressed that, whatever the scope of the power in question, it must be operated in a lawful manner. It is not enough simply to look at the content of the power. It has to be read in conjunction with section 6(1) of the Human Rights Act 1998, which makes it unlawful for a police officer to act in a manner which is incompatible with the Convention rights of any individual. It has also to be read in conjunction with the Equality Act 2010, which makes it unlawful for a police officer to discriminate on racial grounds in the exercise of his powers.

43. It might be thought that these two additional legal restraints were sufficient safeguard in themselves. The result of breaching either will be legal liability and probably disciplinary sanctions as well. It is said that, without the need to have reasonable grounds for suspecting the person or vehicle stopped to be carrying a weapon, it is hard to judge the proportionality of the stop. However, that is to leave out of account all the other features, contained in a mixture of the Act itself, PACE and the Force Standard Operating Procedures, which guard against the risk that the officer will not, in fact, have good reasons for the decision. The result of breaching these will in many cases be to render the stop and search itself unlawful and to expose the officers concerned to disciplinary action.

44. First, as to the authorisation itself: (i) the officer has reasonably to believe that the grounds for making an authorisation exist; (ii) those grounds are much more

tightly framed than the grounds in *Gillan*; (iii) the officer's belief clearly has to be based on evidence; (iv) he has to record in writing, not only what his grounds are, but the evidence on which his belief is based; (v) he has expressly to consider whether the action is necessary and proportionate to the danger contemplated; (vi) that is why, in reality, he has to believe that an authorisation is necessary rather than merely expedient; (vii) the authorisation can only be for a very limited period of time; (viii) it can only be renewed once for a limited period of time; rolling renewals are not possible; (ix) it can only cover a limited geographical area; (x) it is subject to review.

45. Second, as to the operation itself: (i) there should be prior briefing if possible and certainly de-briefing afterwards; (ii) there should be prior community engagement if possible and certainly afterwards; (iii) where the authorisation is given by an officer below the rank of superintendent, it is subject to review by a superintendent; (iv) after the authorisation is over, the operation should be evaluated, in terms of whether its objectives were met, numbers of searches, number of arrests, number of weapons seized, disproportionality etc, and community confidence and reassurance.

46. Third, as to the actual encounter on the street: (i) the officer must be in uniform and identify himself by name and police station to the person stopped; (ii) the officer must explain the power under which he is acting, the object of the search and why he is doing it; (iii) the officer must record this in writing; (iv) the person searched is entitled to a copy of the form; (v) the purpose is limited to searching for offensive weapons or dangerous implements.

47. All of these requirements, in particular to give reasons both for the authorisation and for the stop, should make it possible to judge whether the action was "necessary in a democratic society … for the prevention of disorder or crime". No system of safeguards in the world can guarantee that no-one will ever act unlawfully or contrary to orders. If they do so act, the individual will have a remedy. The law itself is not to blame for individual shortcomings which it does its best to prevent. It is not incompatible with the Convention rights.

48. It would not, therefore, be right to make a declaration of incompatibility in this case. Neither would it be appropriate to make a declaration that the Guidance current at the time, or now, was inadequate or that this particular search was not "in accordance with the law". We would dismiss this appeal.