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Section 60 of the Criminal Justice and Public Order Act (CJPOA) 1994 provides police officers with greater stop-and search powers, in order to find offensive weapons or dangerous instruments. Section 60(5) creates a power which can be exercised in the absence of any grounds for suspecting the presence of such weapons or articles and only applies when valid authorisation is in place, enabling officers to stop and search persons and vehicles. The appellant, who was stopped and searched pursuant to a section 60 authorisation, sought a declaration that the section was offensive to the European Convention on Human Rights (ECHR): the Article 5 ECHR guarantee of liberty and security and/or the Article 8 ECHR right to respect for private and family life. It was further suggested that section 60 was used disproportionately against black people in London, in breach of Article 14 of the ECHR. The proceedings were heard by Lord Justice Kay, Lady Justice Rafferty and Lady Justice Macur in the Court of Appeal (Civil Division).

The Facts

Superintendent Barclay (Deputy Commander for the London Borough of Haringey) granted an authorisation under section 60 of the Criminal Justice and Public Order Act 1994, running from 1 pm on 9 September to 6 am on 10 September 2010. The authorisation came after several days of gang-related violent crimes, and targeted troublesome areas in Haringey. The appellant, Ann Juliette Roberts, was seen avoiding payment of a bus fare by a ticket inspector on 9 September 2010, within the time period of the section 60 authorisation. Having provided the inspector with a false name and address, the appellant was approached by a police officer who suspected that she might have an offensive weapon in her bag, which she was holding tightly against her body. The officer searched the appellant pursuant to section 60.

In the Divisional Court[1] Lord Justice Moses rejected the appellant's argument that section 60 was incompatible with Article 5 of the ECHR. In the Court of Appeal[2] Moses LJ said that the question ought to be considered under Article 8, not Article 5. He opined that the appellant had not been confined, only restrained when she sought to resist the exercise of the power exercised pursuant to section 60. Moses LJ held that there was therefore no deprivation of liberty under Article 5. With respect to Article 8, the court held that the 'price to pay' (the possibility of being subjected to a random search under section 60) 'must seem justifiable … for greater security and protection'

1 *R (Roberts) v the Commissioner of Police of the Metropolis* [2012] EWHC 1977 (Admin), [2012] HRLR 28.
2 *R (Roberts) v the Commissioner of Police of the Metropolis* [2014] EWCA Civ 69, [2014] 1 WLR 3299.

from violence.[3] Moses LJ also dismissed an argument by the appellant that section 60 itself was racially discriminatory.[4] Considering whether the legislation was *used* in a discriminatory manner and whether Article 14 was triggered, Moses LJ criticised the use of statistics by the appellant, adding that the issue 'must await a proper opportunity for the figures to be debated and for the witnesses who speak to these figures to be challenged'.[5]

The appellant sought a declaration that the Divisional Court had erred in its judgment and that section 60 offends Article 5 and/or Article 8 of the ECHR, and that section 60 is used disproportionately against black people in London, in breach of Article 14.

The Law

Section 60(1) CJPOA provides that:

> 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, 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.

Dangerous instruments are defined by section 60, as 'instruments which have a blade or are sharply pointed'. Offensive weapons are defined by section 1(9) of the Police and Criminal Evidence Act (PACE) 1984, as 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'. Under Code A of the PACE Code of Practice, '1.1 Powers to stop and search must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination' and '2.14A … powers must not be used to stop and search persons and vehicles for reasons unconnected with the purpose of the authorisation.'

Article 5 of the ECHR provides that '[e]veryone has the right to liberty and security of person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'.

Article 8(1) of the ECHR provides that '[e]veryone has the right to respect for his private and family life, his home and his correspondence' which shall not be interfered with by a public authority, 'except such as is in accordance with the law and is necessary in a democratic society'. Justifications from 8(1) are found in 8(2), and include national security interests, public safety and in order to prevent disorder or crime.

The Court of Appeal's Reasoning

Is section 60 of the CJPOA offensive to the guarantee of liberty and security within Article 5 of the ECHR and/or the right to respect for private and family life within

3 *Ibid*, [45].
4 *Ibid*, [47].
5 *Ibid*, [51].

Article 8, and is section 60 used disproportionately against black people in London, in breach of Article 14 of the ECHR?

Lord Justice Maurice Kay delivered an opinion, with which Lady Justice Rafferty and Lady Justice Macur fully agreed. The issue under Article 5 was dismissed with little consideration, after Kay LJ held section 60 to fall outside the scope of Article 5's liberty guarantee. Citing *R (Gillan) v Commissioner of Police of the Metropolis*,[6] Kay LJ drew comparisons between the stop-and-search power conferred by section 60 and that pursuant to sections 44 and 45 of the Terrorism Act 2000 (TA 2000). On appeal,[7] the European Court of Human Rights (ECtHR) stated that Article 5 could in fact be triggered by a stop and search, due to a level of coercion created by the threat of arrest, detention and charges for non-compliance with the search. The decision of the ECtHR in *Gillan* did not, however, finally determine the Article 5 question. In Roberts' case, the Court of Appeal held that Article 5 had no application.[8]

On the issue of Article 8, the court considered whether the section 60 stop and search is an interference with someone's rights to respect for her private life, thereby requiring justification pursuant to Article 8(2). Referring to *Colon v Netherlands*,[9] Kay LJ considered the 'potential humiliation and embarrassment of being subjected to a random search in a public place by a police officer who need not have reasonable suspicion of criminality in any form' to bring section 60 searches into the purview of Article 8. The real 'battleground', he said, was whether section 60 is non-arbitrary, and thus in accordance with the law.[10]

Kay LJ referred to the ECtHR holding in *Gillan*, where sections 44 and 45 of the TA 2000 provided a power which was too broad, granting too much discretion to individual police officers. The ECtHR in *Gillan* held that Article 8 had in fact been breached by the TA 2000, since 'the powers … are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse'. That said, the Court of Appeal in the present case found differently with respect to section 60. That section provides for extended powers for only a 'very limited period of time' (24 hours, in contrast to the 28 days allowed under the old TA 2000 provision).[11]

Importantly, Kay LJ held that section 60 'requires that the authorising officer reasonably believes specified things relating to serious violence, dangerous instruments and offensive weapons'. He found that section 60 does not confer an arbitrary power, and satisfied the Article 8(2) test for necessity. Focusing next on the power of the individual officer, the court was satisfied that, due to the Code of Practice (PACE 1984) requirements of fairness, responsibility and respect when searching[12] and the requirement

6 [2006] UKHL 12, [2006] 2 AC 307.
7 *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45.
8 *Roberts* (n 2) [13].
9 ECtHR Application no 49458/06, 15 May 2012.
10 *Roberts* (n 2) [16].
11 *Ibid*, [23].
12 Police and Criminal Evidence Act 1984, Code A [1.1].

that 'powers must not be used to stop and search persons and vehicles for reasons unconnected with the purpose of the authorisation',[13] the section 60(5) police power was not *prima facie* offensive to Article 8.[14]

Finally turning to the issue under Article 14 of the ECHR, within the ambit of Article 8 (as Article 5 was held irrelevant to this case), Kay LJ followed a similar line of dismissal as Moses LJ: holding that he did not think it was appropriate for the court to 'become embroiled in tendentious statistical material'. Distinguishing ECtHR jurisprudence citing statistics as they were 'undisputed' and 'official',[15] Kay LJ noted that the present case provided for no such figures. The appellant drew attention to herself as a 'fare dodger' during and within the purview of a section 60 authorisation; the search was not based on her ethnicity.[16]

Concluding, Kay LJ remarked that he was sensitive to the controversy surrounding police stop-and-search powers, but that this was a subject of debate for elsewhere. No breaches of Articles 5, 8 or 14 of the ECHR had been persuasive to the court and the appeal was dismissed.[17]

Comment and Analysis

There are two areas for consideration in relation to *Gillan*. The first relates to the authorisation governing an area in which a stop-and-search exercise is being carried out; and the second to the discretion which is conferred on an individual officer to carry out a stop-and-search exercise in an individual case.

With respect to the first issue, the Court of Appeal noted that, in *Gillan*, the authorisation had been on the basis of the low standard of 'expediency'. The provisions of section 60 were more stringent and the court noted that it was 'particularly significant' that the authorising officer has a 'reasonable belief' that incidents involving serious violence may take place. The court was satisfied that 'expediency underwritten by reasonable belief' on the part of the authorising officer is sufficient lawful to ground an authorisation. However, this is a misreading of *Gillan*. Closer attention to the text of *Gillan* discloses that, at the authorisation stage, the ECtHR was concerned with a standard of 'necessity'.[18] This is a higher standard, which calls for a proportionality review of the measure. Moreover, the Court of Appeal's application of the standard was profoundly underwhelming, in that the court failed to apply the proportionality test clearly in this case. The relevant passage stated simply: 'In the present case, once it is accepted that Section 60 does not confer an arbitrary power, it is beyond dispute that all considerations pursuant to Article 8(2) have been satisfied'.[19] However, the question of whether a provision is in accordance with law, which

13 *Ibid*, [2.14A].
14 *Roberts* (n 2) [29].
15 *DH v Czech Republic* (2008) 47 EHRR 3.
16 *Roberts* (n 2) [33].
17 *Ibid*, [34].
18 *Gillan* (n 7) [80].
19 *Roberts* (n 2) [24].

relates to arbitrariness, does not dispose of the proportionality question which must follow thereafter. It is not clear whether the court has misdirected itself as to the application of proportionality under Article 8(2) or simply made a factual holding without actually applying the test on the basis of the officer's proportionality exercise. Neither avenue is particularly appealing. The Home Office's recent review of stop-and-search powers discloses a belief that *Roberts* has raised the requirement for authorisations from 'expediency' to 'necessary'.[20] However, the review appears to operate on the basis that section 60 as it stands meets the standard of 'necessity'. As outlined here, the Court of Appeal did not apply the standard correctly and the understandable confusion to which this has given rise is particularly disappointing.

On the second issue, the Court of Appeal appears to have misinterpreted *Gillan* in relation to the discretion left to individual officers. It is the source of some controversy as to whether the use of a stop-and-search power must be accompanied by a reasonable suspicion on the part of the officer using the power. The disagreement arises as a result of the following passage in *Gillan*: 'Not only is it unnecessary for [the police officer] to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched'.[21] The Joint Committee on Human Rights concluded that *Gillan* did not require a 'reasonable suspicion' on the part of the officer.[22] This interpretation of *Gillan* has been followed by the British courts in *Beghal v DPP*[23] and *Canning*.[24] This précis of *Gillan* is unlikely to be accepted by the ECtHR. In *Colon v the Netherlands* the Third Section of the ECtHR reviewed *Gillan* as follows: '[f]inally, and in the Court's view most strikingly, it was left to the discretion of the individual police officer to decide whether to search any particular person; no reasonable suspicion of wrongdoing was required'.[25] It is clear, therefore, that ECtHR itself does not agree with the reading of *Gillan* that has apparently been preferred in the United Kingdom.

However, the Court of Appeal misdirected itself twice over. It seemed to regard the 'reasonable suspicion' test as applied at the authorisation stage as somehow relevant to the individual stop-and-search circumstances, when this was clearly identified as a separate ground of enquiry in *Gillan*. Moreover, the Court of Appeal's decision in relation to the decision of the individual police officer was based on the Code of Practice. The Code of Practice admittedly constrains the arbitrariness of the officer, but the limitations appear not to meet the standards in *Gillan*.

The Court of Appeal's decision in *Roberts* is ostensibly based on *Colon*. However, there was a large degree of oversight at the authorisation stage in *Colon* which was

20 Home Office, 'Police Powers of Stop and Search: Summary of Consultation Responses and Conclusions' (April 2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307545/StopSearchConsultationResponse.pdf) accessed 20 May 2014. See para [3.14].

21 *Gillan* (n 7) [83].

22 Joint Committee on Human Rights, *Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion* (HL 155, HC 1141) paras 17–18.

23 [2013] EWHC 2573 (Admin), [2014] QB 607.

24 *Canning, Re Judicial Review* [2012] NIQB 49.

25 *Colon* (n 9) [73].

not present in *Roberts*. In particular, the ECtHR in *Colon* drew attention to the fact that an individual could appeal the authorisation decision itself; this authorisation oversight was not available in *Roberts*. Moreover, the procedure in *Colon* meant that the authorisation decision had to be taken on the basis of coordinated action, and that this decision was reviewable by a local council. Again, none of these protections existed in *Roberts*. The decision in *Colon* did not, however, deal with the individual application clearly. This creates some confusion given the interpretation which *Colon* placed on this element in its explanation of *Gillan*.

Three possibilities present themselves: (a) if the authorisation procedure is sufficiently robust, this is sufficient to provide that the provision is in accordance with law, (b) a separate test is necessary, but this point was not argued before the ECtHR in *Colon*, or (c) a separate test is necessary, but this had been satisfied on the facts of the case.[26] The correct reading of *Colon* appears to be (b), based on the fact that the applicant's submissions were confined to the judicial review ground and the importance attributed to the ground elsewhere in *Colon*. The failure to apply this as an individual ground of review in *Colon*, therefore, should not be taken to undermine the holding in *Gillan*.

In *Roberts*, the Court of Appeal evinced little interest in the human rights elements of the case, and that lack of interest showed itself in the lack of rigour with which the court developed its reasoning. The decision is, in many ways, a curious one from the very beginning where the court held that Article 8 is engaged 'albeit marginally'.[27] It is not clear how the engagement was marginal, and it seems reasonable to infer that this was symptomatic of the court's lack of interest in the ECHR jurisprudence generally. This may have informed the Court of Appeal's failure to apply the proportionality test, and *Roberts* compares unfavourably with *Beghal* in this regard. The questions of whether a stop-and-search power requires reasonable suspicion, and what the authorisation requirements of the HRA are, have been left in some doubt as a result of the discrepancies between the domestic court decision in *Gillan* and the subsequent successful appeal to the ECtHR. It is to be hoped, therefore, that a further appeal to the Supreme Court is pursued in this case in order to gain a definitive ruling on these matters in British law.

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26 *Ibid*, [68] (Dutch Government's submissions).
27 *Roberts* (n 2) [15].