Suspicionless stop and search – lessons from the Netherlands

Dr Genevieve Lennon, School of Law, University of Dundee.

Introduction

Stop and search without suspicion of criminal wrongdoing, having never come before the European Court of Human Rights (ECtHR) prior to 2010, has been the subject of two cases in two years: *Gillan v United Kingdom* and *Colon v Netherlands*.[1]

Gillan concerned suspicionless stop and search under the Terrorism Act 2000 s.44 whereby the police could stop and search any person without suspicion in an authorised area for articles that could be used in connection with terrorism. Gillan had been stopped and searched under section 44 on his way to a demonstration outside an arms fair. The second applicant, a journalist, was stopped on her way to film the demonstration. The Divisional Court held that the authorisation permitting stops and searches in that area was not ultra vires and that neither the authorisation nor the exercise of the power infringed their right to liberty under the ECHR, Article 5, their right to a private life under Article 8, or their right to freedom of expression and assembly under Articles 10 and 11.[2] That decision was upheld by the Court of Appeal and the House of Lords.[3] The ECtHR ruled only on the Article 8 issue, upholding the applicants' complaint that the exercise of section 44 infringed their right to

[1] *Gillan v United Kingdom* (2010) 50 EHRR 45; *Colon v Netherlands* (2012) 55 EHRR SE5.

[2] *R (on the application of Gillan) v Commissioner of Police for the Metropolis* [2003] EWHC 2545 (Admin).

[3] *R (on the application of Gillan) v Commissioner of Police for the Metropolis* [2004] EWCA Civ 1067; [2005] QB 388; [2006] UKHL 12; [2006] 2 A.C. 307.

respect for their private lives under the ECHR, Article 8 and that it was unjustifiable under Article 8(2) as section 44 was not prescribed by law.

Colon concerned the use of "preventive searches" in the Netherlands, instigated following a rise in violent crime, which permitted the police to stop and search without suspicion any person in a pre-designated "security risk area" for weapons.[4] Colon had been stopped in a designated area, refused to submit to the search and was arrested. At first instance he was found guilty of failing to obey a lawful order, under the Criminal Code, art.184, and fined €150. He successfully appealed to the Court of Appeal but the decision was quashed following an appeal by the Advocate General to the Supreme Court and the case was remitted to the Court of Appeal for re-hearing. Colon was found guilty but not fined. Before the ECtHR he argued, *inter alia*, that his Article 8 rights had been infringed by the use of "preventive searches". The ECtHR unanimously dismissed the complaints, holding that the designation of areas as security risk areas under the Municipalities Act, s.151b, and the subsequent suspicionless stop and search under the Arms and Ammunitions, s.52(3) was prescribed by law and that the interference with Article 8 was proportionate and justifiable under Article 8(2) as pursuing the aims of public safety and the prevention of crime or disorder. The ruling in *Colon* is relevant to UK domestic law for two reasons. First, there are interesting comparisons with the contrary ruling in *Gillan*.[5] Second, *Colon* raises questions regarding the legality of suspicionless stop and search under the Criminal Justice and Public Order Act 1994, s.60.

Preventive searches

[4] See further: Joanne van der Leun & Maartje van der Woude, "Ethnic profiling in the Netherlands? A reflection on expanding preventive powers, ethnic profiling and a changing social and political context" (2011) 21(4) Policing & Society 444.

[5] *Gillan v United Kingdom* (2010) 50 EHRR 45.

Colon concerned preventive searches in Amsterdam whereby the Burgomaster, equivalent to a Mayor, could designate an area as a "security risk area" "in the event of a public order disturbance caused by the presence of weapons, or if there is a serious fear of such a disturbance occurring".[6] Prior violent weapons incidents provided sufficient cause to designate an area. The public prosecutor could then, for a selected twelve hour period, empower the police to stop and search any persons or vehicles in the area, without suspicion, for offensive weapons. The police could search clothing, handbags, backpacks and similar pieces of luggage. Failure to submit to a stop and search constituted a criminal offence punishable by up to three months imprisonment or a fine.[7] The security risk areas were first designated in November 2002 for six months. The area in question in *Colon* was subject to repeated designation up to 2009.

This formula of prior authorisation followed by the deployment of suspicionless stop and search powers will be familiar to many as mirroring the model used in the Terrorism Act 2000 s.44.[8] Section 44 permitted Assistant Chief Constables or Chief Constables to authorise the use of the power if they considered it "expedient" for the prevention of acts of terrorism. Thereafter, a uniformed officer could stop and search any person or vehicle within the authorised area, without suspicion, for "articles that could be used in connection with terrorism". Failure to submit to a stop constituted a criminal offence, punishable by up to six months' imprisonment and/or a fine not exceeding level 5 on the standard scale. Each authorisation could extend up to the force area and last for up to twenty-eight days. In

[6] Municipalities Act, s.155.
[7] Netherlands Criminal Code, art.184.
[8] For commentary on the current power under the Terrorism Act 2000, s.47A, which replaced section 44, and also on *Gillan* see: Ed Cape "The counter-terrorism provisions of the Protection of Freedoms Act 2012: preventing misuse or a case of smoke and mirrors?" (2013) 5 CrimLR 385.

practice the Metropolitan Police Service (MPS), who were the subject of *Gillan*, had a rolling, force-wide authorisation in place for over eight years, between 2001 and 2009.[9]

Prescribed by law

What is interesting from a UK perspective is why preventive searches were held to be prescribed by law in *Colon* when s.44 was held not be in *Gillan*. There appear to be two major reasons. First, the ECtHR emphasised that there was a viable system of review in *Colon*.[10] The Burgomaster had to consult with the head of the regional police and the public prosecutor before designating a security risk area. At first blush this appears comparable to confirmation of s.44 authorisations by the Secretary of State, required within 48 hours or the authorisation by the Chief Constable would lapse.[11] However, there was greater democratic accountability in *Colon* as any member of the Local Council could question the Burgomaster regarding the order. The ECtHR also emphasised that under the Municipalities Act, s.151b, the Local Council had to pass a municipal bye-law which empowered the Burgomaster to designate security risk areas, thereby permitting the Council greater democratic control over the process.[12] In the UK, the Terrorism Act 2000 was, of course, also subject to democratic control, even if the debate on s.44 was limited. The ECtHR may, therefore, have been emphasising the local democratic oversight and also the relative ease with which the bye-law could be amended or repealed in comparison with national law. Finally, the security risk area designations were public and the Council and public prosecutor had to be informed when a designation was issued. This is crucial in enabling such oversight bodies as exist to conduct effective review and contrasts starkly with s.44 authorisations which were not made public.

[9] Metropolitan Police Service *Section 44 Authorisation Data* (Metropolitan Police Service, 2010).
[10] *Colon* (2012) 55 EHRR SE5 [76].
[11] Terrorism Act 2000, s.46(4).
[12] *Colon* (2012) 55 EHRR SE5 [67].

The police were not even obliged to inform the relevant Police Authority when an authorisation was in force.[13]

Second, and arguably more importantly, was the operational practice. The Netherlands were able to rely on two independent reports which asserted the effectiveness of preventive searches and recommended their continued deployment.[14] The reports indicated that the use of weapons had decreased in the designated areas while increasing in the non-designated areas. By contrast, the ECtHR in *Gillan* noted that there were no terrorism related arrests from the s.44 stops.[15] In fact, over the course of the period that s.44 was in force, there were 332 terrorism related arrests made from 574,048 Home Office stops, but given this equates to a hit-rate of 0.05% it is something of a moot point.[16] Equally damaging in *Gillan* was statistical evidence of disproportionality in relation to ethnic minority groups.[17]

This contrasting practice perhaps explains why in *Colon* the ECtHR criticised aspects of s.44 but failed to comment on similar features evident in preventive searches.[18] For example, the ECtHR highlighted the lack of effective judicial review in *Gillan*, largely enabled by the extremely broad discretion of the authorising officer, but failed to draw any comparisons with, or even discuss, the significant, albeit slightly more limited, discretion of the Burgomaster. Similarly, the ECtHR noted that "most strikingly" officers had discretion as to who to select to stop for a s.44 stop.[19] The exact same discretion applies to officers conducting preventive searching, raising questions regarding the potential for the arbitrary

[13] Genevieve Lennon "Policing terrorist risk: stop and search under the Terrorism Act 2000, Section 44" (unpublished PhD thesis, University of Leeds, July 2011).
[14] COT Institute for Safety and Crisis Management *Evaluatie Preventief Fouilleren in Amsterdam: opbrengsten, wapenincidenten en hot spots* (COT: the Hague, 2007); COT Institute for Safety and Crisis Management *Evaluatie Preventief Fouilleren in Amsterdam: de stand van zaken* (COT: the Hague, 2006).
[15] *Gillan v United Kingdom* (2010) 50 EHRR 45 [84].
[16] Home Office, *Statistics on race and the criminal justice system*, (Home Office, 2002-2004, 2006); Ministry of Justice, *Statistics on race and the criminal justice system* (Ministry of Justice, 2007-2011).
[17] *Gillan v United Kingdom* (2010) 50 EHRR 45 [85].
[18] *Colon* (2012) 55 EHRR SE5 [73].
[19] *Colon* (2012) 55 EHRR SE5 [73].

exercise of power, but this was, again, not even mentioned. The fact that the Secretary of State failed to reject or modify any s.44 authorisations was noted by the ECtHR in *Gillan* but there is no mention of whether the public prosecutor questioned any of the designations in *Colon* nor whether any member of the Local Council had in fact queried the Burgomaster.[20]

Criminal Justice and Public Order Act 1994 s.60

Reading *Colon*, prompts comparison with s.44 precisely because of the *Gillan* case, but arguably, the preventive searches in issue in *Colon* more closely resemble suspicionless stop and search under the Criminal Justice and Public Order Act 1994 s.60. Section 60 was originally conceived to deal with football related violence but has been increasingly used to tackle knife crime, for example as part of the MPS' Operations Blunt I and II.[21] The power has been extensively used by a small number of forces, notably the MPS (90,809 persons stopped in 2009/10), Merseyside (15,778), Lancashire (3,629) and Greater Manchester (2,458).[22] Combined, these forces accounted for 95% of the total number of s.60 stops in 2009/10.

Section 60 follows a similar formula to preventive searches and s.44, enabling suspicionless stop and search in areas which have been authorised in advance. Inspectors or officers of higher ranks may give an authorisation under s.60 if they reasonably believe that serious violence will take place and s.60 is expedient to prevent it; that serious violence has occurred and the use of s.60 is expedient to find the dangerous instruments or offensive weapons used in the incident; or that dangerous instruments or offensive weapons are being carried.[23] Once authorised, officers may stop and search any person or vehicle without reasonable suspicion

[20] *Gillan v United Kingdom* (2010) 50 EHRR 45 [80].
[21] Leonard Jason-Lloyd "Section 60 of the Criminal Justice and Public Order Act 1994: its current provisions and future changes" (1998) 162 Justice of the Peace 837; House of Commons, Home Affairs Committee, *Knife crime: session 2008-09* (The Stationery Office, 2009) HC Paper No.112 (Session 2008-09).
[22] Ministry of Justice, *Statistics on race and the criminal justice system* (Ministry of Justice, 2012).
[23] Criminal Justice and Public Order Act, s.60(1).

for weapons or similar articles. The power is limited to 24 hours, extendable by a further 24 hours, however, it has been used on an extended basis by some forces, such as the MPS in Blunt II.[24]

In light of *Colon*, the question arises whether s.60 is Convention compliant? The discretion of officers exercising the power is the same as in *Colon* with a virtually identical objective. The authorising officer's discretion is broader as s.60 can be authorised simply because weapons are being carried as opposed to be being carried and likely to cause serious public disorder as required for preventive searches. It is also broader as there is no requirement of external consultation nor any opportunity, apart from judicial review, to question the authorisation. While the public prosecutor's role cannot be replicated, the recent move to locally elected Police and Crime Commissioners (PCC) suggests a route of democratic accountability that could mirror the role of the Local Council as emphasised by the ECtHR in *Colon*. While the police retain operational independence, the PCCs can require Chief Constables attend before the Police and Crime Panel to answer questions or to submit a report on the exercise of their functions which is comparable to the ability of the Local Council in *Colon* to question the Burgomaster regarding the designation order.[25] The question of effectiveness, and proof thereof, is contested and the outcome of an up-to-date independent study or studies could be a determining factor. The High Court recently held s.60 to be Convention compliant. However, the Court refused to allow a late submission of evidence on the use of s.60 and, it is submitted, placed insufficient weight on the lack of effective methods of review.[26]

Conclusion

[24] See further House of Commons, Home Affairs Committee, *Knife crime: session 2008-09*.
[25] Police Reform and Social Responsibility Act 2011, s.29.
[26] *R (Roberts) v Commissioner of Police of the Metropolis* [2012] EWHC 1977 (Admin); [2012] ACD 104.

Colon serves to quiet the fears of some who suggested that *Gillan* heralded the death of public order policing in general and stop and search in particular.[27] It also serves to reinforce the impression that the ECtHR has, since *Gillan*, changed tack in relation to policing and is placing public policing under less scrutiny, as also suggested by the approach in *Austin*.[28] The reliance on empirical evidence of the effectiveness of the preventive searches underlines the importance of evidence based policing and independent scrutiny. While one can only speculate, it seems unlikely that the same weight would have been placed on the evaluation of preventive searches if they had been conducted in-house.

[27] Richard Buxton "Terrorism and the European Convention" (2010) 7 CrimLR 542.
[28] *Austin v United Kingdom* (2012) 55 EHRR 14; Genevieve Lennon "The purpose of the right to liberty under the ECHR, Article 5" (2012) 3 Web Journal of Current Legal Issues.