



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

REPLACEMENT POWER TO STOP AND SEARCH WITHOUT REASONABLE SUSPICION

Written Evidence to the Joint Committee on Human Rights

1. The Northern Ireland Human Rights Commission (the Commission) is the national human rights institution (NHRI) for Northern Ireland. It was created in 1999 under the Northern Ireland Act 1998, pursuant to the Belfast (Good Friday) Agreement of 1998.¹ The Commission is accredited with 'A' status by the UN International Co-ordinating Committee of NHRIs.² It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,³ and advising on whether a Bill is compatible with human rights.⁴ In all of that work, the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.
2. This submission responds to the call for evidence by the Joint Committee on Human Rights regarding the urgent Remedial Order made by Government on 17 March 2010, to introduce with immediate effect a stop and search power to replace the 'section 44' power found to be incompatible with the ECHR. Government is seeking to bring in this power on a permanent basis through the current Protection of Freedoms Bill.

¹ The Commission's powers were modified by the Justice and Security (Northern Ireland) Act 2007.

² The UK has two other accredited NHRIs: the Equality and Human Rights Commission for Great Britain, except in respect of matters devolved to Scotland, which has established the Scottish Human Rights Commission. The present submission is solely on behalf of the Northern Ireland Human Rights Commission.

³ Northern Ireland Act 1998, s.69(1).

⁴ As above, s.69(4).

The case for a remedial order: Northern Ireland

3. The use of the 'section 44' stop and search power introduced under the Terrorism Act 2000 (TACT) was suspended in July 2011 further to the judgment in *Gillan and Quinton v UK*.⁵ In addition to dealing with s.44, the Protection of Freedoms Bill seeks to amend other similar powers applying only in Northern Ireland. Stop, question and search powers, without reasonable suspicion, are contained in sections 21-24 of the Justice and Security Act (Northern Ireland) 2007 (JSA).⁶
4. Since the discontinuation of use of the s.44 TACT power there has been a corresponding rise in the use of the ss.21 and 24 JSA powers, although the overall number of stops has reduced.⁷ In relation to Northern Ireland, therefore, the case for an urgent remedial order is weakened by the existence of an alternative power which has already been relied upon since the suspension of s.44.
5. As Article 8 ECHR is also engaged by questioning powers, the lack of a reasonable suspicion requirement or other limitations leaves both s.21 and the s.24 stop and search powers susceptible to challenge on grounds similar to those in *Gillan*, that is, that they are not in accordance with the rule of law in a democratic society. A remedial order would, if it contained an ECHR compliant power, be preferable to the continued use of JSA powers. However, as detailed below, the Commission remains concerned that there are insufficient safeguards in the replacement power to prevent stop and search being exercised arbitrarily.

ECHR compliance test for replacement power

6. In *Gillan*, the European Court of Human Rights found that the power failed the legal certainty test under Article 8 ECHR (the

⁵ *Gillan and Quinton v UK* (app no 4158/05).

⁶ Section 21 allows the *stopping and questioning* of any person or vehicle by the police or military about identity and movements, without individual reasonable suspicion (or an authorisation). Section 24 and schedule 3 allow *stop and search* in a public place by the police and military for munitions and transmitters, without individual reasonable suspicion. There is also a power to stop and search on private property, where there is individual reasonable suspicion.

⁷ Police statistics indicate that the use of s.21 and s.24 JSA, and combined use of both, rose from 255 instances in the quarter before s.44 TACT suspension (April-June 2010) to 5,535 in the most recent quarter (October-December 2010); s.44 had been used 6,992 times in its own right in the April-June 2010 period, and a further 1,849 times in combination with s.21. Source: Central Statistics Unit, Police Service of Northern Ireland (PSNI).

right to respect for private life) in that the powers were “neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse”.⁸ The same test applies to the replacement power introduced by the remedial order, namely whether it is compatible with the rule of law in a democratic society by affording sufficient safeguards to prevent its exercise in an arbitrary fashion and/or its deployment in a discriminatory manner.

7. It is emphasised that the violation of Article 8 ECHR found in *Gillan* was not under the test of ‘necessary in a democratic society’, where limitations are considered in relation to their proportionality to the legitimate aim they serve. In that context, the actual effectiveness or ineffectiveness of powers such as s.44 would be considered. Rather, s.44 failed the ‘in accordance with the law’ test, that legislation must be sufficiently clear and foreseeable to enable the individual to regulate their conduct. The Court held:

In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.⁹

8. There are tightly defined genuine ‘emergency’ circumstances where it is possible to exercise temporarily, through the time-limited suspension of certain treaty obligations, counter-terrorism powers which would normally infringe on human rights standards, such as the right to private life. A threshold must be met of a genuine emergency for which the temporary measures are strictly required; it is therefore only in these circumstances that powers which would otherwise infringe standards such as Article 8 should be introduced.¹⁰
9. The new power permits a senior police officer to grant an authorisation, if the officer “reasonably suspects that an act

⁸ *Gillan and Quinton v UK* (app. no. 4158/05) para 87.

⁹ As above, para 77.

¹⁰ Article 15 of the European Convention on Human Rights permits temporary derogations from a number of rights in the Convention in time of war or other public emergency threatening the life of the nation, provided that the derogation only is to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. Under the United Nations human rights system, the UK is also party to the International Covenant on Civil and Political Rights (ICCPR), Article 4 of which also contains a derogation provision.

of terrorism will take place”, and considers that the “authorisation is necessary to prevent such an act”. The specified zone for the authorisation can be no greater than is necessary to prevent such an act; and the duration of the authorisation can be no longer than is necessary to prevent such an act, with the maximum period being 14 days. Following an authorisation, the power can only be exercised to search for evidence of terrorism, but does not require individual reasonable suspicion. As with s.44, the Secretary of State would have oversight powers to cancel an authorisation or shorten its duration; these powers would also now allow him or her to restrict the geographical area of the authorisation. A Code of Practice must be issued, which a court or tribunal may take into account in relation to a police *constable's* failure to have regard to it. The new proposed power therefore has greater safeguards on the face of the legislation than s.44, and some additional oversight. However, there are questions as to whether it will be feasible in practice to verify compliance with some of the authorisation criteria.

10. The oversight power of courts and tribunals in relation to the Code of Practice appear to apply only to a police constable's decision to conduct an individual search. It does not apply to the original decision of the senior police officer to grant an authorisation (having determined that the 'generalised' reasonable suspicion actually arises), despite the exercise of authorisation power also being covered by the Code of Practice. The role given to the Secretary of State in providing oversight to authorisations is only permissive: restrictions “may” be instigated but there is no duty to do so, if the authorisation criteria have not been met. In relation to oversight of s.44 TACT authorisations, shortly before the suspension of use of the power the Police Service of Northern Ireland (PSNI) confirmed to the Commission that while there was dialogue in respect of the necessity of applications, the PSNI was not aware of any instance where the Secretary of State had actually refused or curtailed an authorisation.¹¹ In addition to the question of whether a member of the Executive is the appropriate person to provide such oversight, the more general effectiveness of this particular safeguard is therefore questionable. A Council of Europe human rights

¹¹ PSNI correspondence to Commission, 17 May 2010.

committee urged monitoring of the s.44 authorisations with particular care to ensure that their granting is not purely an administrative exercise.¹²

11. Unlike the 14-day time restriction, while it should be “no greater than is necessary”, there is nothing on the face of the legislation which directly restricts the geographical area. This contrasts with the one square kilometre limit proposed in an unsuccessful amendment to s.44 during the passage of the Crime and Security Bill in the previous Parliament. Just before the suspension of s.44, the PSNI confirmed that an authorisation for its use was in place for the whole of Northern Ireland (approximately 14,000 km²), and had been in the past, although the PSNI stressed there had also been times when some policing areas and districts had not had an authorisation in place.¹³ Authorisations can only be published retrospectively, if at all, and presuming that the rationale is intelligence-led, the reasoning is unlikely to be set out. Should an authorisation under the new power also cover the entire jurisdiction, or large parts of the same, it is difficult to see how the area being “no greater than necessary” could be effectively challenged.
12. In relation to other safeguards, there is no explicit requirement on the face of the legislation for ethnic monitoring (which in Northern Ireland would presumably include grounds of ‘community background’). The individual search requirement also relates back to the concept of ‘terrorism’ which is broadly defined in legislation.
13. **The Commission remains concerned that there are insufficient safeguards to prevent the powers being exercised arbitrarily.**

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¹² Council of Europe Framework Convention for National Minorities, Second Opinion on the United Kingdom, 6 June 2007 ACFC/OP/II(2007)003, para 143.

¹³ PSNI correspondence to Commission, 17 May 2010.