Protection of Freedoms Bill

Briefing for House of Commons Committee Stage

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Introduction and summary

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. JUSTICE welcomes the Protection of Freedoms Bill as an important step in reversing many of the unnecessary and disproportionate measures introduced by the previous government. However, in our Second Reading briefing we also identified a number of problems with several provisions, including a lack of detail (e.g. clauses 29-36) , improper reliance on Henry VIII clauses (e.g. clauses 39-53), or a failure to provide sufficient safeguards against abuse (e.g. clauses 58-62).

3. More generally, we are concerned that many of the measures reveal a piecemeal approach to problems in areas where more fundamental, root-and-branch reform has long been overdue, e.g. the creation of additional Commissioners in areas related to privacy issues and the requirement of prior judicial authorisation for the use of certain surveillance powers under the Regulation of Investigatory Powers Act 2000.

4. Some of the problems we have identified with the Bill have already been considered in Committee stage (i.e. the provisions on DNA retention). Others are the subject of ongoing consultation (i.e. the Code of Practice for CCTV cameras). Plainly, the larger issues raised by the Bill, such as the need to reform RIPA, remain outside its scope. Instead, this briefing identifies two discreet amendments that we believe would substantially improve the current Bill. These are:

    - Amending clause 43B to require authorisations for the use of stop and search powers without reasonable suspicion to be approved by a High Court judge; and

    - The repeal of section 5 of the Public Order Act 1986.

Amendment 1 – Replacement powers to stop and search in specified locations

Clause 60, page 40, line 17 insert –

(1A) The senior police officer who gives an authorisation under subsection 1 must apply to a judge for an order confirming the authorisation as soon as reasonably practicable.

(1B) An authorisation ceases to have effect at the end of the period of 48 hours beginning with the time when it is given unless it has been confirmed by a judge before the end of that period.

(1C) A judge may confirm an authorisation made by a senior police officer under subsection 1 if, and only if, the judge is satisfied that it is necessary and proportionate to do so.

(1D) When confirming an authorisation under subsection 1C, the judge may:

(a) substitute an earlier date or time for the specified date or time;

(b) substitute a more restricted area or place for the specified area or place;

(c) cancel an authorisation with effect from a time identified by the judge.

(1E) An authorisation ceasing to have effect by virtue of subsection 1B does not affect the lawfulness of anything done in reliance on it before the end of the period concerned.

(1F) In this section 'judge' means –

(d) In relation to England and Wales, a High Court judge
(e) In relation to Scotland, a judge of the Court of Session
(f) In relation to Northern Ireland, a High Court judge

Consequential amendment:

Page 111, Schedule 6B, line 11 – omit paragraphs 7 and 8

Effect

The existing requirement under Schedule 6B that authorisations for the use of stop and search powers under clause 60 will lapse unless confirmed by the Secretary of State is replaced by a requirement that the authorisation will lapse unless confirmed by a High Court judge.

Briefing

1. In January 2010, the European Court of Human Rights in *Gillan and Quinton v United Kingdom* held that the stop and search power under section 44 breached the right to privacy under article 8 because of its lack of safeguards against arbitrariness.[1] In particular, it noted the 'breadth of the discretion conferred on the individual police officer' and the lack of any requirement on the senior police officer authorising the use of the stop and search power to make 'any assessment of the proportionality of the measure'.[2] Nor did the weak temporal and geographical limitations provided by sections 44(4) and 46(2) offer 'any real check on the authorising power of the executive'.[3] The availability of judicial review was also not an effective safeguard. As the Court noted:[4]

> 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.

In light of the Court's ruling, the Coalition government directed police not to carry out pedestrian searches under section 44(2). It now seeks to implement the Court's ruling, repealing the previous stop-and-search scheme under sections 44 to 47 of the 2000 Act, (clause 58) and implementing a new scheme under 43B (inserted by clause 60).

2. In our submission to the Home Office review of counter-terrorism powers in August 2010, we made clear that we did not oppose the use of stop and search without reasonable suspicion in every circumstance. Indeed, it seemed to us that the original intention behind the section 44 power was a legitimate one: to enable blanket searches to be carried out in a specified area for a limited period where there was some real and immediate risk justifying the use of the power, e.g. a cordon around St Paul's Cathedral as a response to a bomb threat. As the Court held in *Gillan*, however, the safeguards in sections 44-46 proved wholly inadequate. We therefore recommended the following safeguards:

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[1] (2010) EHRR 45.

[2] Paras 80-83.

[3] Ibid.

[4] Para 86.

(a) raise the threshold for authorisations (e.g. no longer 'expedient' but based on a 'real and immediate risk');

(b) restrict significantly the duration and area of authorisations (e.g. lasting no more than 24 hours, not greater than 1 square mile, etc); and

(c) replace the current model of police authorisations with a system of prior judicial authorisation, preferably by way of *ex parte* application to a Crown Court judge (although there should remain provision for emergency authorisation by a senior police officer in circumstances where there is not sufficient time to apply to the court).

3. The Home Office review subsequently recommended 'significant changes' to 'bring the power into compliance with ECHR rights':[5]

> i. The test for authorisation should be where a senior police officer reasonably suspects that an act of terrorism will take place. An authorisation should only be made where the powers are considered "necessary", (rather than the current requirement of merely "expedient") to prevent such an act;
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> ii. The maximum period of an authorisation should be reduced from the current maximum of 28 days to 14 days;
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> iii. It should be made clear in primary legislation that the authorisation may only last for as long as is necessary and may only cover a geographical area as wide as necessary to address the threat. The duration of the authorisation and the extent of the police force area that is covered by it must be justified by the need to prevent a suspected act of terrorism;
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> iv. The purposes for which the search may be conducted should be narrowed to looking for evidence that the individual is a terrorist or that the vehicle is being used for purposes of terrorism rather than for articles which may be used in connection with terrorism;
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> v. The Secretary of State should be able to narrow the geographical extent of the authorisation (as well being able to shorten the period or to cancel or refuse to confirm it as at present); and

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[5] *Review of Counter-Terrorism and Security Powers*, January 2011, p18.

vi. Robust statutory guidance on the use of the powers should be developed to circumscribe further the discretion available to the police and to provide further safeguards on the use of the power.

4. The proposed power to conduct searches of pedestrians and vehicles under clause 43B is broadly similar in its outline to that under section 44, but has been more tightly drawn. Consistent with the recommendations of the Home Office's Counter-Terrorism Review, authorisation requires a senior police officer to both 'reasonably suspect that an act of terrorism will take place' *and* that 'the authorisation is necessary to prevent the act' In addition, the area authorised must be 'no greater than is necessary to prevent such an act' and the duration must similarly be 'no longer than is necessary' (clause 43B(1)). These requirements of necessity and proportionality are significant improvements over the previous section 44 power in terms of its compatibility with article 8 ECHR. The purposes for which searches may be carried out has also been slightly narrowed, consistent with the Review's recommendation.

5. Paragraph 6 of Schedule 5 further limits the maximum period for an authorisation under clause 43B to 14 days. Authorisations must also be confirmed by the Secretary of State within 48 hours of their making or lapse (paragraph 7(2) of schedule 5). Both the Secretary of State or another senior police officer may make further restrictions on the time and scope of an authorisation (paragraphs 7(4) and 9). As recommended, clause 61 also requires the Secretary of State to establish a Code of Practice concerning the exercise of the stop and search powers under sections 43 to 43B.

6. However, although we consider that the safeguards in clause 43B represent a genuine improvement over those in section 44, they are not in themselves enough to ensure its compatibility with article 8 ECHR. In particular, it is important to note that the Court in *Gillan and Quinton* expressed grave concerns about 'the breadth of the discretion conferred on the individual police officer',[6] which gave rise to 'a clear risk of arbitrariness in the grant of such a broad discretion to the police officer'.[7] It concluded that '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'.[8] Since clause 43B does not impose any requirement for the officer exercising search powers to have reasonable suspicion (clause 43B(5)), it is all the more important for these risks of arbitrariness to be offset by safeguards that restrict its use only to circumstances where it is necessary and proportionate. In other words, the less constraints there are upon the discretion of the individual police officer

[6] N1 above, para 83.

[7] Ibid, para 85.

[8] Ibid, para 86.

exercising search powers, the more important the need for stringent checks on the ability to authorise such searches.

7. As it is, although the authorisation process in clause 43B has been improved, judicial review remains the only means by which the police authorisation can be challenged. However, the Court in *Gillan* expressed serious concern at the adequacy of judicial review:[9]

> Although the exercise of the powers of authorisation and confirmation is subject to judicial review, the width of the statutory powers is such that applicants face formidable obstacles in showing that any authorisation and confirmation are *ultra vires* or an abuse of power

Moreover, although the exercise of stop and search powers was subject to the more general oversight of the independent reviewer of terrorism legislation, the Court noted that the independent reviewer had 'no right to cancel or alter authorisations'.[10] For JUSTICE, this demonstrates the importance of having police authorisations subject to independent and impartial review *before* stop and search powers are exercised.

8. We therefore recommend that clause 43B be amended to require police authorisations to be approved by a High Court judge. Just as the police are normally required to seek a warrant from a judge before conducting a search of private premises, the police should be required to seek judicial approval before authorising the use of stop and search powers without reasonable suspicion within a particular area for a particular time. In those cases where there is not sufficient time for police to apply *ex parte* to a judge for approval, we recommend that police have the power to make emergency authorisations without prior judicial approval, but that such authorisations must be confirmed by a judge within 48 hours. We note that this is very similar to the model provided by paragraph 7(2) of Schedule 5 as currently drafted, under which any authorisation by police must be confirmed by the Secretary of State within 48 hours or lapse. Given that the Coalition government has already accepted the desirability of having police authorisations confirmed by a separate body, we think the case for that confirmation being made by a judge rather than a government minister is overwhelming.

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[9] Ibid, para 80.

[10] Ibid, para 82.

Amendment 2 – new clause

Repeal of offence of use of threatening, abusive or insulting words or behaviour

Omit section 5 of the Public Order Act 1986.

Effect

Section 5 of the Public Order Act 1986 provides that it is an offence to use threatening, abusive or insulting words or behaviour within the hearing of someone *likely* to be caused harassment, alarm or distress. This clause would abolish the offence. The offence of *intentionally* causing another person harassment, alarm or distress would still remain under section 4A of the Act.

Briefing[11]

1. Freedom of expression is arguably 'the primary right in a democracy', without which 'an effective rule of law is not possible'.[12] In England and Wales its importance has been long recognised by the common law:[13]

> The right of free speech is one which it is for the public interest that individuals should possess and, indeed, that they should exercise without impediment, so long as no wrongful act is done… .

2. In particular, it is a fundamental aspect of the right of freedom of expression that it includes not merely the expression of ideas or sentiments that we agree with or approve of. If the right to freedom of expression is to mean anything, it must also extend to forms of expression that others find offensive or insulting , including ideas that 'offend, shock or disturb'.[14] This aspect of freedom of expression is especially important in the context of protests and demonstrations and other circumstances where the expression is political – for expression of political ideas

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[11] This briefing is based on JUSTICE's response to the previous government's consultation on section 5 of the 1986 Act in September 2009.

[12] Lord Steyn in *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277 at p297. Case-law quotations and references in the 'General remarks' section of this document are taken from R Clayton and H Tomlinson, The Law of Human Rights (2nd ed), OUP, 2009.

[13] *Bonnard v Perryman* [1891] 2 Ch 269 at p284.

[14] See e.g. the decisions of the European Court of Human Rights in *Lehideux and Isornia v France* (2000) 30 EHRR 665, para 55; *De Haes and Gijsels v Belgium* (1997) 25 EHRR 1.

enjoy particularly strong protection under article 10 of the European Convention on Human Rights.[15]

3. For these reasons, JUSTICE has long been concerned about the scope and use of section 5 of the Public Order Act 1986, in particular its use by police as a basis for arresting people otherwise engaged in lawful and peaceful protests. In particular, there is no requirement on the prosecution under section 5 to prove either that:

   - the alleged offender *intended* to cause 'harassment, alarm or distress'; or

   - any person was actually caused 'harassment, alarm or distress' by hearing the words.

   It is especially problematic when the alleged victim of the offence is the arresting officer, as exemplified in the well-known case of the Oxford student who was arrested by a police officer for asking if his horse was gay.[16]

4. Our starting point is that there is no right, either in English law or in the law of the ECHR, not to be offended. While there is clearly a public interest in the criminal law protecting members of the public from being threatened or harassed by others, merely causing offence (or being likely to do so) through words or conduct in a public place should not, without more, constitute a criminal offence. However the making of threats and harassment are already well-covered by other parts of the criminal law, in particular the offence under section 4A of the 1986 Act of using threatening, abusive or insulting words *with the intention of causing* another person alarm, distress or distress.[17]

5. More generally, public words and conduct which some members of society would have been offended by in previous centuries (and indeed, which a minority of people with less progressive social views are probably still offended by) has been responsible for important social and political reforms: the assertion of racial and gender equality; gay pride marches; etc. It is essential for the progress of our society that we do not now attempt to ossify public views by censoring debate on matters of current public controversy.

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[15] See e.g. *Thorgeison v Iceland* (1992) 14 EHRR 843, para 62.

[16] See also e.g. *Southard v DPP* [2006] EWHC 3449 (Admin).

[17] See also e.g. section 16 of the Offences Against the Person Act 1861, section 127 of the Communications Act 2003, section 2 of the Criminal Damage Act 1971 or the Protection from Harassment Act 1997.