

Stop and search, and the human rights act



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PART A

The power of stop and search is a general term used to describe the powers of police or occasionally the officials to search the members of public in a various context without a warrant. ^[1] Such powers are governed primarily under Part 1 of the Police and Criminal Evidence Act 1984 (PACE). ^[2] Besides PACE 1984, there are other legislation which governs the power of stop and search. For example, s23 of the Misuse of Drugs Act 1971 ^[3], s60 of the Criminal Justice and Public Order Act 1994 (CJPOA) ^[4] and s47A of the Terrorism Act 2000 (TACT) ^[5]. The power of stop and search under TACT were previously governed under s44, but were ruled illegal by the European Court of Human Rights, stating that the power were too widely drawn and open to abuse. ^[6] S44 were than formally replaced with s47A by the Terrorism Act 2000 (Remedial) Order 2011 ^[7] on the 18 March 2011, by more limited measures in England, Wales and Scotland. All legislations which governs police power of stop and search similarly aim to prevent and deter crimes, however, there is still some difference in the regulations of such powers, between Part 1 of the PACE 1984 and s47A of the TACT 2000. Statistic showed that approximately 1. 1 million stops and searches are recorded under Section 1 of the PACE 1984, in the year of 2011/2012. ^[8] No searches were made by the police in 2011/12 or 2012/13 in Great Britain under s47A of TACT. ^[9] A low detection rate alone does not necessarily undermine the use of stop and search powers. Proponents of the power, especially under terrorism legislation, argue that its use disrupts and deters criminal activity rather than simply detecting it. ^[10]

The first and utmost obvious difference in the powers of stop and search in relation to both PACE 1984 and TACT 2000 are that both legislation have different aim of search. Part 1 of the PACE 1984 provides power to stop and search for a range of items including stolen property, offensive weapons, prohibited articles under s1(7) PACE, controlled drugs or evidence that a person is a terrorist. ^[11] Whereas, powers under TACT 2000 were to search for evidence of terrorism. An officer exercising the stop and search powers may only do so for the purpose of searching for evidence that the person concerned is a terrorist or that the vehicle concerned is being use for the purposes of terrorism, as opposed to the purpose under section 45(1) ^[12] of searching for articles of a kind which could be used in connection with terrorism. ^[13] . The meaning of terrorists are defined under section 40(1) (b) of the 2000 Act. In addition, the regulation of the power of stop and search are different in terms of the powers where exercisable. Under Part 1 of the PACE, the power of stop and search may be exercise by constable at any time, but only in public places, and non-dwelling places to which the public have ready access. ^[14] This includes public transport, museums, sports ground, cinemas, pubs, restaurants, night club, banks and shops. Whilst power of stop and search under S47A only allows a constable with uniform to search at a specific area for a defined period ^[15] with authorisation by an officer of ACPO rank who reasonably suspects that an act of terrorism will take place. ^[16]

Next, the difference of regulations of both PACE and TACT in the power of stop and search by the police are the matter of authorisation. Under Part1 of

the PACE, the constable are allow to conduct searches as long as they are having the reasonable ground of suspicion that relevant offences will be found. ^[17] There are no mention of needing authorisation by officer of a higher ranking before conducting stop and search unlike S47A of TACT. Under this section, authorisation by a senior police officer are essential before stop and search could be conduct by any constable in uniform. ^[18] Authorisation will only be given if an officer reasonably suspect that an act of terrorism will take place ^[19] and consider that the authorisation is crucial to prevent such an act and that the areas or places specified in the authorisation are no greater than is necessary and the duration ^[20] of the authorisation is no longer than is necessary to prevent such an act. The requirement for an authorisation are given in the Code of Practice ^[21] where an authorisation under section 47A may only be made by an officer of ACPO or ACPOS rank. The authorisation would include details of how the exercise of the powers is necessary to prevent the act of terrorism. ^[22]

In most statutory provisions including PACE which grants police the power to stop and search, there is a requirement that the police must have a reasonable ground of suspicion that the person is in possession of an item of a specified kind. ^[23] Although there was no definition of reasonable ground of suspicion laid down in the legislation, Code of Practice A, under PACE had provided some sort of guideline as to what constitute reasonable suspicion. Para 2. 2 explained that reasonable grounds for suspicion will depend on the nature in each case. ^[24] There must be some objective basis for that suspicion based on facts, information and/or intelligence that are relevant to

the likelihood of finding an article of a certain kind. ^[25] Reasonable suspicion can never be supported on the basis of personal factors. Officers must rely on intelligence or information about or some specific behaviour by the person concerned. ^[26] For example the nature of the articles suspected of being carried, the time and place where the person or vehicle is or the behaviour of the person suspected. The case of *Howarth v Commissioner of Police for the Metropolis* (2011) ^[27] explained that reasonable cause for suspicion is a lower standard than which would be required to establish a *prima facie* case. ^[28] It allows police officer to take into account matter that would not be admissible as evidence. In comparison, the power conferred under S47A TACT 2000 can be exercised without reasonable suspicion. An authorisation by a senior police officer allows searches by any constable in uniform in specified areas or places without reasonable suspicion to find evidence related to terrorism. The authorisation would provide explanation which allows stopping and searching of individuals and/or vehicles without suspicion is necessary to prevent the suspected act of terrorism. ^[29]

To conclude, although both PACE and TACT have different regulations in terms of the power of stop and search, however what remains the same is that the underlying principles of stop and search are intended to promote its use in a fair and effective manner. An officer may not search a person where there is no legal basis to do so, even with an individual's consent. Stop and search must be done in a courteous and respectful manner and the length of detainment must be kept to a minimum even when the officer is lawfully entitled to search a person or vehicle. ^[30]

PART B

The Human Rights Act 1998 (HRA) came into force in the United Kingdom in October 2000. ^[31] This legislation gives effect in the UK to certain fundamental rights and freedoms contained in the European Convention on Human Rights (ECHR). Under section 6 of the Human Rights Act 1998, public bodies such as the court, police, local council and all other bodies carrying out the public functions must comply with the Convention rights. This means, individuals can now take human rights cases in domestic courts and they no longer have to go to Strasbourg to argue their case in the European Court of Human Rights. ^[32] With the HRA 1998 coming into force, the power of stop and search had made some impact on the regulation and use of the power of stop and search in some way.

In relation to the use of power of stop and search, public bodies are required to exercise such power in compliance to the convention rights. The legal framework for protecting the fundamental human rights contained in the HRA 1998 allows the public to rely on the articles when they are being stopped and searched. When powers of stop and searched are exercise, the public bodies are required to exercise it in such a way that it is necessary and proportionate. ^[33] Article 5, 8 and 14 of the HRA 1998 would be more relevant in the matter of stop and search. Article 5 ensures the right to liberty and security of person. ^[34] The right in Article 5 is limited, which means that there are certain circumstances or situation where deprivation of liberty is lawful. ^[35] Article 8 protects people from arbitrary interference in their private and family right. ^[36] The act of being subject to a search, which

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may take place in public, and may include a search of a person, their clothing or personal belongings will interfere with Article 8 rights. Article 8 is a qualified right, and Article 8(2) provides exceptions enabling interference with the right, for example in the interests of national security, or the prevention of crime. ^[37] Any interference with a person's Article 8 rights will need to come within one of the exceptions allowed under Article 8(2), and be in accordance with the law, necessary and proportionate. In addition, Article 14 ^[38] allows people to enjoy the Convention rights without any discrimination. In another words, individual must not be stopped or searched purely because of their race or religion. The power of stop and search would only be compatible with human rights if they are used legitimately and proportionately. ^[39] Evidence shows that stop and search powers that do not require reasonable suspicion, as well as those under PACE, may be used in a way that is discriminatory because certain ethnic communities are more likely to experience stop and search than others. However, the black and minority ethnic groups, particularly the black people, have for many years been disproportionately at the receiving end of police stop and search. Joel Miller in his article ' Stop and Search in England, A Reformed Tactic or Business As Usual?' suggested that the treatment towards the black and the minority had always been discriminatory. This is evident in surveys such as the Smith and Gray 1985, Willis 1983, Young 1994, and others. ^[40] The government statistics particularly from the Ministry of Justice 2009 had suggest that the black people in England and Wales in the year of 2007/2008 are more likely to be searched eight times more than white people and Asian

people more than twice, for searches which requires reasonable ground of suspicion. ^[41]

The power of stop and search under Terrorism Act 2000 were previously governed under s44, but were ruled illegal by the European Court of Human Rights in the case of Gillan and Quinton v United Kingdom ^[42]. After the incident of 911, the Home Secretary and senior police officers established the practice of making authorisations continually under section 44 to cover the whole of metropolitan London. ^[43] The police justified their act by claiming that there was now a generalised threat of terrorism in London and it was likely to manifest in any large-scale public gathering, and that it would be impractical to make narrower. In this case, Kevin Gillan and Pennie Quinton were attending a demonstration in London in the year of 2003. Both of them were stopped and searched by the police under S44 Terrorism Act 2000. They subsequently brought a judicial review regarding the power of stop and search on the basis that there was no evidence of terrorism showed by the protestor on that day. They claimed that the stop and search was an interference with their rights to liberty, respect for privacy, and the right to freedom of expression and assembly. ^[44] In March 2006, the House of Lords heard Gillan and Quinton's appeal against the refusal of the lower courts to allow their claim. Lord Bingham and his fellow Law Lords ruled that section 44 was itself compatible with Convention rights, there were sufficient safeguards against arbitrary use of the power, and that there was no evidence that the section 44 power had been exercised unlawfully. ^[45] Gillan and Quinton took their complaints further to the European Court of Human

Rights in Strasbourg. In January 2009, the Court ruled that the searches under section 44 had violated their right to respect for their private life under article 8 of the European Convention on Human Rights (ECHR).^[46]

As a result of a legal challenge made by the European Court of Human Rights, and as a part of the UK government's commitment to introduce safeguards against the misuse of powers under TACT, the Home Secretary conducted a review of these powers.^[47] One of the recommendations of the review was that stop and search powers under section 44 of TACT should be repealed and replaced with a much more targeted and proportionate power.

^[48] The Home Secretary therefore made a remedial order under section 10^[49] of the Human Rights Act 1998 to make immediate changes to the legislation. This new power came into force on 18 March 2011.^[50] Section 47A of TACT allows the police to stop and search persons in order to prevent acts of terrorism, without reasonable suspicion of their involvement in terrorism. Searches under this power may only be authorised in a specific area for a defined period where the police reasonably suspect an act of terrorism will take place.^[51]

Stop and search powers provided under the Police and Criminal Evidence Act (PACE), the Misuse of Drugs Act 1971, the Firearms Act 1968^[52] and the Road Traffic Act 1988^[53] all require a reasonable suspicion that the person stopped is in possession of prohibited goods or has committed an offence.^[54] By contrast, stop and search powers provided under section 60 of the Criminal Justice and Public Order Act 1994 and section 47A do not require

any grounds of reasonable suspicion. Although S47A can be said as an improvement of the previous law, however the power of stop and search without reasonable suspicion had always been an issue. Many are in the view that such power of stop and search without the need of reasonable suspicion is inherently incompatible with the Convention. ^[55] The justification is that the lack of any requirement for reasonable suspicion renders selection for stop and search arbitrary and invites discrimination in the exercise of the power. ^[56]

Rabinder Singh QC, Professor Aileen McColgan and the Human Rights Watch are in the view that the nature of stop and search without the need for reasonable suspicion is incompatible with right to respect for private and family life under Article 8 of HRA 1998. ^[57] In their view, even with the best guidance to officers as to how to exercise the power, cannot be rendered compatible with Convention rights because of the irreducible arbitrariness of the selection of individuals to subject to the power. ^[58] In Human Rights Watch's view, the only human rights compatible power to stop and search is one which requires reasonable suspicion. The Equality and Human Rights Commission (EHRC) itself, however, does not appear to share this view that a power to stop and search without reasonable suspicion is inherently incompatible with Article 8 and other Convention rights. ^[59] In its submission, it " recognises that there may be very exceptional circumstances in which it is necessary for there to be a power to stop and search without reasonable suspicion , for instance to prevent a real and immediate act of terrorism or to search for perpetrators or weapons

following a serious incident.”^[60] In terms of the protection under the power of stop and search, any individual who were searched unlawfully may seek a remedy under the Human Rights Act 1998 for an unjustifiable breach of their rights to liberty, respect for private life or to be free from discrimination.^[61]

All in all, the Human Rights Act 1998 had made some significant impact on regulations and use of the power to stop and search by the public bodies. It is safe to argue that the law in terms of the stop and search power had improved significantly, particularly S47A TACT 2000, which minimize the abuse of power and act in compliance with the Convention rights. With the legislation coming into force, it does not only provide guidelines to the authorities, it also provides momentous protection to the public when the power to stop and search are exercise on them. In any circumstances which the public authorities abuse or misuse the power to stop and search, judicial review would be a mechanism to hold them into account. It was suggested that, when there is misuse of power, judicial review offers the public a relatively quick, effective and inexpensive means of securing their rights through scrutiny of the lawfulness of police action by a specialist judge.^[62] The bases on which it can be argued that the police have acted unlawfully were importantly expanded by the enactment of the Human Rights Act (HRA) 1998.

[1] ‘ Stop and search under the Terrorism Act 2000’ (Justice)<http://www.justice.org.uk/pages/stop-and-search-under-the-terrorism-act-2000.html> accessed 17 November 2014

[2] Police and Criminal Evidence Act 1984

[3] Misuse of Drugs Act 1971

[4] Criminal Justice and Public Order Act 1994

[5] Terrorism Act 2000 (TACT)

[6] Adam Wagner, ' Stop and search powers under review as European Court reject UK appeal ' (UK Human Rights Blog, 1 July 2010)<http://ukhumanrightsblog.com/2010/07/01/stop-and-search-powers-under-review-as-european-court-reject-uk-appeal/> accessed 28 November 2014

[7] Terrorism Act 2000 (Remedial) Order 2011

[8] Home Office, ' Statistics - national statistics Police powers and procedures England and Wales 2011/12'

<https://www.gov.uk/government/publications/police-powers-and-procedures-in-england-and-wales-201112/police-powers-and-procedures-in-england-and-wales-2011-12#stops-and-searches>

[9] ' Statistics Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stop and searches, Great Britain, 2012 to 2013' (Home Office, 12 September 2013)[https://www.gov.uk/government/publications/operation-of-police-powers-under-the-terrorism-act-2000-2012-to-2013/operation-of-police-powers-under-the-terrorism-act-](https://www.gov.uk/government/publications/operation-of-police-powers-under-the-terrorism-act-2000-2012-to-2013/operation-of-police-powers-under-the-terrorism-act-2000-2012-to-2013/)

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2000-and-subsequent-legislation-arrests-outcomes-and-stop-and-searches-great-britain-2012-to-20accessed 20 November 2014

[10] Pat Strickland, ' Stop and Search' (House of Commons Library , 23 January 2014)

[11] Part 1 of Police and Criminal Evidence Act 1984, particularly s2, s7, s8

[12] S45(1) Terrorism Act 2000

[13] ' Does the Order remove the incompatibility?' (Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion - Human Rights Joint Committee)[http://www. publications. parliament. uk/pa/jt201012/jtselect/jtrights/155/15506. htm](http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/155/15506.htm)accessed 27 November 2014

[14] S4 , s5 PACE

[15] Duration: The maximum period for an authorisation is 14 days.

[16] Code of Practice under Terrorism Act 2000

[17] s1(3) PACE

[18] Code of Practice under Terrorism Act

[19] Kiron Reid, ' Stop and Search' (24 September 2014)

[20] The maximum period for an authorisation is 14 days.

[21] Code Of Practice (England, Wales And Scotland) For The Authorisation And Exercise Of Stop And Search Powers Relating To Section 47a Of Schedule 6b To The Terrorism Act 2000

[22] ' Consultation Code Of Practice (Northern Ireland) For The Authorisation And Exercise Of Stop And Search Powers Relating To Sections 43, 43a And 47a Of The Terrorism Act 2000' (Northern Ireland office, February

2012)[https://www.gov.](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136403/consultation_on_the_code_of_practice_for_stop_and_search_powers_under_the_.pdf)

[uk/government/uploads/system/uploads/attachment_data/file/136403/consultation_on_the_code_of_practice_for_stop_and_search_powers_under_the_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136403/consultation_on_the_code_of_practice_for_stop_and_search_powers_under_the_.pdf) accessed 25 November 2014

[23] S1(3) PAC 1984

[24] Code of Practice, para 2. 2 PACE

[25] Andrew Sander, Richard Young and Mandy Burton , *Criminal Justice* (4th edn, Oxford University Press, 2010) 84

[26] ' Stop and search Q&As' (Policy Pages, 21 August 2014)[http://www.met.](http://www.met.police.uk/foi/pdfs/priorities_and_how_we_are_doing/corporate/stop_search_qa_august2014.pdf)

[police.](http://www.met.police.uk/foi/pdfs/priorities_and_how_we_are_doing/corporate/stop_search_qa_august2014.pdf)
[uk/foi/pdfs/priorities_and_how_we_are_doing/corporate/stop_search_qa_august2014.pdf](http://www.met.police.uk/foi/pdfs/priorities_and_how_we_are_doing/corporate/stop_search_qa_august2014.pdf) accessed 25 November 2014

[27] *Howarth v Commissioner of Police of Police of the Metropolis* [2011] EWHC 2818

[28] Andrew Sander, Richard Young and Mandy Burton , *Criminal Justice* (4th edn, Oxford University Press, 2010) 157

[29] Code of Practice under Terrorism Act 2000

[30] Avon and Somerset Constabulary, ' Stop and Search'www. bathnes. gov. uk/sites/default/files/stop_search_notes. docaccessed 24 November 2014

[31] Equality and Human Rights Commission, ' The Human Rights Act'http://www. equalityhumanrights. com/your-rights/human-rights/what-are-human-rights/human-rights-actaccessed 22 November 2014

[32] Equality and Human Rights Commission, ' The Human Rights Act'http://www. equalityhumanrights. com/your-rights/human-rights/what-are-human-rights/human-rights-actaccessed 22 November 2014

[33] ' Article 8 : The right to respect for private and family life, home and correspondence' (Human Rights Review 2012)http://www. equalityhumanrights. com/sites/default/files/documents/humanrights/hrr_article_8. pdfaccessed 24 November 2014

[34] Article 5 HRA 1998

[35] Article 5 : The right to respect for private and family life, home and correspondence' (Human Rights Review 2012)http://www. equalityhumanrights.

com/sites/default/files/documents/humanrights/hrr_article_5. pdfaccessed 24 November 2014

[36] Article 8 HRA 1998

[37] Article 8 : The right to respect for private and family life, home and correspondence' (Human Rights Review 2012)http://www.equalityhumanrights.

com/sites/default/files/documents/humanrights/hrr_article_8. pdfaccessed 24 November 2014

[38] Article 14 HRA 1998

[39] ' Human Rights Thematic Review on the use of police powers to stop and search and stop and question under the Terrorism Act 2000 and the Justice and Security (NI) Act 2007' (Northern Ireland policing Board)http://www.nipolicingboard. org.

uk/stop_and_search_thematic_review__final_draft__15_october_2013. pdfaccessed 24 November 2014

[40] Joel Miller, ' Stop and Search in England, A Reformed Tactic or Business As Usual?' (2010) 50 British Journal of Criminology 954

[41] Ben Bowling and Coretta Phillips, ' Disproportionate and Discriminatory: Reviewing the

Evidence on Police Stop and Search' (Modern Law Review, 2007)http://www.stop-watch. org/uploads/documents/modern_law_review. pdfaccessed 27 November 2014

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[42] Gillan and Quinton v. UK 4158/05 [2010] ECHR 28