Neutral Citation Number: [2014] EWCA Civ 69

Case No: C1/2012/2575 + 2575(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION, DIVISIONAL COURT
MOSES LJ AND EADY J
CO12660/2010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 February 2014

Before :

LORD JUSTICE MAURICE KAY, Vice President of the Court of Appeal, Civil Division
LADY JUSTICE RAFFERTY
and
LADY JUSTICE MACUR

- -

Between:

The Queen on the application of Ann Juliette Roberts	**Appellant**
- and -	
The Commissioner of Police of the Metropolis & ors	**Respondent**

- -

Mr Hugh Southey QC and **Ms Aileen McColgan** (instructed by **Bhatt Murphy Solicitors**) for the **Appellant**
Mr Jeremy Johnson QC and **Ms Georgina Wolfe** (instructed by **Weightmans LLP**) for the **Respondent**
Mr James Eadie QC and **Mr Ben Jaffey (**instructed by **Treasury Solicitors)** for the **Secretary of State for the Home Department**
Mr Alex Bailin QC and **Ms Alison Macdonald and Ms Katherine Hardcastle(**for **Liberty**, the **Intervener)**

Hearing dates : 14 and 15 November 2013

- -

Approved Judgment

Lord Justice Maurice Kay:

1. Section 60 of the Criminal Justice and Public Order Act 1994 was designed to provide police officers with additional powers to stop and search persons and vehicles for offensive weapons or dangerous instruments. Its unusual feature is that an officer exercising the power need not have grounds for suspecting that the person or vehicle is carrying weapons or articles of that kind. On this appeal, Ann Juliette Roberts is seeking to establish that section 60 offends Article 5 and/or Article 8 of the European Convention on Human Rights and Fundamental Freedoms. It is further suggested that section 60 is used disproportionately to stop and search black people in London in breach of Article 14.

Section 60

2. It is clear that the purpose of section 60 is to enlarge police powers in the face of localised violence involving the use of offensive weapons, including knives. The power to stop and search conferred by it is subject to territorial and temporal limits and applies only when a valid authorisation is in place. The section is in the following terms:

> "(1) 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,
>
> (aa) that –
>
> (i) an incident involving serious violence has taken place in England and Wales in his police area;
>
> (ii) a dangerous instrument or offensive weapon used in the incident is being carried in any locality in his police area by a person; and
>
> (iii) it is expedient to give an authorisation under this section to find the instrument or weapon; or
>
> (b) that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason,
>
> 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.
>
> …

> (3) If it appears to an officer of or above the rank of superintendent that it is expedient to do so, having regard to the offences which have, or are reasonably suspected to have, been committed in connection with any activity falling within the authorisation, he may direct that the authorisation shall continue in being for a further 24 hours.
>
> (3A) If an inspector gives an authorisation under subsection (1) he must, as soon as it is practicable to do so, cause an officer of or above the rank of superintendent to be informed.
>
> (4) This section confers on any constable in uniform the power –
>
> (a) to stop any pedestrian and search him or anything carried by him for offensive weapons or dangerous instruments;
>
> (b) to stop any vehicle and search the vehicle, its driver and any passenger for offensive weapons or dangerous instruments.
>
> ….
>
> (5) A constable may, in the exercise of the powers conferred by subsection (4) above, stop any person or vehicle and make any search he thinks fit whether or not he has any grounds for suspecting that the person or vehicle is carrying weapons or articles of that kind."

3. "Dangerous instruments" are defined in section 60 (11) as "instruments which have a blade or are sharply pointed. "Offensive weapons" have the meaning given by section 1(9) of the Police and Criminal Evidence Act 1984, that is 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". In the case of an incident of serious violence in the locality, it includes "any article used in the incident to cause or threaten injury to any person or otherwise to intimidate …".

The facts

4. On 9 September 2010 the appellant was travelling on a bus in Tottenham. She was fare-dodging. She was seen by a Transport for London ticket inspector. They both left the bus at the same stop. In an attempt to avoid liability, the appellant gave a false name and false address to the ticket inspector. The inspector, being suspicious, asked the appellant for proof of her identity. The appellant falsely claimed that she had no proof of identity on her. She was holding her handbag close to her body in a suspicious manner. The inspector checked the name and address provided by the appellant against the electoral register. It became apparent that the details were false. The inspector then secured the assistance of Police Constable Reid. The appellant

again stated that she had no identification documents with her. PC Reid also noticed that the appellant was holding her bag tightly and that she did not want to open it in the presence of the officer. PC Reid suspected that the appellant might have an offensive weapon in her bag. It was not uncommon for middle-aged women to carry such weapons in that area. Indeed PC Reid had been involved in a search of a woman of a similar age earlier that day and that woman had been arrested for possession of a firearm and an offensive weapon (CS gas). PC Reid therefore decided to search the appellant pursuant to section 60, there being an authorisation in place. The appellant tried to walk away and then attempted to resist the search. Eventually she was handcuffed and searched.

5. The section 60 authorisation had been granted by Superintendant Barclay (Deputy Borough Commander). It ran from 1pm on 9 September until 6am on 10 September. It was granted because, in the previous weeks, there had been an escalation in gang violence in Tottenham. Specialist officers from the Territorial Support Group had been drafted in to parts of the Borough of Haringey. In the previous nine days there had been numerous gang-related violent crimes. Indeed, on the previous day five new intelligence reports were received indicating movements of firearms and further incidents of violence which were likely on the afternoon, evening and night of 9 September. The authorisation was targeted. Several wards within Haringey were excluded on the basis that they were outside the troublesome area and there was no evidence that weapons would be carried in them. Superintendant Barclay expressly considered whether the authorisation was proportionate and necessary. He was satisfied that it was. The location was considered to be a hot spot for violence where people carried knives. It is not disputed that the authorisation had a rational basis pursuant to section 60. The central issue is whether section 60 is compatible with Articles 5 and 8.

The decision of the Divisional Court

6. The judgment of Lord Justice Moses (with whom Mr Justice Eady agreed) was a robust rejection of the appellant's contentions – [2012] EWHC 1977 (Admin). As to the compatibility of section 60 with Article 5, Lord Justice Moses said (at paragraph 15):

> "In my view, the question of the arbitrary nature of the power conferred by section 60 ought properly to be considered in the context of Article 8 and not Article 5. In the instant case the claimant was not confined, nor required to move to a police station, handcuffed or restrained. This claimant was only restrained when she sought to resist the exercise of the police power under section 60. Had she not sought to escape, then the detention would have been brief, taking up only such time as was necessary to search for knives or other offensive weapons in her handbag or outer clothing. … I conclude that there was no deprivation of liberty within the autonomous meaning of Article 5.1."

7. Turning to compatibility with Article 8 he said (at paragraph 42):

> "… authority given under section 60 is in accordance with the law and not arbitrary. The power conferred by section 60 to give authorisation is not unfettered. It is circumscribed by the provisions of section 60 and Code A, and subject to the control of the courts, as this very case demonstrates."

8. He later (at paragraph 45) emphasised the margin of appreciation, adding:

> "To those citizens in the particular wards in Haringey at risk from serious gang violence, the possibility of being subjected to a random search must seem a justifiable price to pay for greater security and protection from indiscriminate use of weapons."

9. Lord Justice Moses then went on to consider the challenge pursuant to Article 14 when read with Article 8. He said (at paragraph 47):

> "There is no basis whatever for an assertion that the power of stop and search exercised pursuant to the section 60 authorisation in this case … was exercised in a racially discriminatory way or on the basis of racial discrimination … The challenge is to section 60, the legislation itself. There is nothing in the legislation which itself is racially discriminatory."

He proceeded to consider whether the legislation was being used in a racially discriminatory manner. He was critical of the way in which statistics were sought to be deployed in support of the allegation. He added (at paragraph 51):

> "It seems to me that the issue as to whether section 60 is being used in a discriminatory manner must await a proper opportunity for the figures to be debated and for the witnesses who speak to these figures to be challenged, unless the statistics are agreed. In those circumstances, I would rule that issues under Article 14, read with Article 8, do not arise in this case, and should not be resolved in these proceedings."

Article 5

10. Article 5.1 of the ECHR provides:

> "Everyone 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 … "

11. It is not suggested that subjection to a section 60 search falls within "the following cases" of permissible arrest and detention. The first question is whether subjection to a section 60 search involves a deprivation of liberty at all. In my judgment, this admits of a short answer. *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307 was concerned with the stopping and searching of members of the public pursuant to sections 44 and 45 of the Terrorism Act 2000. On the question

whether there had been breaches of Article 5, Lord Bingham (with whom the other members of the Judicial Committee agreed) said (at paragraph 25):

> "… the procedure will ordinarily be relatively brief. The person stopped will not be arrested, handcuffed, confined or removed to any different place. I do not think, in the absence of special circumstances, such a person should be regarded as being detained in the sense of confined or kept in custody, but more properly of being detained in the sense of kept from proceeding or kept waiting. There is no deprivation of liberty. That was regarded by the Court of Appeal [2005] QB 388, 406, para 46 as "the better view", and I agree."

12. It is true that, when *Gillan* reached the Strasbourg Court [2010] 50 EHRR 45, the judgment was more equivocal. Thus, the Court stated (at paragraph 57):

> "The Court observes that although the length of time during which each applicant was stopped and searched did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5.1. In the event, however, the Court is not required finally to determine this question in the light of its findings below in connection with Article 8 of the Convention."

I shall have to return to the Court's reasoning in relation to Article 8 later. I do not consider that that requires us to depart from Lord Bingham's approach.

13. In any event, it seems to me that the question whether section 60 involves a deprivation of liberty falls to be addressed by reference to the time it is likely to take a police officer to carry out the envisaged search. The fact that the subject's behaviour or a positive result from the search may lead to consequential arrest, detention and criminal charges is, in my judgment, irrelevant. In fairness to Mr Hugh Southey QC, his oral submissions contained only the briefest reference to Article 5. I am entirely satisfied that it has no application in the present case.

Article 8

14. The threshold question in relation to Article 8 is whether someone stopped and searched pursuant to section 60 thereby suffers an interference with his rights to respect for his private life such as to require justification pursuant to Article 8.2. The Divisional Court considered that Article 8.1 is engaged. However, on behalf of the Commissioner, Mr Jeremy Johnson QC has sought to reopen this question before us. The authority upon which he relies is another passage from the speech of Lord Bingham in *Gillan* where he said (at paragraph 28):

> "I am … doubtful whether an ordinary superficial search of the person can be said to show a lack of respect for private life. It is true that 'private life' has been generously construed to embrace wide rights to personal autonomy. But it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and fundamental freedoms, and I incline to the view that an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports, for example, can scarcely be said to reach that level."

15. For my part, I consider that Article 8 is engaged, albeit marginally, in the present circumstances. For present purposes, I simply refer (as did the Divisional Court) to 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. I refer also to *Colon v The Netherlands* (see paragraph 22 below) where, in reasonably similar circumstances, Article 8 was held to be engaged.

16. The real Article 8 battleground in this case is whether the power conferred by section 60 is "in accordance with the law". That is where Mr Southey focuses his attack. He submits that, even before one gets to proportionality and the balancing exercise required by Article 8.2, the section 60 power is not "in accordance with the law" because it permits the police to stop and search a subject arbitrarily.

17. Much of the debate about arbitrariness has been based upon *Gillan* in which the stop and search powers contained in sections 44-46 of the Terrorism Act 2000 were considered. Section 44 enabled a senior police officer (at least an Assistant Chief Constable or, in London, at least a Commander) to issue an authorisation whereby a uniformed police officer was permitted to stop and search vehicles or pedestrians without a requirement of reasonable suspicion. By section 44(3) such an authorisation

> "may be given only if the person giving it considers it expedient for the prevention of acts of terrorism."

18. The authorisation could last for up to 28 days and was subject to confirmation by the Secretary of State (section 46). It could cover the whole of the area of the particular police force and a 28-day authorisation could be renewed on a rolling basis. A search pursuant to a section 44 authorisation had to be for "articles of a kind which could be used in connection with terrorism". Authorisations were subject to statutory oversight on an annual basis by the Independent Reviewer.

19. The challenge to the section 44 regime in the domestic courts failed: [2006] 2 AC 307. In essence, the Supreme Court considered that the rule against arbitrariness was satisfied by the safeguards written into the scheme. Lord Bingham enumerated them as follows (at paragraph 14):

> "First, an authorisation under section 44 … may be given only if the person giving it considers (and, it goes without saying,

> reasonably considers) it expedient 'for the prevention of acts of terrorism'. The authorisation must be directed to that overriding objective. Secondly, the authorisation may be given only by a very senior police officer. Thirdly, the authorisation cannot extend beyond the boundary of a police force area, and need not extend so far. Fourthly, the authorisation is limited to a period of 28 days, and need not be for so long. Fifthly, the authorisation must be reported to the Secretary of State forthwith. Sixthly, the authorisation lapses after 48 hours if not confirmed by the Secretary of State. Seventhly, the Secretary of State may abbreviate the term of an authorisation or cancel it with effect from a specified time. Eighthly, a renewed authorisation is subject to the same confirmation procedure. Ninthly, the powers conferred on a constable by an authorisation … may only be exercised to search for articles of a kind which could be used in connection with terrorism. Tenthly, Parliament made provision in section 126 for reports on the working of the Act to be made to it at least once a year … Lastly, it is clear that any misuse of the power to authorise or confirm or search will expose the authorising officer, the Secretary of State or the constable, as the case may be, to corrective legal action."

When the case moved to Strasbourg, the contrary conclusion prevailed. The following passages are relevant:

> "79. … the safeguards provided by domestic law have not been demonstrated to constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference.
>
> 80. ... 'expedient' [in section 44(3)] means no more than 'advantageous' or 'helpful'. There is no requirement at the authorisation stage that the stop-and-search power be considered 'necessary' and therefore no requirement of any assessment of the proportionality of the measure.
>
> 81. … The failure of the temporal and geographical restrictions provided by Parliament to act as any real check on the issuing of authorisations by the executive are demonstrated by the fact that an authorisation for the Metropolitan Police District has been continuously renewed on a 'rolling programme' since the powers were first granted.
>
> …
>
> 83. Of still further concern is the breadth of the discretion conferred on the individual police officer … Not only

> is it unnecessary for him to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched."

20. The Court also referred to statistical material to which I shall return later. It was further concerned about the difficulty which it considered a claimant could face if he chose to litigate an alleged misuse of power. It concluded:

> "87. … the powers … are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse."

Accordingly, they were not "in accordance with the law."

21. It is not suggested that *Gillan* is dispositive of the present case. The statutory provisions are different. However the decisions of the House of Lords and of the Strasbourg Court (which we are bound to "take into account" by section 3 of the Human Rights Act 1998) contain material which assists our consideration. We also have to keep in mind that, when dealing with the decisions in *Gillan*, it is not for us to defer to Strasbourg at the expense of the House of Lords. That would be a matter for the Supreme Court: *Kay v Lambeth LBC* [2006] 2 AC 465.

22. Before addressing the question of arbitrariness in relation to section 60, I should refer to one other Strasbourg case which is relied upon by both sides, namely *Colon v The Netherlands* (Application no. 49458/06, 15 May 2012). Like the present case, it was concerned with authorisation of a power to stop and search for weapons within territorial limits in the absence of a need for reasonable suspicion. The principal argument for the applicant was that the judicial remedies were ineffective, in particular because "an essential guarantee in the form of prior judicial control was missing" (paragraph 74). The Court rejected that and other arguments on behalf of the applicant and concluded (at paragraph 79) that the interference was "in accordance with the law".

23. Where does all this leave the present case? In my judgment, the scheme of section 60 cannot be said to be arbitrary. It permits the use of stop and search powers only for a very limited period of time – up to 24 hours, extendable by a maximum of a further 24 hours. Its temporal limitation is accompanied by a territorial limitation. The authorisation must relate to a "locality" within a police area. Accordingly, there is no question of a "rolling programme" across the whole area covered by a police authority. It is based on local intelligence of a specific kind, namely serious violence involving weapons. These factors differentiate the present context from that in *Gillan*. It is particularly significant that, unlike the scheme contained in sections 44-46 of the Terrorism Act, section 60 requires that the authorising officer <u>reasonably believes</u> specified things relating to serious violence, dangerous instruments and offensive weapons. That incorporates an objective criterion which is more readily susceptible to judicial review than a purely subjective basis for authorisation. On behalf of the appellant, Mr Southey points to the word "expedient" and refers to the passage in the Strasbourg judgment in *Gillan* (paragraph 80) which attached significance to the fact that the authorising officer had only to "consider it expedient" to issue an authorisation under section 44(3). However, it seems to me that

expediency underwritten by reasonable belief as to the existence of specified prerequisites is a more robust safeguard.

24. There is a further aspect to the concept of "necessity". Although it does not appear in section 60(1), that does not mean that it is without relevance. Although it is absent from what is "in accordance with the law", it remains relevant, in its ECHR sense, to any consideration of justification pursuant to Article 8(2). As the Court said in *Colon*:

> "88. An interference will be considered '*necessary* in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are 'relevant and sufficient'." [Emphasis added]

Of course, at that stage, as the Court acknowledged (paragraph 89), a margin of appreciation must be left to the competent national authorities in this assessment. 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.

25. I acknowledge that, under section 60, the authorising officer will usually be of a lower rank than under section 44. That is the consequence of the "local" nature of the section 60 power. Mr James Eadie QC refers to it as "a short-term power exercised in a particular locality, based on local intelligence and violent crime patterns". I believe that to be an apt description. It is not significant that the section 60 scheme does not attract the oversight of a statutory independent reviewer. The need for such a person in the context of counter-terrorism powers is accentuated by the constraints on disclosure of intelligence material to those minded to challenge the lawfulness of the use of such powers. The same constraints do not exist (at least, not to the same extent) in the section 60 context, as the disclosed material in the present case demonstrates.

26. So far I have concentrated on the safeguards surrounding authorisation. Part of Mr Southey's submission on arbitrariness is directed to the power of the officer who actually stops and searches, without the need for even a subjective belief in relation to the person stopped and searched. It is true that this, too, was a concern of the Strasbourg Court in *Gillan* (paragraph 83). However, it is clear from *Colon* that the absence of such a requirement is not necessarily fatal. As I said earlier, the present case bears more resemblance to *Colon* than it does to *Gillan*. In my judgment, the power pursuant to section 60(5), underscored as it is by the Code of Practice, and consequential as it is on the objectively constrained authorisation, does not fall into the category of arbitrariness.

27. So far as the individual officer who stops and searches is concerned, it is significant that, whilst section 60 does not require him to have reasonable grounds of suspicion in relation to the person stopped, he is at all times controlled by Code A issued under the Police and Criminal Evidence Act 1984. The following provisions of the Code (which I take from the 2011 version, which was not materially different from the 2009 version in force at the material time) are material:

> "1.1 Powers to stop and search must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination. The Equality Act 2010 makes it unlawful for police officers to discriminate against, harass or victimise any person on the grounds of the 'protected characteristics' of age, disability, gender reassignment, race, religion or belief, sex and sexual orientation, marriage and civil partnership, pregnancy and maternity when using their powers …
>
> 1.2 The intrusion on the liberty of the person stopped or searched must be brief and detention for the purposes of a search must take place at or near the location of the stop.
>
> …
>
> 2.13 An authorisation under section 60 may only be given by an officer of the rank of inspector or above and in writing, or orally if paragraph 2.12(c) applies and it is not practicable to give the authorisation in writing. The authorisation (whether written or oral) must specify the grounds on which it was given, the locality in which the powers may be exercised and the period of time for which they are in force. The period authorised shall be no longer than appears reasonably necessary to prevent, or seek to prevent incidents of serious violence, or to deal with the problem of carrying dangerous instruments or offensive weapons or to find a dangerous instrument or offensive weapon that has been used.
>
> …
>
> 2.14A The selection of persons and vehicles under section 60 to be stopped and, if appropriate, searched should reflect an objective assessment of the nature of the incident or weapon in question and the individuals and vehicles thought likely to be associated with that incident or those weapons … But powers must not be used to stop and search persons and vehicles for reasons unconnected with the purpose of the authorisation. When selecting persons and vehicles to be stopped in response to a specific threat or incident, officers must take care not to discriminate unlawfully against anyone on the grounds of any of the protected characteristics set out in the Equality Act."

28. In Notes for Guidance appended to Code A, it is stated that authorisations under section 60 are only to be used

> "to prevent serious violence and the widespread carrying of weapons which might lead to persons being seriously injured by disarming potential offenders or finding weapons that have been used in circumstances where other powers would not be sufficient. They should not therefore be used to replace or circumvent the normal powers for dealing with routine crime problems …"

It is further provided that authorisation should be for the minimum period necessary and the narrowest geographical area necessary (paragraphs 12–13).

These are important provisions, governing the exercise of the section 60 power. I should add that there is now a later 2013 version of the Code.

29. In summary, I am entirely satisfied that section 60 does not provide an arbitrary power. It is "in accordance with the law". It is circumscribed by specific requirements so that, notwithstanding its exceptional nature, it is justified pursuant to Article 8(2).

Article 14

30. Article 14 of ECHR is not in the form of a free-standing, all-embracing protection against discrimination. It is concerned with securing "the enjoyment of the rights and freedoms set forth in this Convention". Thus, the alleged discrimination must come "within the ambit" of another Convention right. The Convention rights sought to be relied on are Articles 5 and 8. The mere fact that no substantive breach of Article 5 or Article 8 is established does not necessarily mean that discrimination on a prescribed ground is absent. The circumstances may still come within their ambit. Whilst I am not persuaded that we are even within the ambit of Article 5 (see paragraph 13, above), I am prepared to accept that, for the reasons explained in paragraph 15, above, we are within the ambit of Article 8.

31. In his skeleton argument for this appeal, Mr Southey stated:

> "Official statistics demonstrate that section 60 is used disproportionately to search black people in London. The official statistics are sufficient to mean that there is prima facie discrimination that the state must justify"

He seeks to rely on *DH v Czech Republic* (2008) 47 EHRR 3.

32. As I have related (at paragraph 9, above), the Divisional Court declined to involve itself with the statistics upon which Mr Southey sought to rely. Since then, he has sought to adduce further statistics in this Court. Mr Johnson opposes such an application but submits that, if this further material is admitted, we should also receive the Commissioner's latest statistics. For my part, I do not think that we should become embroiled in tendentious statistical material. It is true that the Strasbourg Court used statistical material in *DH*. However, it did so following *Hoogendijk* (2005) 40 EHRR SE22 where the Court had referred to "undisputed official statistics" which established a prima facie case of indirect discrimination. Also, the reference to statistics in *Gillan v United Kingdom* (at paragraph 83) was to the Ministry of

Justice's own figures which do not seem to have been disputed. In the present case, on the other hand, it is readily apparent that the statistics are controversial and give rise to difficult issues of interpretation which it would be difficult to resolve without expert assistance of a kind with which we have not been provided. (For a recent critique of a statistical assessment of the use of police power, see Report on the Operation in 2012 of the Terrorism Act 2000 and of part 1 of the Terrorism Act 2006, by David Anderson QC, paragraph 9.19 - 9.20).

33. It is appropriate to stand back and take stock of Article 14 in the circumstances of this case. It is not suggested, nor could it be, that section 60 is intrinsically discriminatory. Nor is it suggested that the grounds for authorisation were not established. It is true that the area covered by the authorisation has a sizeable proportion of black residents (although "residence" is not directly relevant to authorisation or use of the stop and search power). However, the assumed facts of this case demonstrate that Miss Roberts was not subjected to section 60 because of her ethnicity. She drew attention to herself as a fare dodger at a time and in a place where a section 60 authorisation was in place in accordance with the statutory requirements.

34. I am sensitive to the fact that the use of stop and search powers, including those under section 60, attract criticism, particularly among some ethnic minority communities in London. That is a proper subject for debate elsewhere. However, it does not have the potential to render justiciable a specific allegation of discrimination in this particular case. I am wholly unpersuaded that a breach of article 14 has been established. I have preferred to deal with the issue in this way rather than on the basis of a pleading point taken by Mr Johnson.

Conclusion

35. It follows from what I have said that I would dismiss this appeal.

Lady Justice Rafferty

36. I agree.

Lady Justice Macur

37. I also agree.