ANTI-TERROR LEGISLATION AND THE JUDICIAL REVIEW PROCESS: A PERSONAL STORY

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In this lecture I will be presenting a personal view of the judicial review process. In 2003 I was subject to a stop and search by police, while on my way to a demonstration. The police used powers conferred on them by the Terrorism Act 2000. Ever since I have been involved with a case that has tested that piece of legislation, and the ways in which it has been used by the police. Essentially, our argument is on two levels. First, the legislation itself is not in keeping with the weight and tradition of British law and is in conflict with aspects of the European Convention on Human Rights (referred to as the Convention throughout), so the ultimate solution would be to rewrite it. Second, the way the legislation is being used by the police is not as Parliament intended, so the solution would be limitations on use to the police. Seeing the process from the inside has taught me a lot about the British legal system; lessons I hope to share with you. Two warnings are worth bearing in mind however: first, I am not a lawyer so I won't be giving you Act by Act or case by case descriptions of authority and precedent; second, being involved in the case, I obviously have a very subjective view of the matter. In my descriptions of process I'll be as objective as possible, but less so in my evaluations of the judgements offered by the courts.

The first matter I will discuss is the nature of the Terrorism Act itself, at least as far as it is relevant to my case. Then, after a brief description of the circumstances through which I got involved with this judicial review, I will outline the procedure I have experienced. It is not possible for me to cover every legal argument in detail, but I will mention a few of the debates that came up, and offer you snippets of the various judgements. These illustrate some important general points, such as the particular role of the judiciary in relation to the legislature, the nature of the judicial review process, and the attitude of the courts to questioning Parliament in relation to issues of national security. As yet this is something of a story without an ending; the case continues, and my solicitor will shortly be applying to have the case heard in the European Court of Human Rights (referred to as the Strasbourg Court throughout).

The Terrorism Act 2000

The world, we are often told, has changed radically since 911. It is certainly true that that tragedy, and everything that has happened since, have raised the spectre of international terrorism to one of the most prominent in matters of security and law. It was, of course, before 911 that the legislature sought to create a new Act defining new powers for the police in combating terrorism. Among other things, the Act made permanent some of the exceptional powers that had been granted in the Prevention of Terrorism (Temporary Provisions) Act of 1989 which, now repealed, had been designed in the context of Irish Republican terrorism.

The act defines 'terrorism' rather broadly and this definition has been used in subsequent legislation (such as the Terrorism Act 2006). Terrorist activities include serious violence, serious property damage, actions endangering life or creating a serious risk to the health or safety of the public, or serious interference with an electronic system. These activities must be carried out, or threatened, "for the purpose of advancing a political, religious or ideological cause" and be designed to influence the government or intimidate the public in order to count as terrorism. Alternatively, any action taken to the benefit of a proscribed organisation counts as terrorism (sections 1-5). The list of proscribed groups is maintained by the Home Office.[1] It may be that this definition is overbroad and it could be "read to include legitimate gatherings and demonstrations" or to include "many acts ... that, while unlawful, simply do not reach the level at which the extraordinary intrusive measures provided under anti-terrorism legislation can justifiably be used."[2]

Sections 44-47 of the Terrorism Act provide special powers of stop and search to the police, and are the ones disputed in my case. There is a three stage process through which these powers are used. First, a very high ranking police officer must authorise use of the Act over a particular geographical area. Section 44(3) demands that "An authorisation ... may be given only if the person giving it considers it expedient for the prevention of acts of terrorism." It is worth noting that the word 'expedient' became the source of particular debate in court – it appears to be a weaker term than, say, 'necessary', indicating rather something like 'useful'. In the House of Lords, our QC questioned whether Parliament really intended these supposedly exceptional powers to be used wherever they were 'useful'. The interpretation of this key word, therefore, took up considerable court time and is essential to the question of whether a particular authorisation, by a particular officer, was lawful or not.

With authorisation given, the powers then may be used immediately. But, the second stage in the process is that the authorisation must be confirmed by the Secretary of State. If confirmation is not received within 48 hours, then the powers expire. In any case, the authorisation may last no longer than 28 days. A broader question here was raised by the practice of the Metropolitan Police Commissioner of a rolling series of authorisations every 28 days, which were all subsequently confirmed by the Home Secretary without limitation or alteration. From 19th February 2001 until at least October 2003 these supposedly exceptional powers were available to any police officer anywhere in area covered by the London Met.

The third stage is, of course, the exercise of the powers by a police officer. Section 45(1)(a) limits the powers such that they "may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism". However, one might question the interpretability of this 'limitation' since all sorts of everyday articles might plausibly be used in connection with terrorism. A mobile phone, a camera or a map, for instance; all would presumably be useful in planning or carrying out terrorist activities. Section 45(1)(b) further specifies usage of the powers such that they "may be exercised *whether or not the constable has grounds for suspecting the presence of articles of that kind*." It is this last point that explains why I keep referring to supposedly 'exceptional'

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[1] There are currently forty-two proscribed groups, and a further fourteen Irish groups proscribed under earlier legislation. The list is available here: http://security.homeoffice.gov.uk/legislation/current-legislation/terrorism-act-2000/proscribed-terrorist-groups?version=1.

[2] Article 19, 2006, "The Impact of UK Anti-Terror Laws on Freedom of Expression. Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights." Available here: http://www.article19.org/pdfs/analysis/terrorism-submission-to-icj-panel.pdf

powers. Police have powers of stop and search under all sorts of legislation, for looking for weapons, drugs, stolen goods and so on. However, with only one exception all other stop and search powers (as all arrest powers) carry the notion of 'reasonable grounds for suspicion'.[3] As we will see, the lack of a reasonable suspicion clause not only introduces acknowledged dangers of abuse of power, but also makes it exceedingly difficult to prove that such abuse has taken place. Simply put, if an officer is not required to explain any reasoning, then they may act, with impunity, on whatever impulse they wish.

The Facts of the Case (Told from One Side)

Every two years the ExCel Centre in London's Docklands plays host to thousands of government officials, high ranking military personnel, and manufacturers and traders in weapons systems of every level from aircraft carriers to machetes. It has been heavily criticised on several levels, not least for inviting both sides of major regional conflicts to come and peruse the killing machines on display and because some delegate offering banned weapons such as landmines for sale. In addition to moral opposition to the event, many Londoners are also upset at picking up the enormous tab for ensuring the security of this dubious collection of dignitaries.[4]

In September 2003 I attended the demonstrations surrounding the arms fair (DSEi), partly because of sympathy with demonstrators, and partly because I was, at the time, studying for a PhD in political protest. Having just arrived, and somewhat lost, I was actually cycling away from the fair, on my own, when stopped by two police officers. They explained that they wanted to search me, and when pushed, said that they had power to do so under the Terrorism Act. Pushed further, one officer explained 'there's a lot of protests around, so we've got to be careful'. They gave me a pat down and made a thorough search of my possessions (bike tools, sandwiches, notepad, map etc). Having read through my notes, some of which were confidential notes from interviews with protesters, they found a few print outs of web pages describing the times and places of a variety of peaceful and publicly-planned demonstrations and meetings organised over the next few days. After telling his radio what web site they were from one officer decided to confiscate these pieces of paper, allowing me to note down some of the essential details. As I was doing so I heard the reply from his radio: 'it's alright, we know about that site'. Of course they knew about them, the information was from the highest profile anti-DSEi protest website on the 'net. Naturally, he didn't return my papers. Next, I was asked to give my name and address. Knowing that I didn't, by law, have to give these details, and feeling a bit put out, I refused. To which the response was to tell me that although I had the right not to give my details, if I did that I'd probably arouse their suspicions and they might arrest me. So, I gave in. They checked my details, I got a copy of the stop and search form and I was on my way, still heading in the wrong direction for the demonstration I was now late for. The whole thing lasted about twenty minutes.[5]

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[3] The exception is section 60 of the Criminal Justice and Public Order Act 1994 which is more specific and more time limited. The 1994 Act empowers officers where serious acts of violence are deemed to be 'imminent' - a word usually construed in quite limiting way. This is discussed by Lord Justice Brooke and Mr Justice Kay in the judgement of the High Court, paragraphs 10-16.

[4] An entertaining, investigative critique of the arms trade can be found in Thomas, M., 2006, *As Used on the Famous Nelson Mandela.* (Ebury Press)

[5] It should be noted that a couple of points of fact (the confiscation of papers and the pressure to give my personal details) have been contested by the police. However, throughout the judicial review process these facts were never tested. It was only at a later stage, described below, that the factual dispute was put to a jury.

Though I was inconvenienced and felt irritated, not least because I didn't think my behaviour warranted comparison with terrorism, I've never claimed that I was distraught after the event. So, why take the thing through three and a half years (and counting) of legal process? Later that day I met, by chance, a solicitor from Liberty. Alex explained to me the repeated use of the Terrorist Act against protesters, and how the law gave officers particular powers that they wouldn't normally have. After the information presented above, a few of the questions this posed should be clear. Why were they searching me for articles connected with terrorism? I had assumed that this was the police doing what they always do at protests – gently harassing protesters in order to keep an eye on what they might be up to and perhaps to discourage participation. Had I been acting that suspiciously? If they really were looking for articles connected with terrorism, why had they confiscated my list of demonstrations? Why had they said it was to do with the protests? Alex also explained that as a campaigning law firm, Liberty was keen to take on an individual case against the threat to civil liberties inherent in the legislation. Particularly because it was clearly being misused against protesters I was pleased to take on the legal challenge. New legislation needs to go through many stages of scrutiny, especially where it grants unusual powers to authorities. Which the encroaches on civil liberties in the name of security it ought to seek "proportionality and balance" through a process of "informed and free political debate." As Lord Smith of Clifton makes clear, however, "in practice, it is much harder to achieve this ideal because the very situations that trigger a re-examination of the 'perennial question' are invariably ones of crisis ... Such circumstances require swift action by governments so that any critical analysis and monitoring of these responses by Parliament, the judiciary, the media and ultimately the electorate is consequential and often occurs much later."[6] So, by putting my evidence through a judicial review process I could offer a test for what seemed like a badly designed piece of legislation.

The Judicial Review Process

The full title of the case is 'The Queen, on application of Kevin Gillan and Penny Quinton versus the Commissioner of the Police for the Metropolis and the Secretary of State for the Home Department'. Penny Quinton has been my co-appellant throughout the case. She was similarly stopped at the DSEi arms fair on 9th September 2003 although she was there as a freelance journalist. She was stopped for considerably longer as the police made her wait around before the search. They also, at some points, stopped her filming the demonstrations. The judicial review went through three courts, so I'll give you a quick overview of the process before looking at some of the arguments.

The purpose of a judicial review is to examine a law, or an official action by someone with government authority, in order to check compatibility with the basic principles of law. So, the facts of the particular case are less important that what they illustrate about a piece of legislation and how it is being used. The remedy sought, in our case, was at best a declaration of incompatibility. The judiciary do not have the power to strike down an incompatible piece of legislation but by giving a clear judgement they can explain limitations to the law. It also, in the words of my solicitor, 'waves a flag above the legislation so that Parliament knows it is something they need to look at'. But, the judiciary cannot force Parliament to do anything about it. Nevertheless, a judgement would be taken very seriously, and would have a practical impact on the way that the Police made use of the Terrorism Act.

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[6] Lord Smith of Clifton in foreword to Blick, Choudhury & Weir, 2006, *The Rules of the Game: Terrorism, Community and Human Rights*. Available here: http://www.jrrt.org.uk/Terrorism_final.pdf

In September 2003 we applied to the High Court for judicial review proceedings, this was accepted and the case was heard in October 2003 (High Court of Justice, Queens Bench Division). The judgement was handed down quite quickly and stated that use of the Terrorism Act in these cases showed sufficient safeguards to be within the confines of British legal tradition. However, at that stage they made it clear that it was considered an important case and leave to appeal was granted. So, in July 2004 we had a hearing in the Court of Appeal (Civil Division). This was a rather mixed judgement, the actions of the Secretary of State were accepted by the court to be legitimate. But, the Police were criticised heavily for, firstly, failing to give individual officers the required understanding of the law and, secondly, for failing to provide sufficient evidence to the courts. Nevertheless, there was no clear ruling against the police and a refusal to give automatic leave to appeal. While the judgement did consider a range of relevant issues it ambiguously concluded that "this judgement is best left to speak for itself … no order should be made on the appeal either as to the merits or the costs."

As a result we needed to petition the Judicial Committee of the House of Lords for leave to appeal. This petition was made in October 2004 and accepted. After a rather long wait the case was heard in the Lords in January 2006 and the judgement handed down in March 2006. The House of Lords offered the most thorough investigation of the law, and gave the most authoritative judgement. They rejected our case and therefore upheld the position of the Home Secretary vis-à-vis the rolling system of authorisations of the power in London and the position of the Metropolitan Police vis-à-vis both the authorisation of the power and the particular uses of it. Nevertheless, as I'll describe shortly, it still seems to leave some significant ambiguity around how to test for correct use of Section 44 stop and search powers.

The Judiciary, the Government and National Security

Two key issues were clearly raised throughout the case, and formed the justification on which the initial High Court decision was granted: "the claims of the appellants … raise issues of importance as to the role of the courts when proceedings for judicial review involve issues of national security and the extent of the powers of the police" (Woolf, Buxton and Arden, Appeal Court judgement[7]). In the following sections, therefore, I will look at some of the arguments and decisions that clarified or suggested problems with on the one hand, the relationship between the courts and the government (this section) and, on the other, that between the courts and the police, on the other (next section).

I mentioned earlier the use of the word 'expedient' where section 44(3) of the 2000 Act demands that "An authorisation … may be given only if the person giving it considers it expedient for the prevention of acts of terrorism." This applies to the authorisation given by a high ranking officer that the various Terrorism Act powers come into force over a particular area for a particular time. The High Court ruled that it should be given a meaning such as 'advantageous'. In the Court of Appeal our advocate argued that it should rather be given a more restrictive meaning and, moreover, through allowing a looser interpretation the High Court had showed inappropriate deference to the authorities decision-making on whether, given the circumstances, the rolling series of non-stop authorisations covering the whole of London was really expedient for the named purposes. This was important because in accordance with the 'principle of legality' fundamental rights – those enshrined in the Convention – should not be overridden by legislation couched in overly general language.

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[7] The judgement of the Court of Appeal, R(Gillan & anor.) vs The Commissioner for the Police & anor., is available here: http://www.hmcourts-service.gov.uk/judgmentsfiles/j2731/gillan-v-police.htm

The judgement of the Court of Appeal began its evaluation of this argument by stating simply, "The interpretation of the 2000 Act is a matter of law for the courts. There is no question of this Court showing deference or respect to the views of the respondents because of the subject matter of the legislation." (Para. 30) However, it argued that because the legislation contained safeguards on the use of the powers of section 44, the law itself does not conflict with the Convention, though particular usage could. In doing so one would expect an assessment of whether an authorisation or confirmation was justified given the level of threat faced in the particular area over the particular timescale. However, here the Court of Appeal did limit its own role:

> "This brings us to the general approach that the courts should adopt when reviewing the exercise of a power which is provided by Parliament for the prevention of terrorism. Possible terrorist activities create unusual difficulties for the authorities … the range and nature of the terrorist incidents that are possible increase the difficulty in taking preventive action. For this reason, the courts will not readily interfere with the judgement of the authorities as to the action that is necessary. They will therefore usually not interfere with the authorities' assessment of the risk and the action that should be taken to counter the risk." (Para. 33)

Surprisingly, the long quote from paragraph 33 seems a flat contradiction of the statement quoted earlier from paragraph 30. Perhaps in mitigation, the judgement does go on to suggest that, nevertheless, the Court still has a role in assessing proportionality of actions taken by authorities. However, it is unclear how one can assess proportionality without assessing the level of risk, and the judgement offers no advice on this matter. Furthermore, in the judgement of the House of Lords, Lord Bingham expressed an even firmer stance on non-interference with authorities given the subject matter: it would in my opinion be impossible to regard a proper exercise of the power … as other than proportionate when seeking to counter the great danger of terrorism" (para. 29).

This aspect of the case reveals one final point of note: the doctrine of 'separation of powers' tends to be rather oversimplified. To be sure, this doctrine is more formally recognisable in countries with written constitutions such as the US than it is in Britain. Nevertheless, the language of 'checks and balances' is often borrowed to describe the interrelationship of legislature, executive and judiciary in making, executing and interpreting the law. In particular, the judiciary will often strongly defend its role in ensuring that newly enacted legislation does not contradict the common principles of law or, specifically, the Convention. This is evident from the 'Belmarsh case', which examined the use of detention without trial under the Anti-terrorism, Crime and Security Act 2001. Here the same Lord Bingham offered the lead judgement but with opposite effect, he made a declaration that section 23 of the act was incompatible with the Convention. "This must be one of the first times that the courts of the United Kingdom have dealt such a body blow to legislation enacted by Parliament to confer powers on the Executive to meet a threat to national security." (Rt Hon Lady Justice Mary Arden[8]) Nevertheless, in the Belmarsh case the question of deference of courts to authorities also came up, with Lord Bingham again allowing that the context of terrorism meant that some reduction of the role of the court was necessary. In the same judgement Lord Nicholls argued that "All courts are acutely conscious that the government alone is able to evaluate and decide what counterterrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility." Yet the constitution of the House of Lords allows for dissenting voices, and among the nine presiding, Lord Hoffman argued,

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[8] Rt Hon Lady Justice Mary Arden, 2006, 'Meeting the Challenge of Terrorism: the Experience of English and Other Courts' in *Australian Law Journal* Vol.80, pp. 818-838.

> "Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community. ...
>
> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve."[9]

Lord Hoffman was speaking specifically to whether derogation from the Convention rights could be legally allowed, given the level of terrorist threat. Not surprisingly, this aspect of the judgement caused consternation in Whitehall.

So, the picture of the relationship between judiciary and government – always complex – has been complicated further by the context of threats to national security. The gravity of the threat does clearly effect the judgement of the Courts, as the quotations above evidence, yet the courts remain willing to take strong action at times. We can only guess where this continuing process of renegotiation of powers will lead.

The Judiciary and the Police

The High Court judgement explicitly described the role of the judiciary in relation to the police:

> "because the powers are so sweeping and far beyond anything ever permitted by common law powers ... it behoves the police to take particular care to ensure that these powers are not used arbitrarily or against any particular group of people. ...
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> It is now well established that the courts have power to examine the way in which public servants like the police use discretionary powers given to them under a statutory regime. The wider the power, and the more it impinges on personal liberty, the more anxious the court will be to ensure that it is used to achieve the purpose for which it was granted and not for any ulterior or extraneous purpose." (Brooke & Kay, High Court judgement[10])

The judges state that misuse of the legislation would require remedy through public law, but that "We are not, however, satisfied that the police's conduct on 9th September entitles either Mr Gillan or Ms Quinton to a public law remedy. There is just enough evidence available to persuade us that ... the arms fair was an occasion which concerned the police sufficiently to persuade them that the use of section 44 powers was needed ... But it was a fairly close call." (High Court judgement) In the following section I'll suggest that one difficulty for the courts, however, is that the judicial review process is focused on individual cases. And this is relevant not just to the issue of rights to peaceful protest free from harassment, but also to racial or religious discrimination.

The 1984 Police and Criminal Evidence Act (known as PACE and updated April 2003) provides guidance for Police Officers in using various stop and search powers. In relation to the Terrorism Act 2000 powers it explains:

> "The selection of persons stopped under section 44 of Terrorism Act 2000 should reflect an objective assessment of the threat posed by the various terrorist groups active in Great Britain. The powers must not be used to stop and search for reasons

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[9] The judgement of the House of Lords in A vs. Secretary of State for the Home Department [2005] 2 AC 68; quoted in Arden, op cit.

[10] The judgement of the High Court, R(Gillan & anor.) vs. Commissioner of the Police & anor. [2003] EWHC 2545, is available here: http://www.hmcourts-service.gov.uk/judgmentsfiles/j2025/gillan.htm

> unconnected with terrorism. Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers. " (PACE, paragraph 2.25)

I will return to discrimination in a moment. First, though, it is worth noting that in the guidance, we "are also told that if when exercising these powers an officer forms reasonable grounds for suspicion, a search may then be carried out under other powers (para 2.26)" (High Court judgement). It is this that explains why over 450 arrests resulted from the 36,000 uses of section 44 powers in 2005. It is not clear how many of these arrests were in connection with terrorism, or if there were any convictions. However, it is known that that number is vanishingly small. In these cases the Terrorism Act is used where police officers have no reasonable suspicion of wrong doing. When they find something incriminating, however, their search shifts to some other power under which they would ordinarily need reasonable grounds for suspicion. It can be seen, therefore, that the Terrorism Act is very useful in general policing such as searching people on the basis of a 'hunch' that they're carrying drugs. One may justify such search legislation on the grounds that it is useful to general policing, but this was never the intention of the Terrorism Act.

Furthermore, the fact that the Terrorism Act essentially gives officers an easier form of stop and search that may be useful in all policing makes it more likely that stop and search will be used in a discriminatory way. Certainly more than one fifth of stops in 2003-4 were of black or Asian people, and "reports suggest a huge increase in the number of black and Asian people being stopped since the London bomb attacks."[11]

My primary interest in this case came from the suspicion that the police were systematically using anti-terror legislation in order to police political protests. However, racial discrimination would, of course, be equally unacceptable. Our legal argument never focused on discrimination – as both appellants were white it would be impossible to do on the facts – it was nevertheless discussed in the House of Lords hearing. Lord Bingham, chairing the hearing, refused to comment on the matter in his judgement. Nevertheless, both Lord Hope and Lord Brown discuss the matter extensively, arguing that there must be some way that race or religion may be taken into account when faced with a terrorist threat that is, in fact, connected with religion. [12] This is, of course, a difficult and sensitive matter but there is a wide consensus across Europe that one cannot infer suspicion from an individual's membership of a racial or religious group. The logical point is that even if it is true that all al Qaida terrorists are Muslim, it is clearly not true that all Muslims are al Qaida members. What grounds then, does the officer have of suspecting any individual Muslim of being a terrorist?

The key point here, though, is that both racial discrimination and systematic use against protesters are a similar category of police behaviour that demonstrate an apparent limitation in the system of judicial review. Judicial review relies on the facts of a few individual cases being brought to the attention of the courts in order to question some aspect of the application of legislation by those in power. That the facts were not taken to be terribly important is demonstrated by the way that neither appellants or officers were asked to present evidence and bear cross examination (written witness statements were used instead). There was some area of dispute over the facts though, and later, at the

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[11] Russell, B., 2006, "Police stop and search 100 people a day under new anti-terror laws" in *The Independent,* 25 January 2006. Available at: http://news.independent.co.uk/uk/legal/article340820.ece

[12] The judgement of the House of Lords, R (on the application of Gillan (FC) and another (FC)) v. Commissioner of Police for the Metropolis and another [2006] UKHL 12, is available here: http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060308/gillan-1.htm

level of County Court, when we were taking a civil claim rather than a judicial review, cross-examination was seen as essential to clear up this dispute. The judges in the judicial review process, however, were happy to continue on the basis that the area of dispute was small and not terribly relevant. At the same time, judicial review has to proceed on individual cases. If the problem is systematic behaviour by the police force as a whole it is difficult to see how a judicial review can, on the basis of an individual case, rule against an informal police practice. To be sure, at several points in the review process the level of training and guidance received by officers was investigated. Since our claim was against the person with overall responsibility for the Metropolitan Police it was necessary to see how application of the law filtered down to the officer on the street. Naturally, had we been able to demonstrate training materials that specified that officers ought to apply the Terrorism Act in order to harass protesters then the judicial review process could make a general ruling beyond our cases. However, this seems an exceedingly unlikely prospect and if there is a systematic misuse of power it is likely to be something that has developed through informal channels and need not be communicated explicitly from the highest ranks. Yet even if the 3-400 protesters stopped over two days at DSEi in 2003 had all taken individual appeals, the judicial review process would need to look at each case on its individual merits and would still, therefore, be blind to informal but widespread misuse.

Let me put the point slightly differently. Protesters feel harassed by police use of anti-terror legislation because they have a very high rate of being stopped and searched under section 44. They know from seeing it happen repeatedly at demonstrations that, as a protester, they are more likely to be stopped and searched than when going about their everyday business. The fact that the practice is widespread must, itself, form a part of the evidence that the practice is outside the intention of the legislation. However, when before the judges, the question that is asked is whether, in this individual case, the officers misused the terrorism act. Focused at the individual level, the judges ask questions like 'did these officers know the limits to the law?' and 'what did they write on the stop and search forms?'. Yet the question that ought to be asked is 'did the fact that they were protesters influence the officers' decision?' Since the law expressly unburdens the officer from ever rationalising that decision, this question is impossible to answer at the individual case level. Despite the established role of the courts in investigating police use of discretionary powers, therefore, in this case the judicial review process appears to contain an important blind spot.

The European Convention on Human Rights

A number of our arguments throughout aimed at showing that stop and search powers in the Terrorism Act 2000 broke the government's obligations under the Convention. These were finally brought into British law through the Human Rights Act 1998, which is what empowers the judiciary to make a declaration of incompatibility. In particular our argument addressed four Articles of the Convention:

Article 5 states:

> "1. Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:...
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law..."

Article 8 states:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence…

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of nation security"

Article 10 states:

"1. Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority …

2. The exercise of these freedoms… may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security…"

Article 11 states:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others…

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security… "

Before looking at the individual articles it is worth noting that they have, in common, the notion of acceptable restrictions provided that these are 'prescribed by law' and 'necessary in a democratic society'. There is a longer list of what interests they may be necessary in, but clearly it is national security that fits here. One of our arguments rests on the notion that section 44 powers were not, in fact, prescribed by law. There is a common argument in the Strasbourg Court that actions of the state can only be 'prescribed by law' if that law is accessible, foreseeable and compatible with the rule of law, and with adequate information "enabling members of the public to regulate their conduct and foresee the consequences of their actions" (House of Lords judgement, para. 32). However, neither the authorisations for use of the Terrorism Act, nor their subsequent confirmation, were initially made public. Since the section 44 powers depend on that authorisation, the fact that they might be used was itself not public. In an important ruling, Lord Bingham argued, conversely:

> "The 2000 Act informs the public that these powers are, if duly authorised and confirmed, available… The Act and the Code do not require the fact or the details of any authorisation to be publicised in any way, even retrospectively, but I doubt if they are to be regarded as 'law' rather than as a procedure for bringing the law into potential effect. In any event, it would stultify a potentially valuable source of public protection to require notice of an authorisation or confirmation to be publicised prospectively." (House of Lords judgement, para. 35).

This means that as the law has been described on the statute books, the mere fact of its applicability over a particular area over a particular time does not warrant any further publicity. As a result, use of section 44 is, in general, lawful and the test of whether it breaks any Article conventions comes down to facts of the specific case. It is difficult for me to understand how this conclusion is justified. Section 44 powers are supposed to be exceptional, to be used only in times of grave danger. Therefore, one should be free to assume that, unless told otherwise, they are not in force. The citizen regulates his or her behaviour on the grounds that a police officer cannot interfere with person, property or civil rights, unless your behaviour is such that it raises a reasonable suspicion in that officer's mind. The authorisation itself instantly changes that situation and so the citizen needs to know this fact if they are to be given the opportunity to further regulate their behaviour. (Practically, this might mean

allowing more time for journeys through central London, or not carrying a personal diary in public if you would be upset by an officer reading it.)

As for the specific articles our case was lost on each count. In relation to Article 5, the stop and search necessarily involves a non-voluntary compliance with a brief restriction of liberty of movement – did this involve a deprivation of liberty? Lord Bingham referred to a Strasbourg case from Italy that said, "The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends" (quoted in House of Lords judgement). Lord Bingham claimed that the brevity of a stop and search, and the lack of physical barriers from movement therefore meant that a stop and search would normally fall below the threshold required to count as deprivation of liberty.

In relation to Article 8, the decision of the House of Lords came down to whether the stop and search, properly executed, involved an invasion of privacy. Accepting that 'private life' is generally generously construed, Lord Bingham nevertheless came to the opinion that "it would … be impossible to regard a proper exercise of the power … as other than proportionate when seeking to counter the great danger of terrorism". This implies that if the officer is searching for articles that could be used in connection with terrorism, a simple pat-down and bag search would not go beyond the threshold of Article 8. There is an important question left hanging here. Nobody has yet offered a statement of what sort of articles that might be used in connection with terrorism may be searched for. As argued earlier, maps and mobile phones might be used in connection with terrorism. Is it still acceptable, without reasonable ground for suspicion, for an officer to read every page of a personal diary in case there is some information hidden there that might be used in connection with terrorism? Or, should the officer be simply looking for explosives, detonators and the like? If the latter, then it seems likely that the search can go on well within the restrictions of Article 8 since they couldn't be slipped between the pages of a love letter or hidden on the hard drive of a laptop. But as it stands, no such restrictions are in place.

Articles 10 and 11 are less directly implicated. It is quite clear that these are only triggered in the event that section 44 is misused in order to harass protesters or "as would be the case, for example, if the power were used to silence a heckler at a political meeting". Lord Bingham clearly slipped that point into his judgement in connection with the case of Walter Wolfgang, who had recently been ejected from the Labour Party Conference after heckling Jack Straw. He was later searched using section 44 of the Terrorism Act 2000. (As far as I know he hasn't brought a civil suit against the police, but if he were to it seems that Lord Bingham has handed him his case already.) In terms of our own case, the judgement is quite clear that it would need to be shown that the police were deliberately using section 44 for a purpose other than searching for articles that might be connected with terrorism if these Articles were to apply. The difficulties in doing so are the ones I have already pointed out: first, it is not clear what sorts of articles those are, and secondly, it is difficult (perhaps impossible) to show in an individual case what the intentions of the police officers were without relying on an argument that systematic misuse is being carried out. If systematic misuse is being carried out, this does not enter into the debate because of the focus on an individual case. These limitations were, eventually shown up quite concretely at the level of County Court, and it is a description of that to which I now turn.

The Next Steps: To Strasbourg via County Court

With an unsatisfactory end to the judicial review process the next logical step – given the human rights implications of the legislation – would be to apply to have the case heard in the European Court of Human Rights in Strasbourg. However, it is very clear that in order to apply to the Strasbourg Court one must have exhausted all possible domestic channels for remedy. One possibility not yet tried was to take a private civil suit through the County Court. At this level we are essentially suing for damages for mistreatment by the police through claims of assault and battery. While the County Court might consider what is acceptable use of the Terrorism Act they cannot offer anything like the declaration of incompatibility we sought through judicial review. Nevertheless, since it was a requirement of application to Strasbourg we applied for a suit and, in January 2007 the case was heard in a 'civil jury trial' at the Central London County Court.

Before describing that hearing it is worth making a note about money. Both Penny Quinton and myself had been funded by legal aid through the Legal Services Commission (LSC) throughout the judicial review. As a student I didn't have much money, although because of my part time work the LSC decided I needed to make a monthly contribution of around £30 to the legal costs. Although the Liberty solicitors do not charge (they are backed by a charitable foundation) it was still necessary to hire barristers to represent us in court and pay various court fees. Further, on losing the case the opponents can seek to have their costs covered by the unsuccessful appellants. Some form of funding is, therefore, essential. By the time of the County Court trial I had a full time job and LSC would no longer offer legal aid. Since if we lost (a highly likely scenario given what had gone before) we might face costs of up to £20,000 this was a significant problem. Although Penny still had LSC funding it looked very likely that I would have to withdraw from the case because I could not afford to pay my share if we lost. It is with great gratitude, therefore, that I acknowledge the eleventh-hour contribution of a donor organisation who offered to cover costs in the event that we lost. It is worth noting that this support was useful not only because of the financial backing but also because, after a long process of unsuccessful legal argument you cannot help but wonder if you are wasting everyone's time. Having someone personally unconnected with the case offer that level of backing is vital reassurance that the case remained important. The funding arrangements for Strasbourg are very different and taking the case to the European Court is, for the appellant, effectively free.

Winning at County Court level would result in a very small payment in damages (the Police offered £200 out of court settlement) and perhaps make it impossible to progress to the European Court. It would not have a substantial effect on the law. It was difficult, therefore, to muster a great deal of enthusiasm for winning. From the Police perspective, they were unlikely to relish being dragged to Strasbourg, so a small damages settlement would probably be a suitable end to the case. As such, it seems that neither side particularly wanted to win. Still, the level of preparation and courtroom debate attested to the fact that both sides were putting their best possible case forward. The Home Secretary was no longer involved in the case since we could not, at this stage, realistically question the second stage of use of the Terrorism Act (i.e. confirmation of authorisation to use the powers). Rather, we looked at the individual conduct of the officers involved to examine whether they were genuinely searching for searching for "articles of a kind which could be used in connection with terrorism".

The hearing was thus rather different in nature from those in the judicial review process and took the form of a 'civil jury trial'. Here, a jury is used to decide on disputed factual matters in the case. For some reason the jury consists of eight rather than the normal twelve people. Since there is no possibility of a verdict of innocent or guilty the advocates (barristers) on both sides must agree, with the judge, a series of questions on which the jury is asked to decide. All questions must have yes or no

answers, and the burden of proof is relatively light. Unlike in a criminal trial where matters must be decided 'beyond all reasonable doubt', the jury had rather to decide facts 'on the balance of probability'. The two police officers, Penny and myself were all brought to give evidence; we were cross-examined under oath so that the evidence could be tested in front of the jury. Unsurprisingly, cross-examination is a very unpleasant process, since it involves a highly educated and argumentative individual attempting to trip you up and expose your evidence as unreliable. I was told by our advocate that that (despite my feelings on the matter) I'd had a very gentle cross-examination and they are known, at times, to go on for a full day.

Before the jury was brought in and the witnesses cross-examined, however, advocates and judge debated the legally available possibilities for debate. It is here that the limitations of the Terrorism Act 2000, and the House of Lords judgement on the matter, become particularly clear. The respondent's barrister argued that, given the legal excuse from giving reasonable grounds for suspicion our own advocate could not attempt to question the officers' rationales for making the stops in the first place. Our advocate suggested a distinction between reasonable grounds and an honest intention – could he cross-examine the police to investigate whether they honestly believed we might be involved in a terrorist plot? Essentially, this decision rested on a vital judgement from our case as it passed through the House of Lords. Lord Bingham described the powers in the following way:

> "In exercising the power [of stop and search] the constable is not free to act arbitrarily, and will be open to civil suit if he does. It is true that he need have no suspicion before stopping and searching a member of the public. This cannot, realistically, be interpreted as a warrant to stop and search people who are obviously not terrorist suspects, which would be futile and time-wasting. It is to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion." (House of Lords judgement, para. 35.)

The problem with this is that it is clearly quite contradictory. The officer "need have no suspicion", but still must not stop people who are "obviously not terrorist suspects". The practical effect of this, in our case, was that our advocate was allowed to ask what the officers were looking for in the search and, if they answered, 'articles that might be used in connection with terrorism' or similar, could not push any further. He might get away with asking 'were you *really* looking for such articles' but on no account could he ask 'what made you think you'd find them?' The judge even commented at one point in this debate "we're booked in court for two days, this'll take about half an hour".

Ultimately, the jury found against us on key matters of fact. In my case they agreed with the police that, in fact, I hadn't had any documents confiscated and that the police had applied no pressure on my to offer my personal details. They were wrong to do so, but the mistake is quite understandable. There was little evidence to work with and, as such, it was a case of one word against another. The three years that had passed between the events and the hearing were used by both sides to cast doubt on their opponent's memories. However, the judge had pointed out that the police officers, used to giving evidence as they were, would be used to relying on the notes on the stop and search forms thus clearly implying, to my mind at least, that they were inherently more likely to have an accurate picture of events. For the jury to trust two police officers over two people of whom they knew nothing is probably a good sign for authority in Britain. However, it made our County Court case impossible, it was 'more likely than not' that the police were genuinely looking for articles that could be used in connection with terrorism; irrelevant that the searches were misdirected; and practically inadmissible that there had been more systematic, if informal, misuse of anti-terror legislation against peaceful protest.

Summary

My reflections on this case have suggested to me that, more than anything else, the County Court trial demonstrated the impossibility of gaining a judicial remedy for misuse of the exceptional powers made available to the police through the Terrorism Act 2000. Since the police need show no reasonable grounds for suspicion, and the courts decide on the merits of individual cases, it is impossible to demonstrate systematic misuse. Because there is no potential remedy the legislation cannot sit within the bounds of normal legal practice. Furthermore, since the application of the law is unpredictable (the authorisations for enforcement over wide areas need no publicity) it seems outside of the bounds of the European Convention of Human Rights.

However, I should repeat that these are personal reflections of someone outside of the legal profession. The application for the Strasbourg Court needs to be made within six months of the end of domestic proceedings and we will therefore be entering it soon. If the case is 'heard' there is unlikely to be a physical hearing since cases are usually considered in writing. Clearly the same Articles mentioned above are likely to be brought into question though I cannot relay the specific arguments to be used. I hope that offering you these reflections have raised a few issues about both the Terrorism Act and the judicial process that are interesting and useful for your studies.