HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 12
on appeal from[2004] EWCA Civ 1067

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Gillan (FC) and another (FC)) (Appellants)
v.
Commissioner of Police for the Metropolis and another (Respondents)

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood

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Respondents:
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John McGuinness QC
Jonathan Hall
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Secretary of State for the Home Department
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LORD BINGHAM OF CORNHILL

My Lords,

1. It is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence. So jealously has this tradition been guarded that it has almost become a constitutional principle. But it is not an absolute rule. There are, and have for some years been, statutory exceptions to it. These appeals concern an exception now found in sections 44-47 of the Terrorism Act 2000 ("the 2000 Act"). The appellants challenge the use made of these sections and, in the last resort, the sections themselves. Since any departure from the ordinary rule calls for careful scrutiny, their challenge raises issues of general importance.

2. The first appellant, Mr Gillan, was a PhD student studying in Sheffield when, on 9 September 2003, he came to London to protest peacefully against an arms fair being held at the ExCel Centre, Docklands, in east London. He was riding his bicycle near the Centre when he was stopped by two male police officers. They searched him and his rucksack and found nothing incriminating. They gave him a copy of the Stop/Search Form 5090 which recorded that he was stopped and searched under section 44 of the 2000 Act. The search was said to be for "Articles concerned in terrorism". The whole incident lasted about twenty minutes.

3. The second appellant, Ms Quinton, was an accredited freelance journalist and went to the Centre on 9 September 2003 to film the protests taking place against the arms fair. She was stopped by a female police officer near the Centre and asked to explain why she had appeared out of some bushes. Ms Quinton was wearing a photographer's jacket and carrying a small bag and a video camera. She explained she was a journalist and produced her press passes. The officer searched her, found nothing incriminating, and gave her a copy of Form 5090. This recorded that the object and grounds of the search were "P.O.T.A.", which was no doubt intended to be a reference to the 2000 Act. The form showed the length of the search as five minutes, but Ms Quinton estimated that it lasted for thirty.

I. The legislation

4. The 2000 Act, enacted in July 2000, was a substantial measure intended to overhaul, modernise and strengthen the law relating to the growing problem of terrorism. It supplemented existing criminal law statutes such as the Explosive Substances Act 1883 and the Aviation and Maritime Security Act 1990. It replaced some earlier statutes such as the Prevention of Terrorism (Temporary Provisions) Act 1989 as amended. It contained, in section 1, a far-reaching definition of terrorism:

> "(1) In this Act 'terrorism' means the use or threat of action where—
>
> (a) the action falls within subsection (2),
>
> (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
>
> (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
>
> (2) Action falls within this subsection if it—
>
> (a) involves serious violence against a person,
>
> (b) involves serious damage to property,
>
> (c) endangers a person's life, other than that of the person committing the action,
>
> (d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—

(a) 'action' includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) 'the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation."

In Part V of the Act, which contains the provisions at issue in these appeals, "terrorist" is defined, in section 40, to mean a person who has committed an offence under certain specified sections of the Act, or who "is or has been concerned in the commission, preparation or instigation of acts of terrorism".

5. Sections 41-43 of the Act, all under the sub-heading "Suspected terrorists", provide for arrest without warrant, the search of premises and the search of persons by a constable. In each case there must be reasonable suspicion that the person subject to the arrest or search is a terrorist. Sections 44-47, under the sub-heading "Power to stop and search", are not subject to that requirement. These sections provide for a three stage procedure.

6. The first stage is that of authorisation, which is governed by section 44. Omitting amendments made in 2001 which do not bear on the issue before the House, the section provides:

"(1) An authorisation under this subsection authorises any constable in uniform to stop a vehicle in an area or at a place specified in the authorisation and to search—

(a) the vehicle;

(b) the driver of the vehicle;

(c) a passenger in the vehicle;

(d) anything in or on the vehicle or carried by the driver or a passenger.

(2) An authorisation under this subsection authorises any constable in uniform to stop a pedestrian in an area or at a place specified in the authorisation and to search—

(a) the pedestrian;

(b) anything carried by him.

(3) An authorisation under subsection (1) or (2) may be given only if the person giving it considers it expedient for the prevention of acts of terrorism.

(4) An authorisation may be given—

(a) where the specified area or place is the whole or part of a police area outside Northern Ireland other than one mentioned in paragraph (b) or (c), by a police officer for the area who is of at least the rank of assistant chief constable;

(b) where the specified area or place is the whole or part of the metropolitan police district, by a police officer for the district who is of at least the rank of commander of the metropolitan police;

(c) where the specified area or place is the whole or part of the City of London, by a police officer for the City who is of at least the rank of commander in the City of London police force;

(d) where the specified area or place is the whole or part of Northern Ireland, by a [member of the Police Service of Northern Ireland] who is of at least the rank of assistant chief constable.

(5) If an authorisation is given orally, the person giving it shall confirm it in writing as soon as is reasonably practicable."

By section 46(1)-(2), an authorisation takes effect when given and expires when it is expressed to expire, but may not be for longer than 28 days.

7. The second stage is confirmation, governed by section 46(3)-(7). The giver of an authorisation must inform the Secretary of State as soon as is reasonably practicable. If the Secretary of State does not confirm the authorisation within 48 hours of the time when it was given, it then ceases to have effect (without invalidating anything done during the 48-hour period). When confirming an authorisation the Secretary of State may substitute an earlier, but not a later, time of expiry. He may cancel an authorisation with effect from a specified time. Where an authorisation is duly renewed, the same confirmation procedure applies. The Secretary of State may not alter the geographical coverage of an authorisation, but may no doubt withhold his confirmation if he considers the area covered to be too wide.

8. The third stage involves the exercise of the stop and search power, which is governed by section 45. This provides:

> "(1) The power conferred by an authorisation under section 44(1) or (2)—
>
> (a) may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and
>
> (b) may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind.
>
> (2) A constable may seize and retain an article which he discovers in the course of a search by virtue of section 44(1) or (2) and which he reasonably suspects is intended to be used in connection with terrorism.
>
> (3) A constable exercising the power conferred by an authorisation may not require a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves.
>
> (4) Where a constable proposes to search a person or vehicle by virtue of section 44(1) or (2) he may detain the person or vehicle for such time as is reasonably required to permit the search to be carried out at or near the place where the person or vehicle is stopped.
>
> (5) Where—

(a) a vehicle or pedestrian is stopped by virtue of section 44(1) or (2), and

(b) the driver of the vehicle or the pedestrian applies for a written statement that the vehicle was stopped, or that he was stopped, by virtue of section 44(1) or (2),

the written statement shall be provided.

(6) An application under subsection (5) must be made within the period of 12 months beginning with the date on which the vehicle or pedestrian was stopped."

These powers are additional to the other powers conferred on a constable by law: section 114. Section 47 makes it an offence punishable by imprisonment or fine or both to fail to stop when required to do so by a constable, or wilfully to obstruct a constable in the exercise of the power conferred by an authorisation under section 44(1) or (2).

9. In dispensing with the condition of reasonable suspicion, section 45(1)(b) departs from the ordinary and salutary rule found in provisions such as section 1 of the Police and Criminal Evidence Act 1984, section 47 of the Firearms Act 1968, section 23 of the Misuse of Drugs Act 1971 and (as noted above) sections 41-43 of the 2000 Act itself. But such departure is not without precedent. A similar (although more specific and more time-limited) departure is found in section 60 of the Criminal Justice and Public Order Act 1994, where incidents involving serious violence are reasonably believed to be imminent. More pertinently, because addressed to the prevention of terrorism, a similar departure was made in section 13A of the Prevention of Terrorism (Temporary Provisions) Act 1989, inserted by section 81 of the 1994 Act just mentioned. As originally enacted, that section contained provisions very similar to those in sections 44(1), (3) and (4), 45(1) and (5) and 47(1) and (2) of the 2000 Act, but that Act did not (until amended in 1996) apply to the stopping or searching of pedestrians or make any provision for confirmation by the Secretary of State. It is also noteworthy that section 45(1)(b) is not the only provision of the 2000 Act which dispenses with the condition of reasonable suspicion: Schedule 7 to the Act makes detailed provision for the stopping and questioning of those embarking and disembarking at ports and airports, without reasonable suspicion, supplemented by a power to detain for a period of up to nine hours.

II. Code A

10. By section 66 of the Police and Criminal Evidence Act 1984, as amended, the Secretary of State must issue codes of practice in connection with the exercise by police officers of statutory powers to search, detain and question. They are under a duty to have regard to any relevant provisions of a code. In criminal and civil proceedings the contents of any code must be taken into account in determining a question to which such code is relevant. Code A, in the version effective from 1 April 2003 and in force in September 2003, related to powers of stop and search. It is a public document.

11. In paragraphs 1.2 and 1.3 Code A provided:

> "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.
>
> 1.3 If these fundamental principles are not observed the use of powers to stop and search may be drawn into question. Failure to use the powers in the proper manner reduces their effectiveness. Stop and search can play an important role in the detection and prevention of crime, and using the powers fairly makes them more effective"

Paragraphs 2.19-2.23 summarised the statutory provisions governing authorisation and confirmation. Paragraphs 2.24-2.26 continued:

> "2.24 When an authorisation under section 44 is given, a constable in uniform may exercise the powers:
>
> (a) only for the purpose of searching for articles of a kind which could be used in connection with terrorism (see paragraph 2.25);
>
> (b) whether or not there are any grounds for suspecting the presence of such articles.
>
> 2.25 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 unconnected with terrorism. Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers. There may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities).

2.26 The powers under sections 43 and 44 of the Terrorism Act 2000 allow a constable to search only for articles which could be used for terrorist purposes. However, this would not prevent a search being carried out under other powers if, in the course of exercising these powers, the officer formed reasonable grounds for suspicion."

Paragraph 3.5 provided:

"3.5 There is no power to require a person to remove any clothing in public other than an outer coat, jacket or gloves except under section 45(3) of the Terrorism Act 2000 (which empowers a constable conducting a search under section 44(1) or 44(2) of that Act to require a person to remove headgear and footwear in public) and under section 60AA of the Criminal Justice and Public Order Act 1994 (which empowers a constable to require a person to remove any item worn to conceal identity). A search in public of a person's clothing which has not been removed must be restricted to superficial examination of outer garments. This does not, however, prevent an officer from placing his or her hand inside the pockets of the outer clothing, or feeling round the inside of collars, socks and shoes if this is reasonably necessary in the circumstances to look for the object of the search or to remove and examine any item reasonably suspected to be the object of the search. For the same reasons, subject to the restrictions on the removal of headgear, a person's hair may also be searched in public (see paragraphs 3.1 and 3.3)."

Certain steps were required by paragraph 3.8 to be taken before the search:

> "3.8 Before any search of a detained person or attended vehicle takes place the officer must take reasonable steps to give the person to be searched or in charge of the vehicle the following information:
>
> (a) that they are being detained for the purposes of a search;
>
> (b) the officer's name (except in the case of enquiries linked to the investigation of terrorism, or otherwise where the officer reasonably believes that giving his or her name might put him or her in danger, in which case a warrant or other identification number shall be given) and the name of the police station to which the officer is attached;
>
> (c) the legal search power which is being exercised; and
>
> (d) a clear explanation of;
>
> (i) the purpose of the search in terms of the article or articles for which there is a power to search; and
>
> (ii) in the case of powers requiring reasonable suspicion (see paragraph 2.1(a)), the grounds for that suspicion; or
>
> (iii) in the case of powers which do not require reasonable suspicion (see paragraph 2.1(b), and (c)), the nature of the power and of any necessary authorisation and the fact that it has been given."

Officers conducting a search were required by paragraph 3.9 to be in uniform. The Code continued, in paragraphs 3.10-3.11:

> "3.10 Before the search takes place the officer must inform the person (or the owner or person in charge of the vehicle that is to be searched) of his or her entitlement to a copy of the record of the search, including his entitlement to a record of the search if an application is made within 12 months, if it is wholly impracticable to make a record at the time.

If a record is not made at the time the person should also be told how a copy can be obtained (see section 4). The person should also be given information about police powers to stop and search and the individual's rights in these circumstances.

3.11 If the person to be searched, or in charge of a vehicle to be searched, does not appear to understand what is being said, or there is any doubt about the person's ability to understand English, the officer must take reasonable steps to bring information regarding the person's rights and any relevant provisions of this Code to his or her attention. If the person is deaf or cannot understand English and is accompanied by someone, then the officer must try to establish whether that person can interpret or otherwise help the officer to give the required information."

A record was required to be made at the time or as soon as practicable (para 4.1):

"4.1 An officer who has carried out a search in the exercise of any power to which this Code applies, must make a record of it at the time, unless there are exceptional circumstances which would make this wholly impracticable (eg. in situations involving public disorder or when the officer's presence is urgently required elsewhere). If a record is not made at the time, the officer must do so as soon as practicable afterwards. There may be situations in which it is not practicable to obtain the information necessary to complete a record, but the officer should make every reasonable effort to do so."

III. The issues

12. The appellants' applications for judicial review were dismissed by the Queen's Bench Divisional Court (Brooke LJ and Maurice Kay J) ([2003] EWHC 2545 (Admin), [2003] All ER (D) 526 (Oct)). The Court of Appeal (Lord Woolf CJ, Buxton and Arden LJJ) made no order on the appellants' claims against the Commissioner and dismissed their

claims against the Secretary of State: [2004] EWCA Civ 1067, [2005] QB 388. The appellants' case has changed shape somewhat as it has progressed through the courts. It was presented to the House under four main heads.

A. Construction

13. The argument centred on the expression "expedient" in section 44(3). The appellants pointed to the Divisional Court's description of these stop and search powers as "extraordinary" and as "sweeping and far beyond anything ever permitted by common law powers" (para 44 of the judgment), a description echoed by the Court of Appeal (para 8), and suggested that Parliament could not have intended to sanction police intrusion into the freedom of individuals unless it was necessary that the police have such a power. Reliance was placed on the principle of legality articulated in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 130, 131. Reliance was also placed on Home Office Circular 038/2004 (July 2004), *Authorisations of Stop and Search Powers under Section 44 of the Terrorism Act*, addressed to Chief Officers of Police, which emphasised that "Powers should only be authorised where they are absolutely necessary to support a force's anti-terrorism operations". The appellants submitted that section 44(3) should be interpreted as permitting an authorisation to be made only if the decision-maker has reasonable grounds for considering that the powers are necessary and suitable, in all the circumstances, for the prevention of terrorism.

14. I would for my part reject this argument for one short and simple reason. "Expedient" has a meaning quite distinct from "necessary". Parliament chose the first word, also used in section 13A of the 1989 Act, not the second. There is no warrant for treating Parliament as having meant something which it did not say. But there are other reasons also for rejecting the argument. It is true, as already recognised, that section 45(1)(b), in dispensing with the condition of reasonable suspicion, departs from the normal rule applicable where a constable exercises a power to stop and search. One would therefore incline, within the permissible limits of interpretation, to give "expedient" a meaning no wider than the context requires. But examination of the statutory context shows that the authorisation and exercise of the power are very closely regulated, leaving no room for the inference that Parliament did not mean what it said. There is indeed every indication that Parliament appreciated the significance of the power it was conferring but thought it an appropriate measure to protect the public

against the grave risks posed by terrorism, provided the power was subject to effective constraints. The legislation embodies a series of such constraints. First, an authorisation under section 44(1) or (2) 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 under sections 44(1) or (2) 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, which have in the event been made with commendable thoroughness, fairness and expertise by Lord Carlile of Berriew QC. 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.

15. The principle of legality has no application in this context, since even if these sections are accepted as infringing a fundamental human right, itself a debatable proposition, they do not do so by general words but by provisions of a detailed, specific and unambiguous character. Nor are the appellants assisted by the Home Office circular. This may well represent a cautious official response to the appellants' challenge, and to the urging of Lord Carlile that these powers be sparingly used. But it cannot, even arguably, affect the construction of section 44(3). The effect of that sub-section is that an authorisation may be given if, and only if, the person giving it considers it likely that these stop and search powers will be of significant practical value and utility in seeking to achieve the public end to which these sections are directed, the prevention of acts of terrorism.

B. Authorisation and confirmation

16. At 1.0 pm on 13 August 2003 Assistant Commissioner Veness of the Metropolitan Police (an officer of the rank required by section 44(4)(b) of the 2000 Act) gave an authorisation under section 44(4) of that Act. It covered the whole of the Metropolitan Police District and was expressed to have effect for 28 days, until 11.59 p.m. on 9 September, a time some hours after the appellants were stopped and searched. It was confirmed by the Secretary of State on 14 August 2003. Such authorisations had been made continuously for successive periods since section 44 came into force on 19 February 2001, and when this authorisation expired just before midnight on 9 September it was renewed by a further authorisation, also confirmed by the Secretary of State, continuing until 6 October.

17. The appellants' first ground of attack on the authorisation and confirmation was based on their geographical coverage. This, they said, was excessive: even if there was justification for conferring such exceptional powers in areas of central London offering the most spectacular targets for terrorist violence, there could be no need for them in the dormitory suburbs of outer London, which offered no such targets. This is not, in my opinion, an unattractive submission, but it founders on two major obstacles. First, the Assistant Commissioner in his witness statement, having addressed the terrorist threat to the United Kingdom in general and London in particular in August-September 2003, expressly said:

> "(I was particularly conscious that the number and range of particular terrorism targets in London was numerous and geographically spread throughout the entire Metropolitan Police District)."

This aspect was also addressed in the witness statement of Catherine Byrne, a senior Home Office civil servant, on behalf of the Secretary of State:

> "17. In this context it is also simply impracticable to attempt to differentiate between some parts of the Metropolitan Police area and others. As I have already indicated potential targets within the London area are not limited to central London, but exist throughout the

> metropolitan area. Moreover, the powers under sections 44 and 45 of the 2000 Act are aimed not simply at disrupting any attempted attack 'at the last possible moment' but are intended to enable police forces, where appropriate, to ensure that any attempted attack is disrupted at an early stage, and certainly well before any serious harm could be done to members of the public or to property. It must also be remembered that the powers under sections 44 and 45 of the 2000 Act are simply one element of the strategy adopted by the Metropolitan Police (in conjunction with the City of London police) to combat the risk posed by terrorists. This is a point made in the reasons supporting both authorisations made by the Commissioner. Further, the powers under sections 44 and 45 of the 2000 Act play a legitimate part in focussed intelligence gathering operations. These can be directed either for the purpose of disrupting identified risks or (equally legitimately) as a means of obtaining information that can lead to the identification of potential risks."

There is no evidence of any kind to contradict or undermine this testimony. Secondly, as both these witness statements make clear, the Assistant Commissioner and the Secretary of State independently paid attention to secret security intelligence when making the judgments which they respectively did. An offer to explore this evidence before the Divisional Court hearing, subject to procedural safeguards, was made to the appellants but not taken up. In the result, therefore, the House has before it what appear to be considered and informed evaluations of the terrorist threat on one side and effectively nothing save a measure of scepticism on the other. There is no basis on which the respondents' evidence can be rejected. This is not a question of deference but of what in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, para 29, was called "relative institutional competence".

18. The appellants' second, and main, ground of attack was directed to the succession of authorisations which had had effect throughout the Metropolitan Police District since February 2001, continuing until September 2003. It was, they suggested, one thing to authorise the exercise of an exceptional power to counter a particular and specific threat, but quite another to authorise what was, in effect, a continuous ban throughout the London area. Again this is not an unattractive submission. One can imagine that an authorisation renewed month after month might become the product of a routine bureaucratic exercise and

not of the informed consideration which sections 44 and 46 clearly require. But all the authorisations and confirmations relevant to these appeals conformed with the statutory limits on duration and area. Renewal was expressly authorised by section 46(7). The authorisations and confirmations complied with the letter of the statute. The evidence of the Assistant Commissioner and Catherine Byrne does not support, and indeed contradicts, the inference of a routine bureaucratic exercise. It may well be that Parliament, legislating before the events of September 2001, did not envisage a continuous succession of authorisations. But it clearly intended that the section 44 powers should be available to be exercised when a terrorist threat was apprehended which such exercise would help to address, and the pattern of renewals which developed up to September 2003 (it is understood the pattern has since changed) was itself a product of Parliament's principled refusal to confer these exceptional stop and search powers on a continuing, countrywide basis. Reporting on the operation of the 2000 Act during the years 2002 and 2003, Lord Carlile (para 86) found that sections 44 and 45 remained necessary and proportional to the continuing and serious risk of terrorism, and regarded London as "a special case, having vulnerable assets and relevant residential pockets in almost every borough".

19. There is no material before the House to justify the conclusion that the authorisation of 13 August and the confirmation of 14 August 2003, or either of them, were unlawful.

C. The Human Rights Act and the European Convention

20. The appellants addressed argument on articles 5, 8, 10 and 11 of the European Convention on Human Rights. It is necessary to consider these articles separately.

Article 5

21. So far as relevant to this appeal, article 5 provides:

> "Right to liberty and security
>
> 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…."

It is unnecessary to recite the other sub-heads of exception: they provide an exhaustive list of the cases in which, in accordance with a procedure prescribed by law, a person may be deprived of his liberty (*Ireland v United Kingdom* (1978) 2 EHRR 25, para 194), but none of the other exceptions is capable of applying here. Reference must, however, be made to article 2 of the Fourth Protocol to the Convention. This protocol has not been ratified by the United Kingdom, but has been relied on by the European Court when considering what amounts to a deprivation of liberty under article 5. Article 2 of the Fourth Protocol is entitled "Freedom of Movement" and provides in paragraph 1

> "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement …."

22. It is clear that the giving of an authorisation by a senior officer and its confirmation by the Secretary of State cannot, of themselves, infringe the Convention rights of anyone. Thus the threshold question is whether, if a person is stopped and searched in accordance with the procedure prescribed by sections 44-45 and Code A, he is "deprived of his liberty" within the autonomous meaning of that expression in article 5(1). The appellants contend that he is so deprived, even if only for a short time, since the police officer has the power to require compliance with the procedure; a member of the public will not feel that his compliance is voluntary; the officer has a power to detain, which he may or may not exercise (section 45(4)); reasonable force may be used to enforce compliance (section 114(2)); and non-compliance is criminally punishable. Thus a member of the public has no effective choice but to submit, for as long as the procedure takes. The respondents for their part do not, I think, contend that compliance with the procedure is in any meaningful sense voluntary; but they submit that viewed objectively, and in the absence of special circumstances, the procedure involves a temporary restriction of movement and not anything which can sensibly be called a deprivation of liberty.

23. The House was referred to a mass of authority relied on to show that one or other of these approaches should be preferred. There is, however, no European decision on facts closely analogous with the present, and it is not in my view helpful to consider whether a stop and search under section 45 is more closely analogous with, for instance, the case of a man forcibly compelled to submit to a blood test (*X v Austria* (1979) 18 DR 154: held, deprivation of liberty) or with that of a ten year-old girl kept at a police station for two hours for questioning, for part of the time in an unlocked cell (*X v Germany* (1981) 24 DR 158: held, no deprivation of liberty). The Strasbourg jurisprudence is closely focused on the facts of particular cases, and this makes it perilous to transpose the outcome of one case to another where the facts are different. Still more perilous is it, in my opinion, to seek to transpose the outcome of Canadian cases decided under a significantly different legislative regime.

24. The task of the House is eased by the substantial agreement of the parties on the correct approach in principle. Perhaps the clearest exposition of principle by the Strasbourg court is to be found in *Guzzardi v Italy* (1980) 3 EHRR 333, an exposition repeatedly cited in later cases. The case concerned an applicant who, pending his criminal trial, was subject for over 16 months to a form of internal exile on an island off the coast of Sardinia. He was specially supervised in an area of 2.5 square kilometres. He was held to have suffered a deprivation of his liberty. The Commission reached this conclusion (para 90) because of the small area in which the applicant had been confined, the almost permanent supervision to which he had been subject, the all but complete impossibility of his making social contacts and the length of his enforced stay. The Italian Government challenged this analysis on a number of grounds (para 91). In paragraphs 92-93 the Court observed:

> "92. The Court recalls that in proclaiming the 'right to liberty', paragraph 1 of Article 5 is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 which has not been ratified by Italy. In order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole

> range of criteria such as the type, duration, effects and manner of implementation of the measure in question.
>
> 93. 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."

The Court continued (para 95):

> "95. The Government's reasoning (see para 91 above) is not without weight. It demonstrates very clearly the extent of the difference between the applicant's treatment on Asinara and classic detention in prison or strict arrest imposed on a serviceman. Deprivation of liberty may, however, take numerous other forms. Their variety is being increased by developments in legal standards and in attitudes; and the Convention is to be interpreted in the light of the notions currently prevailing in democratic States."

The Court went on to review the special features of the applicant's situation, and held:

> "It is admittedly not possible to speak of 'deprivation of liberty' on the strength of any one of these factors taken individually, but cumulatively and in combination they certainly raise an issue of categorisation from the viewpoint of Article 5. In certain respects the treatment complained of resembles detention in an 'open prison' or committal to a disciplinary unit."

25. It is accordingly clear, as was held in *HL v United Kingdom* (2004) 40 EHRR 761, para 89, that

> "in order to determine whether there has been a deprivation of liberty, the starting-point must be the concrete situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question."

I would accept that when a person is stopped and searched under sections 44-45 the procedure has the features on which the appellants rely. On the other hand, 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 as "the better view" (para 46), and I agree.

26. If, however, a stop and search carried out in accordance with sections 44-45 and Code A, in the absence of special circumstances, does involve a deprivation of liberty, it is necessary to consider (as the Court of Appeal did) (a) whether that deprivation is in accordance with the law and, if so, (b) whether it is a lawful detention in order to secure the fulfilment of an obligation prescribed by law. Whether the deprivation is in accordance with the law and whether the relevant obligation is prescribed by law are questions separately considered in paragraphs 31 to 35 below. If not, and if there is a deprivation of liberty, the appellants must succeed, for the respondents cannot rely on the exception. But if, for purposes of the argument at this stage, compliance with the law be assumed, the respondents in my opinion bring themselves within the exception, for the public are in my opinion subject to a clear obligation not to obstruct a constable exercising a lawful power to stop and search for articles which could be used for terrorism and any detention is in order to secure effective fulfilment of that obligation.

Article 8

27. Article 8(1) provides that

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

By article 8(2),

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety …. for the prevention of disorder or crime …. or for the protection of the rights and freedoms of others."

28. The appellants contended that exercise of the section 45 stop and search power necessarily involves an interference with the exercise of the article 8(1) right, and therefore had to be justified under article 8(2). The respondents did not accept that there would necessarily be such interference, but accepted that there might, as where (for instance) an officer in the course of a search perused an address book, or diary, or correspondence. I have no doubt but that the respondents' concession is rightly made. I am, however, 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.

29. If, again, the lawfulness of the search is assumed at this stage, there can be little question that it is directed to objects recognised by article 8(2). The search must still be necessary in a democratic society, and so proportionate. But if the exercise of the power is duly authorised and confirmed, and if the power is exercised for the only purpose for which it may permissibly be exercised (ie. to search for articles of a kind which could be used in connection with terrorism: section 45(1)(a)), it would in my opinion be impossible to regard a proper exercise of the power, in accordance with Code A, as other than proportionate when seeking to counter the great danger of terrorism.

Articles 10 and 11

30. The power to stop and search under sections 44-45 may, if misused, infringe the Convention rights to free expression and free assembly protected by articles 10 and 11, as would be the case, for example, if the power were used to silence a heckler at a political meeting. I find it hard to conceive of circumstances in which the power, properly exercised in accordance with the statute and Code A, could be held to restrict those rights in a way which infringed either of those articles. But if it did, and subject always to compliance with the "prescribed by law" condition discussed below, I would expect the restriction to fall within the heads of justification provided in articles 10(2) and 11(2).

D. Lawfulness

31. The expressions "prescribed by law" in article 5(1), 5(1)(b), 10(2) and 11(2) and "in accordance with the law" in article 8(2) are to be understood as bearing the same meaning. What is that meaning?

32. The appellants relied on a number of authorities such as *Malone v United Kingdom* (1984) 7 EHRR 14, paras 66-68, *Huvig v France* (1990) 12 EHRR 528, *Hafsteinsdóttir v Iceland* (App No 40905/98, 8 June 2004, unreported), paras 51, 55-6 and *Enhorn v Sweden* (2005) 41 EHRR 633, para 36, to submit that the object of this requirement is to give protection against arbitrary interference by public authorities; that "law" includes written and unwritten domestic law, but must be more than mere administrative practice; that the law must be accessible, foreseeable and compatible with the rule of law, giving an adequate indication of the circumstances in which a power may be exercised and thereby enabling members of the public to regulate their conduct and foresee the consequences of their actions; that the scope of any discretion conferred on the executive, which may not be unfettered, must be defined with such precision, appropriate to the subject matter, as to make clear the conditions in which a power may be exercised; and that there must be legal safeguards against abuse. These requirements, the appellants argued, were not met in the present case. They acknowledged, of course, that sections 44-47 of the 2000 Act were adequately accessible to the public. But they contended that "law" in this context meant not only the Act but also the authorisation and confirmation, and these were not accessible. Thus a member of the public would know that the section 44 power to stop and search could be

conferred on the police, but would not know at any given time or in any given place whether it had been. He could not know whether, if he went to Battersea Park, he would be liable to be stopped and searched. Nor, if stopped and searched, could he know whether the constable was authorised to stop and search him. When, unknown to a member of the public, the power had been conferred on a constable, the constable's discretion to stop and search was broad and ill-defined, requiring no grounds of suspicion and constrained only by the condition that the power could be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism.

33. The respondents did not, I think, challenge the principles advanced by the appellants, which are indeed to be found, with minor differences of expression, in many decisions of the Strasbourg court. But they strongly challenged the appellants' application of those principles to the present facts. They did not accept that the authorisation and confirmation were "law" in this context. They pointed to the court's acceptance in *Malone*, above, para 67, a case concerned with the covert interception of telephonic communications, that

> "the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly."

The court had recognised that in some fields legal rules could not be laid down with total precision (*Bronda v Italy* (1998) 33 EHRR 81, para 54) and that a measure of vagueness was inevitable if excessive rigidity was to be avoided *Kuijper v Netherlands* (App No 64848/01, 3 March 2005, unreported). There were, moreover, strong reasons for not publishing the details of authorisations, which would by implication reveal those places where such measures had not been put in place, thereby identifying vulnerable targets, and could undermine the ability of the police to use such powers effectively in cases where they suspected that terrorists might be operating and wished to conduct random stopping and searching in a particular area in the hope of catching them without giving them warning in advance. The respondents contended that the

constable's discretion was closely constrained by the sole purpose for which the power could be properly exercised. An improper authorisation and confirmation were susceptible to challenge by judicial review. An improper stop and search would expose the constable to claims in tort for wrongful imprisonment, trespass to the person and goods, and breach of Convention rights.

34. The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly-accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided.

35. The stop and search regime under review does in my opinion meet that test. The 2000 Act informs the public that these powers are, if duly authorised and confirmed, available. It defines and limits the powers with considerable precision. Code A, a public document, describes the procedure in detail. 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. The efficacy of a measure such as this will be gravely weakened if potential offenders are alerted in advance. Anyone stopped and searched must be told, by the constable, all he needs to know. In exercising the power 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. It is not suggested that the constables in these cases exercised their powers in a discriminatory manner (an impossible contention on the facts), and I prefer to say nothing on the subject of discrimination.

IV. The exercise of the powers in this case

36. In summarising the facts in paragraphs 2 and 3 above, I have deliberately omitted reference to matters mentioned by the respective appellants in their witness statements which, if accepted, might show that the stop and search powers were improperly exercised in their cases. This is an aspect which, because of the course these proceedings have taken, has not been explored in sworn evidence by the appellants, or tested in cross-examination, or made the subject of any evidence by the officers who conducted the searches. It is a matter which the appellants may, if so advised, pursue in county court proceedings which they have already issued. It is a matter which the House cannot fairly resolve at this stage in these proceedings. I therefore express no opinion upon it.

37. I would accordingly dismiss both appeals and invite the parties to make written submissions on costs within 14 days.

LORD HOPE OF CRAIGHEAD

My Lords,

38. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with it, and for the same reasons I too would dismiss both appeals. I should like however to add a few words on the two aspects of the case that seem to me to be the most troublesome.

39. They both relate to the discrimination issue to which my noble and learned friend Lord Brown of Eaton-under-Heywood very properly draws attention in his speech. How does the fact that it is likely to be difficult in practice to detect discriminatory use of the power square with the principle of legal certainty that requires that the use of such powers must be in accordance with the law if they are to be compatible with the Convention rights? And how in practice is discriminatory use of the power to be prevented, given the nature of the terrorist threats that it is designed for? I should like to take these questions in the reverse order, because the answer that I would give to the first question has a close bearing on the problem that is raised by the second.

Discrimination

40. The extent of the stop and search power in section 45 of the Terrorism Act 2000 is defined in subsection (1) of that section. This subsection provides (a) that it may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and (b) that it may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind. It is combined with a power to detain the person or vehicle that the constable proposes to search, but only for such time as is reasonably required to permit the search to be carried out at or near the place where the person is stopped: section 45(4). The power may only be exercised in an area or at a place specified in an authorisation given under section 44(1) or (2), and an authorisation may be given only if the person giving it considers it expedient for the prevention of acts of terrorism. An authorisation must be confirmed by the Secretary of State within 48 hours, failing which it ceases to have effect: section 46(4).

41. One has only to observe the huge numbers of people moving every day through this country's transport network to appreciate the fact that it would be wholly counter-productive for the police to be compelled to exercise the section 44 power in these circumstances on a basis that was a purely random one. Those they might wish to stop for very good reasons would slip through the net as the process of random selection was being conducted. A brief study of the selection process would be enough to guide the terrorist as to how to organise his movements so that he could remain undetected. A system that is to be effective has to be flexible. Precise rules cannot be laid down in advance. Much has to be left to the discretion of the individual police officer.

42. Common sense tells us that the nature of the terrorist threat will play a large part in the selection process. Typically terrorist acts are planned, organised and perpetrated by people acting together to promote a common cause rather than by individuals. They will have a common agenda. They are likely to be linked to sectors of the community that, because of their racial, ethnic or geographical origins, are readily identifiable. That was true of sectarian violence during the troubles in Northern Ireland, as Simon Brown LJ pointed in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] QB 811, 840G-H, para 86 In that passage he was contemplating the use of stop and search powers following a terrorist outrage. It is certainly true today, as

the current wave of international terrorism is linked to groups that have an Islamic fundamentalist background.

43. What then if it is found that the police are using the section 44 power more frequently to stop Asians than other racial groups in the community? Does this amount to direct discrimination contrary to domestic law, as Mr Rabinder Singh QC suggested from time to time in the course of his argument? The issue does not arise directly in this case, of course, because neither of the appellants is of Asian origin. But it cannot be overlooked, especially in view of the concern that the House expressed in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2005] 2 AC 1 about the fact that all Roma applicants were being routinely treated, simply because they were Roma, with more suspicion and subjected to more intensive and intrusive questioning than non-Roma. As Baroness Hale of Richmond said, at p 64B-C, para 97, the setting up of an operation to meet the challenge of dealing with an influx of asylum seekers from one comparatively easily identified racial or ethnic group required enormous care if it was to be done without discrimination. The evidence showed that the operation that was being conducted in that case was inherently and systematically discriminatory and unlawful.

44. The decision in the *Roma* case reminds us that if a person discriminates on racial grounds the reason why he does so is irrelevant. The use of the section 44 power on racial grounds is not exempt for being treated as discriminatory simply because of the purpose for which it is being exercised. It is no answer to say that the time and place for the exercise of the section 44 power was selected in response to the threat of a terrorist outrage, any more than it was to say that the procedures that were being operated at Prague airport were designed to deal with an influx through that airport of asylum seekers of Roma origin. Nor is it an answer to say that a decision as to when and where to exercise the power was based on common sense, as Lord Brown points out: para 88. The whole point of making it unlawful for a public authority to discriminate on racial grounds is that impressions about the behaviour of some individuals of a racial group may not be true of the group as a whole. Discrimination on racial grounds is unlawful whether or not, in any given case, the assumptions on which it was based turn out to be justified.

45. Where then does this leave the police officer when he is deciding whom to stop and search in the exercise of the section 44 power? The

key must surely lie in the point which Baroness Hale made in her speech in the *Roma* case, at p 59H, para 82, that the object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group. That was the trap into which the immigration officers fell at Prague airport, as the evidence showed that all Roma were being treated in the same way simply because they were Roma. So a police officer who stops and searches a person who appears to be Asian in the exercise of the section 44 power must have other, further, good reasons for doing so. It cannot be stressed too strongly that the mere fact that the person appears to be of Asian origin is not a legitimate reason for its exercise.

46. Times and places will vary, of course, and the numbers and mixture of people of different races and ethnic backgrounds that one sees using buses, railways and the London Underground may not be typical of the places where authorisations are given throughout the country. But a decision to use the section 44 power will in practice always be based on more than the mere fact of a person's racial or ethnic origin if it is to be used properly and effectively, especially in places where people are present in large numbers. The selection process will be more precisely targeted, even if in the end it is based more on a hunch than on something that can be precisely articulated or identified. Age, behaviour and general appearance other than that relating to the person's racial or ethnic background will have a part to play in suggesting that a particular person might possibly have in his possession an article of a kind which could be used in connection with terrorism. An appearance which suggests that the person is of Asian origin may attract the constable's attention in the first place. But a further selection process will have to be undertaken, perhaps on the spur of the moment otherwise the opportunity will be lost, before the power is exercised. It is this further selection process that makes the difference between what is inherently discriminatory and what is not.

47. On balance, therefore, I think that it is not inevitable that stopping persons who are of Asian origin in the exercise of the section 44 power will be found to be discriminatory. But the risk that it will be employed in a discriminatory fashion cannot be discounted entirely. No more can the risk that the power will be used on occasions, as the appellants claim but has yet to be established by evidence, for a purpose that has nothing to do with the prevention of acts of terrorism. These thoughts lead to the problem of satisfying the test of legal certainty. This must be done if the use of the section 44 power is not to be open to the objection that it is, by its very nature, arbitrary.

Legal certainty

48. The sight of police officers equipped with bundles of the stop/search form 5090 which is used to record the fact that a person or vehicle was stopped by virtue of sections 44(1) or 44(2) has become familiar in Central London since the suicide bombings that were perpetrated on 7 July 2005 and the attempts to repeat the attacks two weeks later. They can be seen inside the barriers at stations on the London Underground, watching people as they come through the barriers and occasionally stopping someone who attracts their attention and searching them. Most people who become aware of the police presence are there because they want to use the transport system. The travelling public are reassured by what they see the police doing at the barriers. They are in the front line of those who would be at risk if there were to be another terrorist outrage. But those who are singled out, stopped and searched in this way may well see things differently. They may find the process inconvenient, intrusive and irritating. As it takes place in public, they may well also find it embarrassing. This is likely to be the case if they believe, contrary to the facts, that they are being discriminated against on grounds of race. These features of the process give rise to this question. Are the limits on the use of the power sufficient to answer a challenge that the Convention rights of the person who is searched are being violated because its use is unforeseeable and arbitrary?

49. From that person's perspective the situation is one where all the cards are in the hands of the police. It is they, and not the general public, who know that an authorisation is in force and the area that it relates to. It is they who decide when and where within that area they should exercise the power that has been given to them. It is they who decide which persons or which vehicles should be stopped and searched. Sections 44(1) and 44(2) make it clear that the power may be exercised only by a constable in uniform. Section 45(1)(a) provides that the power may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism. But no criterion is laid down in the statute or in any published document as to the precise state of mind that the constable must be in before the power can be exercised.

50. Section 45(1)(b) provides that the power may be exercised whether or not the constable has grounds for suspecting the presence of articles of a kind which could be used in connection with terrorism. The definition of the word "terrorism" for the purposes of the Act is a wide

one, and the matter is left to the judgment of each individual police officer. The first indication that members of the public are likely to get that they are liable to be stopped and searched is when the order to stop is given. Those who are well informed may get some indication as to what is afoot when they see the police with bundles of forms in their hands looking in their direction. But for most people the order to stop will come as a surprise. Unless they are in possession of articles of the kind that the constable is entitled to search for, they may well wonder why they have been singled out for the treatment that they are being subjected to.

51. There is, of course, a strong argument the other way. If the stop and search procedure is to be effective in detecting and preventing those who are planning to perpetrate acts of terrorism it has to be like this. Advertising the time when and the places where this is to be done helps the terrorist. It impedes the work of the security services. Sophisticated methods of disguise and concealment may be used where warnings are given. Those involved in terrorism can be expected to take full advantage of any published information as to when and where the power is likely to be exercised. So the police need to be free to decide when and where the use of the procedure is to be authorised and whom they should stop on the spur of the moment if their actions are to be a step ahead of the terrorist. Must this system be held to be unlawful under Convention law, as Mr Rabinder Singh submitted it should, on the ground that it is arbitrary?

52. The question whether the process is in accordance with the law for the purposes of the Convention is not answered merely by a finding that it is lawful under domestic law. That is only the first stage in the analysis: see *R v Governor of Brockhill Prison, ex p Evans* [2001] 2 AC 19, 38B-E. There are two further questions that must be answered. One is whether, assuming that the process is lawful under domestic law, it nevertheless fails to comply with the general requirements of the Convention as to the quality of the law in question. These requirements are based on the principle that any restrictions on the rights and freedoms of the individual must be prescribed by law in a way that is sufficiently accessible and sufficiently precise to enable the individual to foresee the consequences. The other is whether, assuming again that the two previous criteria are met, the process is nevertheless open to criticism on the ground that it is arbitrary. The appellants submit that the criterion of foreseeability is not met because the powers are widely drawn, and because the public does not have access to the authorisations which are not published. They also submit that, because it is so difficult

to detect an improper or discriminatory use of it, the power that is given to the constable is arbitrary.

53. The criterion of lawfulness can be examined in four stages. First there is the legislation. Next, there is the general guidance that is given by Code A as to how the powers under section 44 are to be exercised. Then there are the authorisations themselves, whose issue is a necessary preliminary to the exercise of the section 44 power and which the Secretary of State must confirm. Finally, and crucially, there is the exercise of the power by the police officers who are authorised to make use of it.

54. Guidance as to how the question should be approached is provided by the Strasbourg authorities. The European Court recognised in *Kuijper v The Netherlands*, Application no 64848/01, 3 March 2005, pp 13-14, that legislation may have to avoid excessive rigidity if it is to keep pace with changing circumstances. It may be couched in terms which, because they are to a greater or lesser extent vague, must be left to interpretation and application to the facts by the courts. In *Huvig v France* (1990) 12 EHRR 528, paras 33-34, the court also recognised the value, in the context of telephone tapping, of regulatory control, including supervision by the courts if need be, even though it was found to be lacking in that case in the absence of legislation or case law. In *Malone v United Kingdom* (1985) 7 EHRR 14, para 67, the court said that the requirement of foreseeability did not mean that an individual had to be able to foresee when his communications were likely to be intercepted by the authorities. Nevertheless the law had to be sufficiently clear in its terms to give citizens an adequate indication of the circumstances in which and the conditions on which the authorities were empowered to resort to this.

55. I think that one can draw together the guidance to be found in these authorities, and in the others to which Lord Bingham has referred, in this way. The use of the section 44 power has to be seen in the context of the legislation that provides for it. The need for its use at any given time and in any given place to be authorised, and for the authorisation to be confirmed within 48 hours, provides a background of law that is readily accessible to the citizen. It provides a system of regulatory control over the exercise of the power which enables the person who is stopped and searched, if he wishes, to test its legality in the courts. In that event the authorisation and the confirmation of it will of necessity, to enable the law to be tested properly, become relevant evidence. The guidance in para 2.25 of Code A warns the constable that

the power is to be used only for reasons connected with terrorism, and that particular care must be taken not to discriminate against members of minority ethnic groups when it is being exercised. It is no more precise than that. But it serves as a reminder that there is a structure of law within which the power must be exercised. A constable who acts within these limits is not exercising the section 44 power arbitrarily.

56. As the concluding words of para 67 of the decision in *Malone v United Kingdom* (1985) 7 EHRR 14 indicate, the sufficiency of these measures must be balanced against the nature and degree of the interference with the citizen's Convention rights which is likely to result from the exercise of the power that has been given to the public authority. The things that a constable can do when exercising the section 44 power are limited by the provisions of section 45(3) and 45(4). He may not require the person to remove any clothing in public except that which is specified, and the person may be detained only for such time as is reasonably required to permit the search to be carried out at or near the place where the person or vehicle has been stopped. The extent of the intrusion is not very great given the obvious importance of the purpose for which it is being resorted to. In my opinion the structure of law within which it is to be exercised is sufficient in all the circumstances to meet the requirement of legality.

57. It should be noted, of course, that the best safeguard against the abuse of the power in practice is likely to be found in the training, supervision and discipline of the constables who are to be entrusted with its exercise. Public confidence in the police and good relations with those who belong to the ethnic minorities are of the highest importance when extraordinary powers of the kind that are under scrutiny in this case are being exercised. The law will provide remedies if the power to stop and search is improperly exercised. But these are remedies of last resort. Prevention of any abuse of the power in the first place, and a tighter control over its use from the top, must be the first priority.

LORD SCOTT OF FOSCOTE

My Lords,

58. I have had the advantage of reading in advance the opinion of my noble and learned friend Lord Bingham of Cornhill and am in full agreement with his reasons for concluding that these appeals should be dismissed. I want to add just a few words of my own.

59. Lord Bingham, in paragraphs 14 and 15 of his opinion, has rejected the appellants' contention that the adjective "expedient" in section 44(3) of the Act of 2000 should be construed as meaning "necessary and suitable in all the circumstances". This construction, say the appellants, is required in order to comply with the principle of legality. The stop and search powers of the police where a section 44 "authorisation" is in place are exercisable without the need for a prior reasonable suspicion that the object of the search is engaged in any wrongful conduct and, therefore, interfere with "fundamental notions of liberty and privacy of the individual" (para.40 of the appellants' Case). Parliament, it is argued, cannot have intended the general words of sub-section (3) to permit the infringement of fundamental common law liberties. "Expedient" should be read as "necessary".

60. My Lords, I would reject this argument for all the reasons given by Lord Bingham and would add that the adjective "expedient" was deployed in Part V of the Act ("Counter-Terrorist Powers") not only in section 44(3) but also in section 48(2). In section 44(3) the adjective was used to describe the only purpose for which stop and search authorisations could be given. In section 48(2) the adjective was used to describe the only purpose for which an authorisation enabling a police officer "to prohibit or restrict the parking of vehicles on a [particular] road specified in the authorisation" could be given. A section 48 parking authorisation may only be given "if the person giving it considers it expedient for the prevention of acts of terrorism". It is not remotely arguable that a power to impose parking restrictions interferes with fundamental notions of liberty or privacy; nor can it be supposed that the word "expedient" can have a stricter construction in section 44(3) than it has in section 48(2). Parliament's use of the same language in section 48(2) as in section 44(3) reduces greatly, in my opinion, the weight of the appellants' argument on construction. I am therefore in respectful agreement with what Lord Bingham has said in paragraph 15 of his opinion and, in particular, with the last sentence of that paragraph.

61. The appellants, in challenging the validity of the stop and search authorisation in reliance on which the police officers stopped and searched them, contend that the authorisation, and its confirmation by the Home Secretary, constituted an excessive and disproportionate response to the threat of terrorist activity in London at that time. They say that the authorisation and confirmation went outside the boundaries of a reasonable response to that threat.

62. The problem, to my mind, with a challenge of this character is that an assessment of the reasonableness of the response requires an assessment of the degree of seriousness of the terrorist threat to which the authorisation was a response. This latter assessment will in most cases require some knowledge of the intelligence material on which the police and the Home Secretary relied when making their own assessment of that threat and of what should be done in response to it. The appellants have not contended that the giving of a section 44 authorisation could never be a proportionate response to a threat of terrorist activity. They accept, and indeed contend, that a balance must be struck between, on the one hand, the degree of interference with ordinary liberties brought about by police exercising their section 44 stop and search powers and, on the other hand, the degree of risk to the public posed by the terrorist threat as it appears from the available intelligence material.

63. The appellants say that when this balance is struck the giving of the authorisation can be judged to be a disproportionate response. I disagree for two reasons. First, the interference with the fundamental rights of individuals brought about by a police power to stop and search without the need for reasonable suspicion of wrongdoing is not, in my opinion, of overwhelming weight. It is not an interference of the same order as, for example, an indefinite detention on undisclosed grounds. A stop and search will often be very annoying to the person concerned, and may sometimes produce a feeling of humiliation or a perception of victimisation or discrimination; but any invasion of privacy will be shortlived and any deprivation of liberty will usually be no more than theoretical. These are the matters that must go into one side of the scale when the balance is struck. What goes into the other side of the scale must depend on the intelligence material that has been relied on as justifying, or requiring, the giving of the authorisation. I would not, speaking for myself, expect a challenge to the validity of a section 44 stop and search authorisation, based on the alleged disproportionate nature of that response to a perceived threat of terrorism, to be able to succeed without the court having had an opportunity to review the intelligence material that had been relied on.

64. In the present case the Divisional Court did not have that opportunity. It is common ground that prior to the Divisional Court hearing the Home Secretary offered the appellants a procedure (involving the use of a Special Advocate) whereby the Divisional Court could review in closed session the underlying intelligence material on the basis of which the Home Secretary had confirmed the authorisation. But the offer was not taken up and the relevant evidence, given by Catherine Byrne, a senior civil servant in the Home Office, was of an unspecific character (see paras.11 to 18 of her witness statement). In that state of the evidence the Divisional Court could not reasonably have concluded that the authorisation was a disproportionate response to the threat of terrorist activity in London appearing from the available intelligence material. Nor could the Court of Appeal and nor, in my opinion, can your Lordships. What the position would have been had the underlying intelligence material been reviewed it is impossible to tell.

65. I would therefore reject the challenge to the validity of the authorisation and its confirmation by the Home Secretary.

66. The appellants say also that, even if the authorisation and its confirmation were valid, the stopping and searching to which each of them was subjected was unlawful. Section 45 of the Act makes clear that the exercise of the section 44 stop and search power

> "… may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism" (ss(1)(a)).

It follows that if the section 44 stop and search power is used for some other purpose, its use is unlawful. Each of the appellants has formed the view that he/she was stopped and searched for public order reasons not connected with terrorism but with protests and disturbances that the police apprehended might occur at the Docklands arms fair. Each of them has commenced county court proceedings claiming damages in tort. These contentions raise issues of fact which can be resolved in the county court proceedings but cannot assist the appellants on this appeal.

67. Having had the advantage of reading in advance the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood I would like to associate myself with his comments about random

searches. Whether a stop and search is random depends on whether the question is asked from the point of view of the searcher or that of the searched. From the point of view of the person searched the police officer's choice of him or her to be subjected to a search may seem entirely random, or may seem absurd or discriminatory or vindictive. But from the point of view of the police officer, it is difficult to see how the choice could ever be a random one. A policy of stopping and searching every tenth person is not a random search; it is a search that follows a pattern. The pattern would allow the police officer no room for judgment as to who to stop and search. It would therefore be a pattern designed to minimise the chances of achieving the statutory purpose of combating terrorism. In the real world a police officer will always have some reason for selecting a particular individual as a person to be stopped and searched. The reason does not have to be based on grounds for suspicion (see s.45(1)(b)). It may be based, as Lord Brown has said, on no more that a professional's intuition. Or it may be because the person selected conforms to some extent in the mind of the police officer to a stereotype of a person who might possibly be in possession of articles "which could be used in connection with terrorism" (s.45(1)(a)).

68. Lord Brown has raised the question whether an exercise of the section 44 power more frequently with regard to persons of Asian appearance than to others can be reconciled with the requirements of domestic discrimination law. This issue was not addressed by counsel but, speaking for myself, I do not think that domestic discrimination law would invalidate what otherwise would be a lawful use of stop and search powers conferred by the 2000 Act. If and to the extent that a use of stop and search powers for the statutory purpose expressed in section 45(1) might require some degree of stereotyping in the selection of the persons to be stopped and searched and arguably, therefore, some discrimination, that use would, I think, be validated by the statutory authority of the 2000 Act (see s.41(1)(a) and s.42 of the Race Relations Act 1976, as amended). I do not, therefore, share the concerns of my noble and learned friend about the implications of the *Roma Rights* case [2005] 2 AC 1.

69. I would dismiss these appeals.

LORD WALKER OF GESTINGTHORPE

My Lords,

70. I am in full agreement with the opinion of my noble and learned friend Lord Bingham of Cornhill, which I have had the privilege of reading in draft. For the reasons given by Lord Bingham I would dismiss these appeals.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

71. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. So completely do I agree with it that much of what I had intended to say now seems superfluous. The appeal does, however, raise points of real constitutional importance and on one particular aspect of it I would still like to express certain thoughts of my own.

72. Sections 44 and 45 of the Terrorism Act 2000 ("the 2000 Act") allow police officers in certain circumstances to stop and search members of the public innocently going about their business (whether in a vehicle or on foot) without the officer having to have any grounds whatever for suspecting the person of the least wrongdoing. Those two sections, together with the other relevant legislation, are to be found in Lord Bingham's opinion and it is quite unnecessary to set them out afresh.

73. Put shortly, these provisions enable an authorisation to be given (if considered expedient for the prevention of acts of terrorism) which in turn confers upon police officers the power to stop and search vehicles, their drivers, passengers and contents, and also pedestrians. The power may be exercised only to search for articles of a kind useful in connection with terrorism (which the constable can then retain if he reasonably suspects that such was their intended use), but it is exercisable irrespective of whether the constable has grounds for suspecting the presence of articles of that kind.

74. Given the exceptional (although, as Lord Bingham has explained, neither unique nor particularly novel) nature of that power (often described as the power of random search, requiring for its exercise no reasonable suspicion of wrongdoing), it is unsurprisingly hedged about with a wide variety of restrictions and safeguards. Those most directly relevant to the way in which the power impacts upon the public on the ground are perhaps these. It can be used only by a constable in uniform (section 44 (1) and (2)). It can be used only to search for terrorist-connected articles (section 45(1) (a)). The person searched must not be required to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves (section 45(3)). The search must be carried out at or near the place where the person or vehicle is stopped (section 45(4)). And the person or vehicle stopped can be detained only for such time as is reasonably required to permit such a search (section 45(4)). Unwelcome and inconvenient though most people may be expected to regard such a stop and search procedure, and radically though it departs from our traditional understanding of the limits of police power, it can scarcely be said to constitute any very substantial invasion of our fundamental civil liberties. Nevertheless, given, as the respondents rightly concede, that in certain cases at least such a procedure will be sufficiently intrusive to engage a person's article 8 right to respect for his private life, and given too that this power is clearly open to abuse—the inevitable consequence of its exercise requiring no grounds of suspicion on the police officer's part—the way is clearly open to an argument that the scheme is not properly compliant with the Convention requirement that it be "in accordance with the law."

75. For this requirement to be satisfied, Mr Rabinder Singh QC correctly reminds your Lordships, not only must the interference with the Convention right to privacy have some basis in domestic law (as here clearly it does in the 2000 Act); not only must that law be adequately accessible to the public (as here clearly it is—unlike, for example, the position in *Malone v United Kingdom* (1985) 7 EHRR 14); not only must the law be reasonably foreseeable, to enable those affected to regulate their conduct accordingly (a requirement surely here satisfied by the public's recognition, from the very terms of the legislation, that drivers and pedestrians are liable to be subjected to this form of random search and of the need to submit to it); but there must also be sufficient safeguards to avoid the risk of the power being abused or exercised arbitrarily.

76. As I understand the appellants' argument, it is upon this final requirement that it principally focuses: this power, submits Mr Singh, is all too easily capable of being used in an arbitrary fashion and all too

difficult to safeguard against such abuse. True, he acknowledges, if the power is in fact abused in any particular case the police officer concerned will be liable to a civil claim for damages (and, no doubt, to police disciplinary action). But, he submits, it will usually be impossible to establish a misuse of the power given that no particular grounds are required for its apparently lawful exercise. Assume, for example, that a police officer in fact exercises this power for racially discriminatory reasons of his own, how could that be established? There are simply no effective safeguards against such abuse, no adequate criteria against which to judge the propriety of its use. Certainly it is provided by paragraph 2.25 of Code A (a published code issued under section 66 of the Police and Criminal Evidence Act 1984) that: "Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers". But, say the appellants, there is simply no way of policing that instruction with regard to the exercise of so wide a random power. No way, that is, submits Mr Singh, unless it is by stopping and searching literally everyone (as, of course, occurs at airports and on entry to certain other specific buildings) or by stopping and searching on a strictly numerical basis, say every tenth person. Only in one or other of these ways, the appellants' argument forces them to contend, could such a power as this be exercisable consistently with the principle of legal certainty: there cannot otherwise be the necessary safeguards in place to satisfy the Convention requirement as to "the quality of the law" (a concept explored in a number of the Strasbourg authorities, as, for example in *Huvig v France* (1990) 12 EHRR 528 at paragraphs 29-35).

77. I would reject this argument. In the first place it would seem to me impossible to exercise the section 44 power effectively in either of the ways suggested. Imagine that following the London Underground bombings last July the police had attempted to stop and search everyone entering an underground station or indeed every tenth (or hundredth) such person. Not only would such a task have been well nigh impossible but it would to my mind thwart the real purpose and value of this power. That, as Lord Bingham puts it in paragraph 35 of his opinion, is not "to stop and search people who are obviously not terrorist suspects, which would be futile and time-wasting [but rather] 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." It is to be hoped, first, that potential terrorists will be deterred (certainly from carrying the tools of their trade) by knowing of the risk they run of being randomly searched, and, secondly, that by the exercise of this power police officers may on occasion (if only very rarely) find such materials and thereby disrupt or avert a proposed terrorist attack. Neither of these

aims will be served by police officers searching those who seem to them least likely to present a risk instead of those they have a hunch may be intent on terrorist action.

78. In his 2001 review of the operation of the Prevention of Terrorism (Temporary Provisions) Act 1989 (amended as explained by Lord Bingham in paragraph 9 of his opinion) and the Northern Ireland (Emergency Provisions) Act 1996, Mr John Rowe QC said this of the power to stop and search those entering or leaving the United Kingdom with a view to finding out whether they were involved in terrorism:

> "The 'intuitive' stop
>
> 37. It is impossible to overstate the value of these stops …
>
> 38. I should explain what I mean by an 'intuitive stop'. It is a stop which is made 'cold' or 'at random'—but I prefer the words 'on intuition'—without advance knowledge about the person or vehicle being stopped.
>
> 39. I do not think such a stop by a trained Special Branch officer is 'cold' or 'random'. The officer has experience and training in the features and circumstances of terrorism and terrorist groups, and he or she may therefore notice things which the layman would not, or he or she may simply have a police officer's intuition. Often the reason for such a stop cannot be explained to the layman."

79. Later in his review Mr Rowe noted of the more general stop and search powers originally contained in sections 13A and 13B of the 1989 Act that "these powers were used sparingly, and for good reason". I respectfully agree that the section 44 power (as it is now) should be exercised sparingly, a recommendation echoed throughout a series of annual reports on the 2000 Act by Lord Carlile of Berriew QC, the independent reviewer of the terrorist legislation appointed in succession to Mr Rowe—see most recently paragraph 106 of his 2005 report, suggesting that the use of the power "could be cut by at least 50 per cent without significant risk to the public or detriment to policing." To my mind, however, that makes it all the more important that it is targeted as the police officer's intuition dictates rather than used in the true sense randomly for all the world as if there were some particular merit in stopping and searching people whom the officers regard as constituting no threat whatever. In short, the value of this legislation, just like that

allowing people to be stopped and searched at ports, is that it enables police officers to make what Mr Rowe characterised as an intuitive stop.

80. Of course, as the Privy Counsellor Review Committee chaired by Lord Newton of Braintree noted in its December 2003 report on the Anti-Terrorism, Crime and Security Act 2001:

> "Sophisticated terrorists change their profile and methods to avoid presenting a static target. For example, al Qaeda is reported to place particular value on recruiting Muslim converts because they judge them to be less likely to be scrutinised by the authorities."

It seems to me inevitable, however, that so long as the principal terrorist risk against which use of the section 44 power has been authorised is that from al Qaeda, a disproportionate number of those stopped and searched will be of Asian appearance (particularly if they happen to be carrying rucksacks or wearing apparently bulky clothing capable of containing terrorist-related items).

81. Is such a conclusion inimical to Convention jurisprudence or, indeed, inconsistent with domestic discrimination law? In my judgment it is not, provided only that police officers exercising this power on the ground pay proper heed to paragraph 2.25 of Code A:

> "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 unconnected with terrorism. Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers. There may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities)."

Ethnic origin accordingly can and properly should be taken into account in deciding whether and whom to stop and search provided always that the power is used sensitively and the selection is made for reasons connected with the perceived terrorist threat and not on grounds of racial discrimination.

82. A salutary reminder of the need for sensitivity in the exercise of this power is to be found in the June 2005 report (2005) 41 EHRR SE9 by Mr Gil-Robles, the Council of Europe Commissioner for Human Rights, following his visit to the United Kingdom in November 2004:

> "33. Whilst strong measures may prove necessary to counter serious terrorist threats, their impact on certain communities should be an important consideration when deciding to adopt such measures and every effort must be made to avoid the victimisation of the vast majority of innocent individuals. What is essential is that the measures themselves are proportionate to the threat, objective in their criteria, respectful of all applicable rights and, on each individual application, justified on relevant, objective, and not purely racial or religious, grounds.
>
> 34. The use of extended stop and search powers under anti-terror legislation raises all of these issues. I was informed by the Commission for Racial Equality that there was a 36% increase in the number of Asians stopped over the course of 2002/3 under section 44 of the Terrorism Act 2000 compared to a 17% increase for Whites. Between the adoption of the Act and 2002/3, there was a 300% increase in the number of Asians stopped. The maintenance of good community relations is clearly difficult under such circumstances. The Government has, however, shown considerable sensitivity to these concerns and the need to maintain a constant dialogue with the leaders of Muslim communities."

No suggestion is to be found there, one notes, that the section 44 power, despite being exercised more frequently with regard to Asians than others (and certainly not on a purely random basis), necessarily involves a violation of the Convention either for want of legal certainty or on any other ground.

83. How then is this approach to be reconciled with the requirements of domestic discrimination law, and in particular with the decision of the House of Lords in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2005] 2 AC 1? This I confess to have found substantially the most difficult question arising on this appeal. Tempting though it is to leave it unaddressed (as largely it was in argument) this would seem to me ultimately unhelpful given not least the explicit reference made in the *Roma Rights* case to the use of police stop and search powers.

84. It is perhaps convenient to remind your Lordships of what essentially was decided in the *Roma Rights* case. The Prague operation was designed largely to stop people travelling from the Czech Republic to this country to seek asylum here. The vast majority of those who had done so in the past and could be expected to do so in future were Roma and realistically therefore it was Roma applicants at whom the scheme was principally targeted. British immigration officers at Prague airport were concerned to refuse leave to enter the United Kingdom to anyone who either admitted an intention to claim asylum on arrival or, more likely, avowed some other reason for coming but in fact harboured that intention. The House of Lords reversed the decision of the majority in the Court of Appeal (myself and Mantell LJ, Laws LJ dissenting) and found the operation to be unlawful because Roma, being inherently more likely than non-Roma to make false applications for entry, were routinely treated with more suspicion and subjected to more intense and intrusive questioning than others.

85. Baroness Hale of Richmond said (at para 89) that the immigration officers should have been instructed "to treat all would-be passengers in the same way, only subjecting them to more intrusive questioning if there was specific reason to suspect their intentions from the answers they had given to standard questions which were put to everyone," and at para 90 added:

> "It is worth remembering that good equal opportunities practice may not come naturally. Many will think it contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong."

86. Lord Steyn said (at para 37) that "the reasoning of the majority of the Court of Appeal in this case had at first glance the attractiveness of appearing to be in accord with common sense", setting out in this regard the following passage from my own judgment below:

> "Because of the greater degree of scepticism with which Roma applicants will inevitably be treated, they are more likely to be refused leave to enter than non-Roma applicants. But this is because they are less well placed to persuade the immigration officer that they are not lying in order to seek asylum. That is not to say, however, that they are being stereotyped. Rather it is to acknowledge the undoubtedly disadvantaged position of many Roma in the Czech Republic. Of course it would be wrong in any individual case to assume that the Roma applicant is lying, but I decline to hold that the immigration officer cannot properly be warier of that possibility in a Roma's case than in the case of a non-Roma applicant. If a terrorist outrage were committed on our streets today, would the police not be entitled to question more suspiciously those in the vicinity appearing to come from an Islamic background?"

Lord Steyn however, then quoted with approval from an article by Mr Rabinder Singh QC, "Equality: The Neglected Virtue" 2004 EHRLR 141 which, he said, "convincingly exposed the flaw in the reasoning of the majority":

> "It is clear that there was less favourable treatment. It is also clear that it was on racial grounds. As all the judges acknowledged, the reason for the discrimination is immaterial: in particular, the absence of a hostile intent or the presence of a benign motive is immaterial. What the majority view amounts to is, on analysis, an attempt to introduce into the law of direct discrimination the possibility of justification. But Parliament could have provided for that possibility—as it has done in the context of allegations of indirect discrimination—and has chosen not to do so. . . .[T]he danger in the majority's reasoning is that it is capable of application outside the limited areas with which the Court was concerned. For example, it could be applied in the context of police stop and search powers. Simon Brown LJ expressly gives an example

> from just that context. This is potentially very damaging to race relations law going beyond what may have been perceived to be the problem in the Roma case itself."

Lord Steyn agreed with that analysis and concluded that the Prague airport scheme was "inherently and systematically discriminatory on racial grounds against Roma, contrary to section 1(1)(a) of the Race Relations Act 1976."

87. Lord Bingham and Lord Hope agreed with Lady Hale's reasoning on the discrimination issue. Lord Carswell, whilst recognising (at para 112) that

> "many people would regard it as nothing more than an application of ordinary common sense to treat Romani applicants in that way [i.e. with a greater degree of scepticism than others], given the officers' regular experience of dealing with them (and assuming in the officers' favour that they were doing no more than attempting conscientiously to ascertain which applications were genuine),"

similarly concluded (at para 113) that the officers must

> "treat all applicants, whatever their racial background, alike in the method of investigation which they carry out until in any individual case sufficient reason appears to prolong or intensify the examination."

88. In short, each of the three reasoned speeches on this issue acknowledged the apparent common sense underlying the immigration officers' approach. Why, one must therefore ask, if it was adjudged right to override the dictates of common sense in that case should police officers be allowed to use their common sense in exercising the section 44 power?

89. I have not found it altogether easy to distinguish between on the one hand the greater scepticism logically felt by immigration officers towards Roma than non-Roma applicants (held in the *Roma Rights* case

to have been unlawfully discriminatory) and on the other hand the greater preparedness which police officers understandably have to stop and search those of Asian appearance (as Mr Gil-Robles noted) given the perceived source of the main terrorist threat today. The difficulty in making this distinction is, indeed, apparent from Mr Rabinder Singh's article published in response to my own reference in that case to the use of police powers in a terrorist context.

90. The only basis I can see for a distinction (and I do not pretend to find it entirely satisfactory) is if one assumes that in the *Roma Rights* case the immigration officers had not sufficiently had regard to each Roma applicant as an individual, rather merely than as a stereotypical member of the group (see para 74 of Lady Hale's speech). It would, of course, have been wrong for immigration officers to have treated every Roma applicant identically irrespective of how his answers to questions put to him affected the interviewing officer's view as to the genuineness of his particular application. But that surely, so far from according with common sense, would have been not merely wrong but also silly. Nevertheless the House appears to have concluded that this was indeed the immigration officers' approach and on that basis struck down the scheme.

91. Clearly nothing which your Lordships are saying on the present appeal would support that kind of an approach to the stop and search power. It is one thing to accept that a person's ethnic origin is part (and sometimes a highly material part) of his profile; quite another (and plainly unacceptable) to profile someone solely by reference to his ethnicity. In deciding whether or not to exercise their stop and search powers police officers must obviously have regard to other factors too.

92. Of course it is important, indeed imperative, not to imperil good community relations, not to exacerbate a minority's feelings of alienation and victimisation, so that the use of these supposed preventative powers could tend actually to promote rather than counter the present terrorist threat. I repeat, therefore, as Lord Carlile has consistently done in his annual reports, that these stop and search powers ought to be used only sparingly. But I cannot accept that, thus used, they can be impugned either as arbitrary or as "inherently and systematically discriminatory" (Lord Steyn's characterisation of the Prague operation) simply because they are used selectively to target those regarded by the police as most likely to be carrying terrorist connected articles, even if this leads, as usually it will, to the deployment of this power against a higher proportion of people from

one ethnic group than another. I conclude rather that not merely is such selective use of the power legitimate; it is its *only* legitimate use. To stop and search those regarded as presenting no conceivable threat whatever (particularly when that leaves officers unable to stop those about whom they feel an instinctive unease) would itself constitute an abuse of the power. Then indeed would the power be being exercised arbitrarily.

93. For these reasons, in addition to those given by Lord Bingham and by my noble and learned friend Lord Hope of Craighead whose opinion I have also now had the opportunity to read in draft, I too would dismiss both these appeals.