

ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTARY MEMORANDUM BY THE HOME OFFICE

The Home Office published an ECHR memorandum on introduction of the Anti-Social Behaviour, Crime and Policing Bill in the House of Commons on 9 May 2013. This further supplementary memorandum addresses the issues arising from Government amendments tabled on 10 July for Commons Committee Stage.

New clause 22 and new Schedule 1: “Powers to seize invalid passports etc”.

2. This new clause and Schedule provide two new search and seizure powers.

3. The first of these is a power (“the first power”) given to examining officers to enable them to require a person to hand over, search for, inspect and retain invalid travel documents. This power is set out in paragraph 2 of the new Schedule. Examining officers are constables and persons appointed as immigration officers or designated as customs officials. This power is only available at a port which is defined in paragraph 1(4) of the Schedule. That definition includes airports, seaports and railway stations which are used by trains travelling internationally. The power may only be exercised in relation to a person whom the officer believes to be entering or leaving Great Britain or Northern Ireland or travelling by air within Great Britain and Northern Ireland. The search power is to search the person, anything that the person has with them or any vehicle in with the examining officer believes the person to have been travelling or to be about to travel.

4. The second power (“the second power”) is available only to constables who reasonably believe that a person is in possession of a British passport that has been cancelled by the Secretary of State) on the basis that the person to whom it was issued is involved in activities so undesirable that it is against the public interest for him or her to have access to passport facilities. It is further subject to an authorisation by the Secretary of State for the use of the second power. In these limited circumstances the power is available at any place in the United Kingdom that is not a port. The content of the second power is identical to the first power except that there is in addition a power to search any premises on which the constable is lawfully present. The exercise of the Royal Prerogative on public interest grounds is likely to be exercised in relation to persons suspected of being involved in terrorist activity and the use of second power will be similarly exercised. Reasonable force may be used only where necessary for the purpose of exercising either power.

ECHR Article 5

5. Article 5 provides that everyone has the right to liberty and security of person. No one shall be deprived of their liberty unless that the detention falls within one of the six specified exceptions in Article 5(1) and is in accordance with a procedure prescribed by law. The case law, such as *Gillan & Quinton v UK*¹, has established

¹ Gillan v UK [2010] 50 EHRR 45

that a power to stop and search does not inevitably involve a breach of Article 5. Each case will depend on whether the stop in question amounts to a deprivation of liberty or a restriction of movement.

6. In the proper exercise of these new powers there will be no deprivation of liberty but rather restriction in movement for the short period while the power is exercised. Even if Article 5 is engaged the use of targeted powers in the interests of preventing crime or protecting lives and security could not amount to the kind of arbitrary detention proscribed by Article 5.

7. The first power may only be used to search for invalid travel documents at ports. Members of the public will expect to be liable to be stopped and asked to show their travel documents in this setting. It is likely in the vast majority of cases to take only a very short period to establish whether the document is valid or not. A power to stop, question and detain a person for the purpose of determining whether he or she is a terrorist, without any requirement for suspicion that he is such a person already exists under Schedule 7 to the Terrorism Act 2000

8. The Government has a legitimate interest in securing the national borders and ensuring that those not entitled to travel do not do so. The use of these powers will help to prevent those seeking to travel in order to commit crime or to evade justice in the United Kingdom. It is a legitimate aim for the Government to wish to ensure that those seeking to leave or enter the country or to travel by air within it have the proper authorisation to do so.

9. The checking of any travel document retained under either power must be carried out as quickly as possible (see paragraph 4(1)), so this will limit any restriction on a person's movement while the checking is carried out. Further, a valid or expired passport must be returned to the person straight away (paragraph 4(2)).

10. The second power is more widely available in the geographic sense as it can be exercised anywhere in the United Kingdom. However, this power is only available in very limited circumstances. It can only be used to search for or seize a passport cancelled by the Secretary of State, under the Royal Prerogative, on public interest grounds – where the passport holder has or may have been, or will or may become, involved in activities so undesirable that it is contrary to the public interest for the person to have access to passport facilities - and where the Secretary of State has authorised the use of the second power in respect of a specified passport. . In these circumstances it is necessary for there to be a power which would enable a constable to search for and seize a cancelled passport in accordance with the authorisation issued by the Secretary of State. Such cases will be extremely rare. Where the Secretary of State has made a decision to refuse passport facilities to a person and has made a separate decision that the exercise of the in-country power should be available in the case, then it must be possible to take the appropriate steps to secure the return of that passport. Currently such powers do not exist.

11. In contrast to the first power, the second power may only be exercised in the case of a person whom the constable reasonably believes to be in possession of a passport to which the paragraph containing the power applies. This adds a

safeguard for the individual by requiring an element of objectivity to the constable's belief that the person is in possession of the passport.

ECHR Article 8

12. Article 8 is prima facie engaged in all cases of search and seizure. The ECtHR found in *Gillan & Quinton v UK* that searches conducted under powers in the Terrorism Act 2000 which 'require an individual to submit to a detailed search of his person, his clothing and his personal belongings' constituted an interference with the individual's Article 8 rights. These new powers provide only for the search for very specific articles. In the House of Lords decision on the same case, Lord Bingham remarked²; *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.*

13. Depending on the nature of the search and the circumstances there may well be cases where Article 8 is not engaged by the new powers, but in some, article 8 is likely to be engaged. The Government considers however that any interference with that right will be justified under Article 8(2).

14. The provisions will be 'in accordance with the law' because they will be contained in primary legislation and formulated with sufficient precision to enable a person to know in what circumstance the powers can be exercised. The powers also pursue the legitimate aims of national security, public safety and the prevention of disorder or crime, as the search powers are directed at the prevention of travel using invalid documents. Such searches will help protect national security, prevent crime and facilitate the bringing of criminal proceedings.

15. The powers are also necessary in a democratic society in that they are proportionate to the aim pursued and meet a pressing social need. The pressing social need that this clause addresses is the need to ensure that effective border controls are available and that powers exist to ensure that invalid travel documents are not held or used by those not entitled to do so and that those whose activities are contrary to the public interest and have had their passport facilities cancelled are not able to facilitate travel by retaining possession of their passport.

ECHR Article 1 Protocol 1

16. Article 1, Protocol 1 might be engaged where these new powers are used to seize property. There is no entitlement to a British passport and United Kingdom passports remain the property of the Crown at all times. However, there may be documents or items seized using these new powers that are the property of the holder. Where these documents are invalid then it is likely that there will be no

² Gillan v Met Pol Comr [2006] UKHL 12 at para 28

entitlement for the holder to remain in possession. If seized documents are valid or are only invalid because they have expired then paragraph 4 of the Schedule provides that they must be returned straight away in accordance with paragraph 4(2) of the Schedule.

17. The test for justification of a control of use of property is that the control must be in accordance with the law and that the control must be for the public interest. The measure must also be proportionate to the aim pursued. The powers of seizure in this clause will be in accordance with the law because they are to be contained in primary legislation and are formulated with sufficient precision to enable a person to know in what circumstance they can be exercised. The seizures will be in the public interest because the powers are to seize documents which are not validly held. The powers are strictly targeted and are therefore proportionate. Any validly held documents must be returned as soon as that has been established and in any event within 7 days.

18. In conclusion, it is therefore the Government's view that the new clause and Schedule are compatible with Articles 5 and 8 of the Convention and Article 1, Protocol 1.

Extradition

New clause 23: "Proportionality"

19. New clause 23 amends the Extradition Act 2003 ("the 2003 Act") by inserting new section 21A.

20. The new section will apply in cases where a European Arrest Warrant ("EAW") has been issued in order to prosecute the person for an offence. In addition to requiring the judge to be satisfied that extradition would be compatible with the Convention rights (which is already the case, under existing section 21³), the section will require the judge to be satisfied that extradition would not be disproportionate. In deciding whether extradition would not be disproportionate, the judge will have to take into account (so far as the judge thinks appropriate) the seriousness of the conduct, the likely penalty and the possibility of the issuing State taking less coercive measures.

21. The Government considers that new section 21A of the 2003 Act is compatible with the Convention rights. In particular, it will ensure that extradition – which, of course, entails a person being sent to another country and being arrested and likely detained for that purpose – only happens when the offence is serious enough to justify this.

New clause 24: "Extradition barred if no prosecution decision in requesting territory"

22. New clause 24 amends the 2003 Act by inserting new section 12A.

³ Section 21 of the Act, as currently drafted, requires the judge to look at human rights in cases where the person is wanted for prosecution and in cases where the person is wanted to serve a sentence. Section 21 will continue to apply in cases where the person is wanted to serve a sentence. However, section 21A will in future apply in cases where the person is wanted for prosecution, and will cover both human rights and proportionality.

23. New section 12A will apply in cases where an EAW has been issued in order to prosecute the person for an offence. Where it appears to the judge that there are reasonable grounds for believing that a decision to charge and/or a decision to try has not been taken in the issuing State (and that the person's absence from that State is not the only reason for that), extradition will be barred by section 12A unless the issuing State can prove that those decisions have been made (or that the person's absence from that State is the only reason for the failure to take the decision(s)).

24. The Government considers that new section 12A of the 2003 Act is compatible with the Convention rights. In particular, by helping to ensure that extradition only takes place where the issuing State has reached the point in proceedings where it has made (or is ready to make) a decision to charge and a decision to try the person, it will help prevent people spending potentially long periods in pre-trial detention following their extradition, whilst the issuing State continues to investigate the offence.

Home Office
11 July 2013