



Statewatch Analysis

UK: The Misuse of Section 44 stop and search powers continues despite European Court ruling

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The police are using section 44 powers to stop and search people for reasons unrelated to terrorism. Both amateur and professional photographers are being increasingly impeded as part of a broader struggle over the control of public space

On 12 January 2010, the European Court of Human Rights (ECHR) ruled that section 44 of the Terrorism Act 2000 breaches privacy rights afforded by Article 8 of the Convention on Human Rights. Section 44 gives police the power to indiscriminately stop and search people without reasonable suspicion. This is in part because the police have too much discretion over when to use this power, and insufficient legal safeguards are in place to guard against its misapplication.

Further, section 44 is being invoked to impede and harass amateur and professional photographers. A climate of suspicion is being cultivated in which anyone taking a photograph of a prominent building or landmark is potentially seen to be conducting reconnaissance ahead of a terrorist attack. The Home Office published guidance to officers urging them to respect photographers' rights on many occasions in 2009 with negligible impact. And pending a possible government appeal of the ECHR judgment, section 44 powers will continue to be used.

Provisions of section 44

The Terrorism Act 2000 came into force on 19 February 2001. Section 44 gives senior police officers the power to create "authorisation" zones in designated geographical areas (subject to the Home Secretary's endorsement). These are sites deemed sensitive to national security that are believed to be potential targets of terrorist attack. It was anticipated that zones would predominantly be established around famous landmarks, government buildings and train stations, but police forces have used the power more widely. For instance, the Metropolitan Police authorisation zone encompasses all of its territory: the whole of greater London. An authorisation is only in place for a period of 28 days, but can be continually renewed as it has been in London since 2001.

Within these zones police have the power to stop and search individuals without reasonable suspicion that an offence is being committed and seize "articles that could be used for terrorism whether or not there are grounds for suspecting that such articles are present." There is no obligation to explain to an individual why a search is being carried

out. Police Community Support Officers (PCSOs) are granted these powers if accompanied by a uniformed police officer.

Misuse of section 44

Police invoked powers afforded to them under section 44 to stop and search people on 256,026 occasions in England and Wales between April 2008 and March 2009. The Metropolitan Police and Transport Police were responsible for 95% of this total. Of this colossal figure only 1,452 stops resulted in arrest, less than 0.6% of the total number, and the vast majority of these were for offences unrelated to terrorism. In November 2009, the Home Office trumpeted a 37% decrease in the use of section 44 for the first quarter of 2009-10, but the figure of 36,189 is still massive and equates to an average of 398 people being stopped every day in April, May and June 2009.[1]

The power is clearly being overused, as Lord Carlile QC warned in the UK terror law watchdog's 2009 annual report:

I have evidence of cases where the person stopped is so obviously far from any known terrorism profile that, realistically, there is not the slightest possibility of him/her being a terrorist, and no other feature to justify the stop.[2]

Preconditions for invoking section 44 are so broad that it can be used against virtually anyone for anything. Increasingly police have used anti terrorism laws to impede the lawful activities of protesters and media workers (see *Statewatch* Volume 18 Nos. 3 and 4). Jeff Moore, chairman of the British Press Photographers' Association (BPPA), described section 44 as "an extremely poor piece of legislation that creates an enormous amount of confusion, both among the public and the police officers that use it." [3] In April 2008, the chairman of the Metropolitan Police Federation, Peter Smyth, said that "the Terrorism Act 2000 doesn't make police powers clear" and admitted that officers receive no training as to how to apply recent legislation correctly when dealing with photographers.[4]

Further, *The Independent* reports that:

Privately senior officers are "exasperated, depressed and embarrassed" by the actions of junior officers and, particularly, PCSOs who routinely misuse the legislation. One source said that an "internal urban myth" had built up around police officers who believe that photography in Section 44 areas is not allowed.[5]

This is well illustrated by the case of photojournalist Jess Hurd who, in December 2008, was detained for more than 45 minutes by police while covering a wedding in London's Docklands. Her complaint to the Independent Police Complaints Commission alleges that her camera was forcibly removed by an officer who told her: "we can do anything under the Terrorism Act." She also says that she was "informed that she could not use any footage of the police car or police officers and that if she did there would be 'severe penalties'." [6]

A recent high profile example of section 44's misuse is the case of BBC photographer Jeff Overs who was stopped while taking photos of St Paul's Cathedral in November 2009. [7] Similarly, in December 2009, one of the country's leading architectural photographers, Grant Smith, was stopped and searched by seven officers, who arrived in three squad cars and a riot van, while he was photographing Wren's Christ Church in central London. Incredibly, when an ITN film crew arrived to cover the story they too were initially told that filming was not allowed.[8]

Police practice has thus resulted in a number of complaints from photographers, both amateur and professional, who claim to be routinely obstructed by a police force that increasingly treats photography as a suspicious, even criminal activity. In December 2009,

The Independent launched a front-page campaign to highlight this trend after their journalist, Jerome Taylor, was stopped by police from taking a photograph of Parliament at night.[9]

The police's response

The Association of Chief Police Officers (ACPO) responded promptly by sending a message to every chief constable in England and Wales telling them that “unnecessarily restricting photography, whether from the casual tourist or professional is unacceptable and worse still, it undermines public confidence in the police service.” [10] Andy Trotter, chair of the ACPO's media advisory group, told *The Independent* that:

Photographers should be left alone to get on with what they are doing. If an officer is suspicious of them for some reason they can just go up to them and have a chat with them - use old-fashioned policing skills to be frank - rather than using these powers, which we don't want to over-use at all.[11]

After another high profile case, in which *The Guardian* journalist Paul Lewis was stopped by police for taking photographs of the Swiss Re Gherkin building in central London, the Metropolitan Police followed suit and issued guidance to all of its borough commanders emphasising that “unless there is a very good reason, people taking photographs should not be stopped.”[12]

The BPPA, National Union of Journalists (NUJ) and Amateur Photographer welcomed these messages, but said it was uncertain whether they will have a significant impact. The BPPA listed six occasions in the past 18 months on which government departments, agencies and representatives (such as the National Policing Improvement Agency, the Home Office and even the Prime Minister) have reaffirmed the rights of photographers with negligible result. Indeed, giving evidence to the UK Joint Committee on Human Rights in December 2008, Vernon Coaker MP, then Minister for Policing, Crime and Security, read an extract from a letter he had written to NUJ General Secretary, Jeremy Dear, in which he offered assurances that revised guidance had addressed the issue (see *Statewatch* Volume 18 No. 4). Amateur Photographer said: “We have been given similar assurances before but actions by police on the ground over recent months indicate that the message to curb restrictions on photographers is still not getting through.”[13]

European Court of Human Rights judgment

Publicity surrounding this issue intensified when, on 12 January 2010, the ECHR found section 44 to breach Article 8 of the European Convention on Human Rights which provides the right to respect for private life. The case was brought by Kevin Gillan and Pennie Quinton who were stopped and searched by police on their way to a demonstration in London's Docklands in September 2003. Quinton, a journalist, was ordered to stop filming despite showing her press card.[14]

The panel of seven judges ruled that a public search, without grounds for suspicion, “amounted to a clear interference with the right to respect for private life.” Further, “the public nature of the search, with the discomfort of having personal information exposed to public view, might even in certain cases compound the seriousness of the interference because of an element of humiliation and embarrassment.”

Significantly, the judgment objected not only to the manner in which anti-terrorism powers are being used, but the whole process by which they are authorised. Parliament and the courts are not providing sufficient checks and balances against misuse: “...the powers of authorisation and confirmation as well as those of stop and search under

sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.” The Court cited the fact that the Metropolitan Police has been allowed to establish an authorisation zone covering the whole of greater London since 2001 as an example of this shortcoming.

The Court also expressed concern over the level of individual autonomy police officers enjoy when deciding whether to stop and search someone. The absence of clear criteria for the use of section 44 means that many officers predicate their actions on instinct and “professional intuition.” As a result “there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer.” The result of this is that it becomes impossible to assess their performance:

in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised.

The government expressed disappointment with the judgment and said it intends to appeal. A request to refer the decision to the ECHR’s grand chamber must be made within three months, giving the government until 12 April 2010 to do so. If the court’s ruling stands the government will have an obligation to amend the law so that it conforms to the Convention. However, there is no timeframe for legal amendments to be made and the UK government has been known to be reluctant when it comes to complying with ECHR judgments. For the time being section 44 powers are still in place; the Metropolitan Police affirmed that their use “remains an important tactic in our counter terrorism strategy.” [15]

The control of public space

Writing in *The Guardian*, Henry Porter observed that the persecution of photographers is part of a broader struggle over the control of public space. He argues that police are using anti-terrorism legislation to re-designate public space as state space, “over which the police and CCTV systems have exclusive photographic rights.” [16]

Those wishing to hold public protests have been similarly impeded and intimidated by the use of section 44 powers. Further, far from fulfilling their obligation to facilitate protest, the police have imposed “bureaucratic obstacles” on those wishing to organise demonstrations. The most discernable example of this is the Serious Organised Crime and Police Act 2005. Sections 132-138 of the Act allow police to restrict access to “designated sites” deemed sensitive to national security. They also oblige organisers to provide the Metropolitan Police Commissioner with six days advance notice of a demonstration. Those who do not comply with these restrictions can be arrested and jailed. These sections will finally be repealed by the Constitutional Reform and Governance Bill, published in July 2009, and replaced by new undefined conditions that will be introduced by statutory instrument (secondary legislation used to exercise a power granted by primary legislation) as part of the new Public Order Act.

Footnotes

[1] Home Office Statistical Bulletin 2008/09:
<http://www.homeoffice.gov.uk/rds/pdfs09/hosb1809.pdf>

[2] Report on the operation in 2008 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006, by Lord Carlile of Berriew QC, June 2009, pp. 29:
<http://www.statewatch.org/news/2009/jun/uk-carlile-report-2008.pdf>

[3] The Independent, 4.12.09: <http://www.independent.co.uk/news/uk/home-news/photographers-snap-over-use-of-section-44-by-police-officers-1833839.html>

[4] Amateur Photographer website, 28.4.08:
http://www.amateurphotographer.co.uk/news/terror_act_police_attack_government_over_photography_in_public_news_254852.html

[5] The Independent, 5.12.09: <http://www.independent.co.uk/news/uk/home-news/police-uturn-on-photographers-and-antiterror-laws-1834626.html>

[6] The British Journal of Photography website 13.12.09:
<http://www.bjp-online.com/public/showPage.html?page=871966>

[7] London Evening Standard 27.11.09: <http://www.thisislondon.co.uk/standard/article-23776068-bbc-man-in-terror-quiz-for-photographing-st-pauls-sunset.do>

[8] Amateur Photographer website, 10.12.09:
http://www.amateurphotographer.co.uk/news/ITN_film_crew_stopped_while_covering_photographer_story_news_292827.html

[9] The Independent 3.12.09:
<http://www.independent.co.uk/opinion/commentators/jerome-taylor-i-was-questioned-over-my-harmless-snapshot-1833130.html>

[10] Daily Mail 5.12.09: <http://www.dailymail.co.uk/news/article-1233454/Police-told-stop-questioning-photographers-taking-pictures-tourist-landmarks.html>

[11] The Independent, 5.12.09: <http://www.independent.co.uk/news/uk/home-news/police-uturn-on-photographers-and-antiterror-laws-1834626.html>

[12] Guidance issued to Metropolitan Police Service officers and staff re stop and search photo policy, 14.12.09:
http://cms.met.police.uk/news/policy_organisational_news_and_general_information/guidance_issued_to_mps_officers_and_staff_re_stop_and_search_photo_policy

[13] Amateur Photographer website:
http://www.amateurphotographer.co.uk/news/Photographers_campaign_forces_police_Uturn_AP_comment_news_292612.html

[14] Case of Gillan and Quinton v. The United Kingdom (Application no. 4158/05), 12.1.10:
<http://www.statewatch.org/news/2010/jan/echr-judgment-gillan-quinton.pdf>

[15] Metropolitan Police Service statement re Section 44, 13.1.10:
http://cms.met.police.uk/news/policy_organisational_news_and_general_information/mps_statement_re_section_44

[16] The Guardian, 7.1.10:
<http://www.guardian.co.uk/commentisfree/henryporter/2010/jan/07/police-photography-public-space>

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