



Do Police Powers of Stop and Search in Scotland strike a fair balance between the rights of the accused, or those subject to searches, and the rights of the state?

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Introduction

John Alderson states that strengthening the security of persons and property and ‘facilitating human dignity through upholding and protecting human rights’ are among the chief objectives of the Police in a free, permissive, and participatory society.¹ By regarding these objectives one can see two of the main aims of criminal procedure in Scotland: to uphold the authority of the state in attempting to ensure the security of citizens, and to protect the rights of the accused, ensuring that justice is done fairly and without discrimination. However, these two aims are not always balanced and this can be demonstrated by examining police powers of stop and search in Scotland. This article argues that whilst recent reforms to police powers of stop and search have seemingly equalised the balance between these rights, there are certain statutes that confer excessive powers on the state and that demonstrate an imbalance in specific places.

Stop and search

The working definition of stop and search used by Police Scotland is ‘any encounter between a Police officer and a member of the public, which results in that individual being searched

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¹ John Alderson, *Policing Freedom; A Commentary on the Dilemmas of Policing in Western Democracies* (MacDonald and Evans, 1979), ix

for the purpose of obtaining evidence.² In other words it is the searching of a person not in police custody whom a police officer reasonably suspects to have committed a crime, to be in the process of committing a crime, about to commit a crime, or be in possession of a prohibited article such as an offensive weapon. These powers were previously both statutory and non-statutory, or consensual. Statutory stop and search occurs under legislation authorising police to search someone such as section 23 of the Misuse of Drugs Act 1971 which gives officers the power to search someone they have reasonable grounds to suspect is in possession of drugs. Non-statutory stop and search, in contrast, occurs when there is no specific legislation that gives the police power to search a person, but police asking permission to search that person followed by their consent allows for the search to go ahead.³

However, research published by Murray in 2014 for the Scottish Centre for Crime and Justice Research revealed this system of statutory and non-statutory stop and searches to be unstable in its application across Scotland, as there was no countrywide standard of procedure in place for the police to follow. Murray deemed the system to be ineffective in its pursuit of justice as it adopted a numbers-driven approach which she believed resulted in attention being directed to meaningless numbers rather than sensible, objective crime prevention. Because of this, police in some areas were seen to be using their stop and search powers in an excessive and discriminatory manner and, since no metric oversaw the use of these powers, this practice continued unchecked by the justice system.⁴

Recent reforms

The impact of Murray's research has been hugely important and has resulted in non-statutory, or consensual, stop and searches being abolished by the Criminal Justice (Scotland) Act 2016.⁵ This followed the recommendations of a report on the matter, published by an independent advisory group, chaired by John Scott, Q.C., in August 2015.⁶ The report recommended the abolition of consensual stop and searches, the introduction of a code of

² Kath Murray, *Stop and Search In Scotland: An Evaluation of Police Practice* (Scottish Centre for Crime & Justice Research 2014), 1

³ Scottish Government, *Consultation on a Draft Code of Practice for Police Stop and Search*, March 2016

⁴ Murray (n.2), 2

⁵ *ibid.*

⁶ Independent Advisory Group on Stop and Search, 'The report of the Advisory Group on Stop and Search' SG/2015/128

practice covering stop and search and the regular reviewing of this code at intervals of 4 years.⁷

Thus, Section 65(2) of the Act states that it is unlawful for a constable to search a person otherwise than in accordance with a power of search conferred in express terms by an enactment, or under the authority of a warrant expressly conferring a power of search. In addition to this, police officers must now state under which statute they are searching a person before conducting a search, as is expressed in the draft code of practice introduced by the Scottish Government in March 2016.⁸

The code of practice, as recommended by the advisory group report and required under section 73 (1) of the 2016 Act, is based on the principles set out in section 32 of the Police and Fire Reform (Scotland) Act 2012, which states that the main purpose of policing is to improve the safety and well-being of persons, localities and communities and that the police should achieve that purpose by policing in a way that is accessible to, and is engaged with communities, and promotes measures to prevent crime, harm, and disorder. This means that all stops and searches must be lawful: based on a statute and in accordance with any legal duties placed on Police officers; proportionate: balancing the rights of the individual against the necessity of the search; justifiable: applied indiscriminately and backed by intelligence, and accountable: properly recorded and verifiable.⁹ Therefore the new code of practice, provided it is approved, will place a huge emphasis on what is required of police officers when carrying out stops and searches to ensure that their actions are seen as fair and just.

Suspicion-based and ‘suspicionless’ stop and searches

Statutory stop and search can be further divided into two sections, as Lennon writes in her paper ‘Searching for change: Scottish stop and search powers.’¹⁰ These are suspicion-based and ‘suspicionless’ stop and searches. Suspicion-based stop and searches are, as explained above, based on a reasonable suspicion that a person may have committed a crime, be in the process of committing a crime, be about to commit a crime or be in possession of a prohibited article. This is the most common type of statutory stop and search and constitutes the

⁷ *ibid* 15-16

⁸ Scottish Government (n.3), para 5.9

⁹ *ibid* para 2.1

¹⁰ Genevieve Lennon, 'Searching for change: Scottish stop and search powers' [2016] 20(2) *Edinburgh Law Review* 178-203

majority of the stops and searches carried out in Scotland. In contrast, suspicionless statutory stop and searches are rarer as they either involve a reasonable belief by a senior officer that an incident involving serious violence may be carried out in a designated locality under section 60 of the Criminal Justice and Public Order Act 1994 or involve the reasonable suspicion of an assistant chief constable or chief constable that an act of terrorism is going to take place in a specified area under section 47A of the Terrorism Act 2000. In other words, they are ‘suspicionless’ in the sense that suspicion has not focused on a particular person, but there is a reasonable suspicion that a crime may be about to occur. Suspicion that these incidents and acts will occur authorises police officers to stop and search any person or car in the area for dangerous instruments, offensive weapons, evidence that they are a terrorist or evidence that their vehicle is being used in connection with terrorism. In exercising these specific powers police officers are granted what Lennon calls ‘virtually unfettered discretion,’¹¹ and the remainder of this article will assess these powers and the other powers of stop and search in relation to the rights of the person being searched and the discretion of state authorities.

The relationship of the law with Human Rights

Police powers of stop and search fall under the ambit of several human rights but chief among these are the right to liberty under Article 5 of the European Convention of Human Rights, the right to privacy under Article 8 and the rights under Article 14 which confer upon citizens freedom from discrimination in the exercise of their convention rights.¹² By enforcing their public duty, police do risk infringing upon these rights. But under the Convention, liberty and privacy are not absolute rights and can be interfered with by the state based on reasonable suspicion that an offence has been committed or in the interests of national security.¹³ Therefore, striking a balance between upholding the rights of individuals and pursuing security can place legislators in a difficult position in carrying out their public duties, as these interests often come into conflict.

However the new reforms brought about by the 2016 Act have promoted the rights of those being searched, as under these reforms officers must now verify the searches that they choose

¹¹ *ibid* 186

¹² European Convention of Human Rights 1950, Article 8(1) and Article 14

¹³ *ibid* Article 5 (1) (c) and Article 8(2) respectively

to carry out with a statute, as stated in section 65 (2) of the 2016 Act.¹⁴ Following this change the amount of stop searches that are carried out by the police in Scotland has dropped by 93 per cent.¹⁵ This has also been aided by the requirement for officers to prove reasonable suspicion in order to justify the exercising of their powers to stop and search people, which existed prior to the 2016 Act. This was an issue in the case of *Skeet v HM Advocate*¹⁶ in which the accused appealed against a decision of the Sheriff Court that a police officer's search of his vehicle for evidence of drug dealing was lawful under section 23 of the Misuse of Drugs Act 1971 on the grounds that the police officer did not have reasonable grounds to believe that the accused was in possession of drugs. In refusing the appeal, the judges stated that "the decision of reasonableness of the suspicion spoken to by the Police officers was a question of fact and primarily it was a question of fact to be determined by the sheriff."¹⁷ Thus the motives of officers in deciding whom to stop and search can be judicially scrutinised, further protecting the rights of those made subject to stop searches.

It could be argued that the human rights issues involved in the police powers of stop and search now relate more to 'suspicionless' stop searches involving suspected serious violence or terrorism. The statutes mentioned above, which govern this section of the law of stop and search, allow Police officers to exercise their powers with wide 'unfettered' discretion. Lennon cites the case of *Gillan v United Kingdom*¹⁸ which involved the use of suspicionless stop and search powers by the police and centred on 'preventative searches', which were authorised by the Terrorism Act 2000 under section 44, now governed by section 47A.¹⁹ These powers were held by the European Court of Human Rights to be incompatible with the right to privacy under Article 8 of the ECHR, but Lennon calls into question whether the new powers under section 47A are much of an improvement. Section 47A requires a police officer to reasonably suspect that an act of terrorism is going to take place, which is a procedural barrier that section 44 did not put in place. However, the section still allows for a broad subject of search, largely because of the breadth of the definition of terrorism, meaning that a risk of arbitrariness, and thus of discrimination, still exists in the exercising of these powers

¹⁴ For example a 'suspicionless' stop and search under s.60 of the Criminal Justice and Public Order Act 1994 as mentioned above, must be carried out in accordance with the requirements of the s.60 to be permissible

¹⁵ Economic and Social Research Council, 'Changing stop and search legislation in Scotland' (*YouTube*, June 22 2016) <<https://www.youtube.com/watch?v=m6B-pDZQfuE>> accessed 6 October 2017

¹⁶ 2015 S.C.L. 780

¹⁷ *ibid* 782

¹⁸ 4158/05, [2010] ECHR 28

¹⁹ Lennon (n.10), 186-188

by the Police. Therefore the rights of those being searched can be infringed under these statutes as the Police are authorised to use wide discretion when choosing who to stop and search and can do this without much justification as with the suspicion-based stop searches.

The relationship between the law and the State

However, it is not only the rights of those being searched that are affected by this, but also the authority of the State to exercise their powers of stop and search. Whilst their ability to carry out stop searches in this area is not as limited as those listed under the 2016 Act, the ease with which they can be accused of discrimination when exercising these powers means there is more risk involved for the police than may be initially recognised. SECTION 69 of the 2016 Act calls for the Police service to publish information recording the number of searches carried out by officers during each year; the age, gender and ethnic and national origin of those searched; the proportion of those searches that resulted in something being seized or a case being sent to the Procurator Fiscal and the number of complaints lodged against the Scottish Police Service regarding the carrying out of searches. This protects the rights of those being searched but limits the prerogative of the police by placing them in the spotlight and at risk of losing the support of the public which, as Alderson states, is essential to the authority of the police service:

“[T]he law is lacking in power if it does not have the general backing of the public; or, to put it another way, the police in using their law enforcing powers will generally be effective with public support and generally less effective without it.”²⁰

However, the 2016 Act also allows the Police to be more transparent by forcing them to state under which statute they are authorised to search a person and their reasons for suspecting a person of committing an offence and needing to be searched. *Borland v HM Advocate*²¹ and the *Skeet* case act as examples of this as they both involved police officers justifying to the court in detail their reasons for suspecting a person of a crime before having searched them. Thus, whilst this may appear to limit the powers of the police in so far as they must ensure they have clear reasoning backed up by statute for suspecting a person before carrying out that search, it can benefit them, as it protects them from making mistakes with regards to

²⁰ Alderson (n.1), 11

²¹ 2016 S.C.L. 32

procedure by being more vigilant and open, preventing the unravelling of investigations due to those mistakes.

Conclusions

One can conclude that the new reforms made to police powers of stop and search have re-balanced the scales between the rights of those being searched and accused of crimes based on evidence gathered during those searches and the authority of the State. By limiting the type of stop searches allowed to only statutory searches and requiring the police to keep a record of who they stop and search, the 2016 Act has provided safeguards against discrimination in some areas and against the overuse of these powers, which were both problems under the previous law.

However, whilst the reforms have limited the powers of the state in some ways, they have left unchecked the powers to carry out suspicionless stop and searches which can give rise to discrimination, as the police are given wide discretion and a broad definition of terrorism as a basis by which to justify their actions. Furthermore, there have been calls from the Government in recent months to increase the powers of the police in relation to the stop and search of children and young people for alcohol, as the new legislation does not include a specific legal power to do so. The Law Society of Scotland released a paper in response to this stating that they believed that a new specific power to search young people for alcohol would only serve to alienate those young people from the police and risk the creation of a disproportionate negative perception of children.²² Thus, whilst the 2016 Act may signal a move towards the balancing of the rights of the person being searched and the State, there are still areas of the law which allow for discrimination, and, if these calls for new powers succeed, then that newfound balance could be at risk.

²² The Law Society of Scotland, *Consultation on Police Powers to Search Children and Young People for Alcohol*, July 2016, 3