

(1) LIBERTY
(2) BRITISH-IRISH RIGHTS WATCH
(3) THE IRISH COUNCIL FOR CIVIL LIBERTIES

Applicants

v.

UNITED KINGDOM

Respondent Government

**APPLICANTS' ADDITIONAL OBSERVATIONS
IN RESPONSE TO THE COURT'S LETTER
OF 28 FEBRUARY 2006**

Introduction

1. The Section Registrar's letter of 28 February 2006 indicated that the President had directed consideration of admissibility and merits together, and invited any additional evidence or written observations from the parties by 28 March 2006.
2. The Applicants wish to make short observations on two points:
 - a. The recent decision of the House of Lords in *R. (Gillan) v. Metropolitan Police Commissioner* [2006] UKHL 12, and
 - b. The question whether the Court should hold a hearing.

The House of Lords decision in *Gillan*

3. The Court will recall that the Respondent Government seeks to place weight on the IPT decision in the parallel domestic proceedings between the Applicants and various governmental bodies concerning interception under RIPA 2000 after October 2000: see the Government's Supplementary Observations dated 14 February 2005. In the IPT proceedings, the governmental bodies relied on the then recent decision of the Court of Appeal in *Gillan* ([2004] 3 WLR 1144). In response, the Applicants sought to draw a distinction between the situation in *Gillan* (which concerned police stop and search

powers) and clandestine interception of private communications. The IPT nevertheless drew support from *Gillan*, evidently rejecting that distinction.

4. The reasoning of the House of Lords serves to emphasise the distinction between police powers of the kind considered in *Gillan* and clandestine interception. It further undermines the Respondent Government's reliance on the IPT decision for the purpose of the present case.
5. *Gillan* concerned the exercise of powers conferred on the police by section 44 of the Terrorism Act 2000. Unusually, the section enabled a police officer to stop and search a person without reasonable suspicion. The power was only exercisable in a geographical area designated in an authorisation issued by a senior police officer. Unbeknown to Mr. Gillan and his co-litigants, an authorisation had been issued in respect of the entire Metropolitan Police area. The Court of Appeal held that the "in accordance with the law" criterion of Article 8(2) was satisfied.
6. The obvious difference between that situation and clandestine interception is that the exercise of the stop and search power is by its very nature self-evident to the individual concerned. Since the s. 44 power is exercisable only where an authorisation has been given, the exercise of the power also amounts to notice to the individual that the authorisation has been (or should have been) given. Thus the individual is immediately able to identify the basis for any challenge to the exercise of the power: if no authorisation has in fact been given, the stop/search is unlawful without more; and if an authorisation has been given, the individual is entitled (as the *Gillan* claimants did) to challenge its justification.
7. By contrast, a person who is subject to clandestine activity by the State in relation to his private communications has no notice of the exercise of official power. That is precisely why the Court in its case-law has repeatedly stressed the importance of closely scrutinising the legal basis for this activity. The Applicants made these points to the IPT.

8. A copy of the Lords' judgment is annexed to these Observations. The Lords upheld the Court of Appeal's dismissal of the *Gillan* claimants' case. In the present case the Court is not concerned with the correctness or otherwise of that decision, nor with whether the Lords properly understood and applied the principles to be derived from the Court's case-law on Article 8(2). Indeed the *Gillan* claimants, who were represented by Liberty, may well make an application to the Court following the Lords' decision. However, the Applicants do draw attention to certain pronouncements of their Lordships which, even if the *Gillan* decision is correct in its application of the Convention, reinforce the contrast between clandestine interception and overt acts such as stop/search.

9. In particular Lord Bingham, at paragraph 35, observed:

"Anyone stopped and searched must be told, by the constable, all he needs to know".

Lord Hope at paragraph 55 similarly commented that the statutory regime:

"...enables the person who is stopped and searched, if he wishes, to test its legality in the courts. In that event the authorisation... will of necessity, to enable the law to be tested properly, become relevant evidence".

10. Lords Scott and Walker agreed with the reasoning of Lord Bingham (see paragraphs 58 and 70), and Lord Brown agreed with that of Lords Bingham and Hope (paragraph 93).

Hearing

11. The Court raised the possibility of an oral hearing in correspondence in early 2003. At that stage the Court was concerned only with the admissibility stage of the case. The Applicants responded by pointing out that in this case the Court had received evidence from the parties -- including expert evidence -- about the practices in question, and a hearing would be a useful opportunity for the Court to receive assistance from the parties as to (a) the proper approach in general to evidence submitted by parties in a situation of this kind, and (b) the conclusions that ought to be drawn from the evidence submitted in this case. The Court may well find such assistance particularly valuable given the complexity of the issues this case raises.

12. The Applicants respectfully suggest a hearing remains useful for those reasons. Moreover the exchange of written submissions since the Court first raised the question of a hearing has brought into play several additional important issues of principle. Those include the extent to which the decision of the former Commission in *Christie* should still be regarded as good law in the light of developments in the Court's jurisprudence in such cases as *Valenzuela Contreras v. Spain* (1998) 28 EHRR 483. In all the circumstances, the case remains a proper one for a hearing on the merits before the Court determines the application.

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Date: 27 March 2006

Annex: Judgment of the House of Lords in *R. (Gillan) v. Metropolitan Police Commissioner*
[2006] UKHL 12