

**IN THE MATTER OF  
THE HUMAN RIGHTS AND EQUALITY IMPLICATIONS OF  
THE INTRODUCTION OF  
FULL BODY SCANNERS AT AIRPORTS**

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**ADVICE**

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**Introduction & Summary of Advice**

1. We have been asked to advise the Equality and Human Rights Commission (“the Commission”) as to the human rights and equalities implications of the Government's introduction of Advanced Imaging Technology (“full body scanners”) at Heathrow and Manchester Airports (“the two airports”). The government intends that the use of full body scanners should be extended to all UK airports by the end of 2010.
2. As is well known, the issue has come to the fore as a result of the attempted bombing of a plane flying to Detroit on 25 December 2009. Full body scanners are now in use at the two airports, with (at present) only a small proportion of prospective airline passengers being selected for scanning. An Interim Code of Practice (“the Interim Code”) covering the use of these scanners has been issued, without consultation. However, the government intends to conduct a full consultation on this issue, with a view to the production of a final code later in the year.
3. We note also that two further security measures are either underway or under consideration. First, airport staff are being trained in what the government has described as “behavioural analysis techniques” which it is intended will help

staff to spot passengers acting unusually with a view to targeting such persons for further search. Second, consideration is being given to the introduction of “targeted passenger profiling” as a means of assisting in the decision of who should be subjected to additional security measures (including, presumably, full body scanning). While each of these initiatives (and particularly the second) may raise separate human rights and equalities issues, neither is the subject of separate analysis in this Opinion, except insofar as they impact or might impact on the human rights and equality implications of the use of full body scanners.

4. So far as human rights law is concerned, we proceed on at least the assumption that use of full body scanners in a manner as outlined by the Interim Code could be an appropriate, necessary and proportionate means of protecting the right to life of air passengers and crew. We nonetheless conclude that the use of full body scanners as outlined is on balance likely to infringe Article 8 of the European Convention on Human Rights and Fundamental Freedoms (“the European Convention”). That is primarily because there is an invasion of privacy involved in the use of such scanners which cannot in our view be said to be “in accordance with the law” as required under Article 8(2), and in relation to which no effective waiver is currently routinely secured. (There is so far as we know no dispute that the British Airport Authority (“BAA”) staff engaged in these security checks are other than either part of a public authority or are exercising public functions for the purposes of the Human Rights Act and so are within the Act).
5. For similar reasons, the use of full body scanners is, at present, likely to breach the Data Protection Act 1998 (“the Data Protection Act”) because the use of full body scanners amounts to “processing” of sensitive personal data, and is not subject to lawful authority. However, the issues of legality under Article 8 of the European Convention and under the Data Protection Act are likely to stand or fall together. If a court holds that there is an insufficient legal basis for the use of full body scanners to comply with Article 8, it will also be insufficient to comply with the Data Protection Act, and vice versa.

6. So far as equalities legislation is concerned, there is nothing in the papers before us, including Lord Adonis's letter to Trevor Phillips of 15<sup>th</sup> January 2010, which evidences any compliance with the general equality duties under section 71 Race Relations Act 1976, section 49A Disability Discrimination Act 1995 or section 76A Sex Discrimination Act 1975. If that is right, then there is a breach of those duties. In our view, a continued failure to comply with these duties means that there is a serious risk that the scanning technologies will be used in ways which discriminate directly or indirectly on grounds of race or sex (in particular), and/or that their use will have an adverse effect on community relations. It does not appear that this has been given any or any adequate consideration in the process of policy formation, which is a free-standing error of law.
  
7. We develop these points below. We also draw attention to the European Parliament's Resolution of 23<sup>rd</sup> October 2008 on the impact of aviation security measures and body scanners on human rights, privacy, personal dignity and data protection. We would be happy to consider any further such materials as may be brought to our attention.

## **The Human Rights Issue**

### *The applicability of Article 8(1)*

8. Article 8(1) states that "Everyone has the right to respect for his private and family life, his home and his correspondence". The first question that arises, therefore, is as to whether the use of full body scanners engages this provision.
  
9. There are two main types of body scanner commercially available capable of detecting body-worn threat items. They use either backscatter X-ray or active millimetre wave technologies. They are capable of producing a gray image of the human body and any objects concealed on it. At present the image produced does not show any distinguishing features such as hair or skin tone

and it is not possible to recognise people from their facial features. It shows external characteristics but does not penetrate the skin or display images of the internal organs. The Government acknowledges that other technologies could be considered for use in future.

10. In *S and Marper v United Kingdom* (apps 30562/04 and 30566/04, 4 December 2008), the European Court of Human Rights, sitting as a Grand Chamber, unanimously found the retention of fingerprints, DNA profiles and cellular samples to be an interference with the private life of each applicant for Article 8 purposes. Under the heading of “General Principles”, the Court had these remarks to make about the breadth of the term “private life” in Article 8 (1):

66. The Court recalls that the concept of “private life” is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III, and *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-IX). It can therefore embrace multiple aspects of the person's physical and social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, among other authorities, *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I with further references, and *Peck v. the United Kingdom*, no. 44647/98, § 57, ECHR 2003-I). Beyond a person's name, his or her private and family life may include other means of personal identification and of linking to a family (see *mutatis mutandis Burghartz v. Switzerland*, 22 February 1994, § 24, Series A no. 280-B; and *Ünal Tekeli v. Turkey*, no. 29865/96, § 42, ECHR 2004-X (extracts)). Information about the person's health is an important element of private life (see *Z. v. Finland*, 25 February 1997, § 71, *Reports of Judgments and Decisions* 1997-I). The Court furthermore considers that an individual's ethnic identity must be regarded as another such element (see in particular Article 6 of the Data Protection Convention .... which lists personal data revealing racial origin as a special category of data along with other sensitive information about an individual). Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz*, cited above, opinion of the Commission, p. 37, § 47, and *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20, § 45). The concept of private life moreover includes elements relating to a person's right to their image (*Sciacca v. Italy*, no. 50774/99, § 29, ECHR 2005-I).

67. The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (see *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116). The subsequent use of the stored information has no bearing on that finding (*Amann v. Switzerland* [GC], no. 27798/95, § 69, ECHR 2000-II). However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained (see, *mutatis mutandis*, *Friedl*, cited above, §§49-51, and *Peck v. the United Kingdom*, cited above, § 59).

11. Full body scanners penetrate the whole of a person's physical identity. The process reveals a person's gender and the precise construction of his or her particular body, together any usually concealed physical features that the "owner" of the body in question might never want to have made known to strangers or even friends and family. It has the potential to reveal sensitive information about the individual including about his or her health: this is what the Government's Q and A on body scanners dated 26<sup>th</sup> January 2010 delicately refers to as "anomalies". No class of passenger will be exempt, with children and persons with disabilities or transgendered people being given no special treatment.
12. As indicated above, the scans produce an image of a body and so are within *Sciacca v Sweden* (2006) 43 EHRR 20, cited in *S and Marper* (above). In *Sciacca*, the European Court confirmed (following *Von Hannover v Germany* (app 59320/00, (2005) 40 EHRR 1) that the "concept of private life includes elements relating to a person's right to their image" (para 29) and that there was "a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'" (*ibid*, quoting *Van Hannover*). In *Sciacca*, what was important for privacy purposes was the creation of a visual record of a public scene. A material consideration for the Court was that the Applicant was not a well-known figure: "the applicant's status as an 'ordinary person' enlarges the zone of interaction which may fall within the scope of private life" (*ibid*). The fact that she was the subject of criminal

proceedings (as was the case with the applicant in *Sciacca*) did not curtail “the scope of such protection”.

13. The full body scan produces an image of the body which is an intimate one and which is then scrutinised by a security officer in order to identify whether or not the imaged passenger needs to be further examined. While it is true that the image is not thereafter retained by the authorities, and that it is destroyed and rendered irretrievable after this process has been completed, there is retention for the brief time required for analysis, with this examination being conducted by a human staff member, not a machine.
14. We note that the Interim Code provides that the security officer conducting analysis of the image must not be able to see the person whose image they are viewing; that a person selected for screening may request that the screen reader is of the same sex as the person; and that the scan image is not retained after it has been analysed.
15. It is also true that in some cases, anonymisation of data which would otherwise be regarded as personal and confidential may have the effect of removing the element of privacy from it. For example, in *R v Department for Health ex parte Source Informatics* [2000] 1 All ER 786, the Court of Appeal held that the Data Protection Act 1998 and recital 26 of the Data Protection Directive 95/46/EC did not apply to data anonymised in such a way that the data subject is no longer identifiable.
16. These stipulations ameliorate the effects, but do not remove the fact, of the invasion of privacy: the Article 8(1) breach is constituted by first the production and then the analysis of the image. The point of scanning technology is that if something which appears to be suspicious (which may or may not actually be a cause for concern) alerts the person scanning to the need for further checks or enquiries, security staff will be able to identify the person in relation to whom suspicion has been aroused. For the same reason, the fact that all images of the passenger must be destroyed and be thereafter irretrievable

once analysis is complete has a bearing on the extent of the invasion of privacy but not on the fact of the privacy invasion itself. These various safeguards have a bearing on the proportionality of the intrusion into a passenger's privacy but they do not turn the basic action under scrutiny into one that does not engage Article 8(1).

17. Our judgment that Article 8 is engaged is strengthened by the consistency of such a finding with general principle. The respect for 'private life' is about the protection of a person's personal space from unwanted intrusion. It concerns "the respect for autonomy in matters of private life which is guaranteed by Article 8 of the ECHR" (Baroness Hale of Richmond in *R v C* [2009] UKHL 42, para 27). The protection of private information is worth having as an aspect of a person's autonomy and dignity: see generally Lord Hope of Craighead in *AG Ref (No 3 of 1999): Application by BBC to set aside or vary a reporting restriction order* [2009] UKHL 34. A person has a reasonable expectation that the privacy of his or her clothed person will be respected. More fundamentally, "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit" (per La Forest J in *R v Dymnt* (1988) 45 CCC (3d) 244, at 255-256, cited with approval by Baroness Hale in *R v Chief Constable of South Yorkshire Police, ex parte LS; R v Chief Constable of South Yorkshire Police ex parte Marper* [2004] UKHL 39, at para 68 – Baroness Hale's approach in this case on this issue was subsequently followed by the European Court).
18. It is true that a majority of the House of Lords took a rather narrower view of the breadth of Article 8 in the decision that was departed from in *S and Marper. R v Chief Constable of South Yorkshire Police, ex parte LS; R v Chief Constable of South Yorkshire Police ex parte Marper* cited above. But the Lords (as they then were) and the Supreme Court (as it now is) acknowledges its duty to give practical recognition to the judgments of the European Court of Human Rights: *R (Ullah) v Special Adjudicator* [2004] UKHL 26. In *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, their lordships departed

from an earlier ruling on Article 8 when its finding on the remit of the article was contradicted by the Strasbourg court (in *Pretty v United Kingdom* (2002) 35 EHRR 1). Neither the Supreme Court nor the now superseded appellate committee of the House of Lords has ruled on this issue, and there is no reason to doubt that they would not follow Strasbourg guidance. Indeed as is reflected in the dicta quoted above, the jurisprudence on Article 8 in the British courts has itself taken on a broader significance in recent years.

*Is the right waived?*

19. Assuming Article 8(1) to be in issue in this case and to have been breached, a question of consent to the breach, or waiver of the right, arises. The persons subject to full body scans are self-selected to the extent that they are all going places as a result of agreements made with carriers to take them to their places of destination, and such agreements can be and frequently are conditional on various conditions, including requirements related to security. The issue is briefly adverted to in the recent decision of *Gillan and Quinton v United Kingdom* (application 4158/05, 12 January 2010) where the powers under scrutiny related to stop and search in public places:

“64. The Court is ... unpersuaded by the analogy drawn with the search to which passengers uncomplainingly submit at airports or at the entrance of a public building. It does not need to decide whether the search of the person and of his bags in such circumstances amounts to an interference with an individual's Article 8 rights, albeit one which is clearly justified on security grounds, since for the reasons given by the applicants the situations cannot be compared. An air traveller may be seen as consenting to such a search by choosing to travel. He knows that he and his bags are liable to be searched before boarding the aeroplane and has a freedom of choice, since he can leave personal items behind and walk away without being subjected to a search. The search powers under [the law challenged in this case] are qualitatively different. The individual can be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search. “

20. These remarks were not at the core of the case in *Gillan*. It is true that an arguable case can be made that intending aircraft passengers forgo their right to privacy to the extent judged necessary in the interests of security at the

moment when they complete a purchase of their airline ticket where this transaction requires certain conditions of travel to be acceded to (including conditions related to accessing the aircraft). However not all such waivers are automatically effective: Strasbourg case-law is clear that to be successful a waiver must be unequivocal and attended by minimum standards commensurate with its importance: see generally R Clayton and H Tomlinson *The Law of Human Rights* (2<sup>nd</sup> edn, 2009), pp 398-401. A contract between two parties cannot be taken to have produced a waiver simply on account of its existence: *Rommelfanger v Germany* (1989) 62 DR 151.

21. The Interim Code states that information about the full body scans (and presumably the no-flight consequence of not agreeing to it) “should be adequate, clear and provided ideally before ticket purchase” and “[i]n any event .. must be provided prior to entering the passenger screening area”. But for passengers who have already purchased their tickets this will be too late: their decision to travel has been made, having been done so without agreement to an invasion of their privacy of this precise sort. It is true that the contract of purchase may involve an acceptance of security conditions currently in force, but it is clear that this cannot give the authorities a blank cheque to act as they wish – passengers could not be required, for example, to parade naked prior to boarding on the basis that their purchase of their ticket had waived their right to privacy through their having ticked a box in an “e-contract” or signed their name to pages of material in a travel agent’s office. There have to be reasonable limits on the operation of such contractual clauses.
22. The Interim Code states that a refusal to submit to a full body scan means that in practice a passenger will be unable to fly. No alternative of a body pat search for example is to be offered or allowed upon request. It is not clear why this is the case, as such a search would surely be a good practice even if the passenger were being denied access to their flight; and since (we assume) it would happen anyway, why then not allow those who insist on this

alternative to proceed to their flight if indeed they turn out to be without any suspicious items?

23. For most passengers the reality is that there will often be no choice other than to fly. This is not like selecting between different consumer products or as between different airlines. The choice is whether or not to travel, not with whom to travel. Since all airlines require the buyer to assent to the full body checks if selected, there is in reality no choice at all for those who desire to fly. The passenger is captive, arbitrarily denied access to the flight of his or her choice and for which he or she has paid, even after the body search that follows their refusal to undergo the full body scan has made their innocence clear. Although the matter is not beyond argument, we do not consider that, by flying, a passenger waives his or her Article 8 rights.

*The application of Article 8(2)*

24. Given the applicability of Article 8(1), does Article 8(2) apply to permit the invasion of the right?
- (i) *Legitimate aim and proportionality*
25. Clearly there are a number of legitimate aims behind the introduction of the full body scanners, including the interests of national security, public safety, the prevention of crime and the protection of the rights of others. The infringement of the right is also likely to be judged proportionate to the mischief which the full body scanners are designed to prevent. Even though their success rate is not guaranteed (and they would have had what ministers acknowledge to have been only a 50-60% chance of identifying the explosives carried on board by the Christmas day bomber), it is not likely that the courts would rule against their use on this ground alone. The aspects of the current scheme discussed at paras 14-16 above come into play here. Issues of relative institutional competence would also be relevant, with the courts being likely to be reluctant to second-guess the executive on such sensitive crime-

prevention measures (see by analogy *R v Secretary of State for the Home Department ex parte Rehman* [2001] UKHL 47 especially per Lord Slynn and Lord Hoffmann). We do, however, note the doubts on this issue raised by the European Parliament in 2008, which also have a bearing on the question of proportionality (discussed in paragraphs 30-31 below). Thus, although we have assumed for the purposes of this advice that the use of full body scanners is a proportionate measure, further exploration of the EU material may suggest that such use is not, in fact, proportionate. That is, at least, not if conducted unilaterally by the UK; at some airports only; on an interim basis and without the benefit of the researches identified by the European Parliament.

(ii) *'In accordance with the law'*.

26. The key question is as to whether the use of the scanners is “in accordance with the law”. The requirements of this clause are well set out by Lord Hope in *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, at paras 40-41:

“40. The Convention principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism that it is being applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate. I derive these principles, which have been mentioned many times in subsequent cases, from *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49 and also from *Winterwerp v The Netherlands* (1979) 2 EHRR 387, pp 402-403, para 39, *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, p 669, paras 58-59 which were concerned with the principle of legality in the context of article 5(1), *Silver v United Kingdom* (1983) 5 EHRR 347, paras 85-90; *Liberty v United Kingdom* (2008) 48 EHRR 1, para 59 and *Sorvisto v Finland*, Application No 19348/04, 13 January 2009, para 112.

41. The word “law” in this context is to be understood in its substantive sense, not its formal one: *Kafkaris v Cyprus* (2008) 25 BHRC 591, para 139. This qualification of the concept is important, as it makes it clear that law for this purpose goes beyond the mere words of the statute. As the Grand Chamber said in that case in paras 139 -140, it has been held to include both enactments of lower rank than statutes and unwritten law. Furthermore, it implies qualitative requirements, including those of accessibility and foreseeability. Accessibility means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it what acts and omissions will make him criminally liable: see also *Gülmez v Turkey*, Application no 16330/02, 20 May 2008, para 49. The requirement of foreseeability will be satisfied where the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail. A law which confers a discretion is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary: *Goodwin v United Kingdom* (1996) EHRR 123, para 31; *Sorvisto v Finland*, Application No 19348/04, 13 January 2009, para 112.”

27. There are therefore two issues as to whether full body scanning is “in accordance with the law”. Firstly, whether there is a substantive legal basis for permitting such searches, and secondly, whether the ostensible legal basis has the normative qualities associated with the international law concept of “law”.
28. In *Gillan and Quinton v United Kingdom* (cited above), the Strasbourg court unanimously found the discretionary powers of stop and search in the Terrorism Act 2000 (ss 44-47) to be a breach of Article 8, notwithstanding that it was provided for by a statutory measure, on the ground that the “in accordance with the law” component of Article 8 was not met. The relevant passage of the judgment is as follows:

“76. The Court recalls its well established case-law that the words “in accordance with the law” require the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual - if need be with appropriate advice - to regulate his conduct (*S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§ 95 and 96, ECHR 2008-...).

77. For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise (*Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 4, ECHR 2000-XI; *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I; see also, amongst other examples, *Silver and Others v. the United Kingdom*, 25 March 1983, §§ 88-90, Series A no. 61; *Funke v. France*, §§ 56-57, judgment of 25 February 1993, Series A no. 256-A; *Al-Nashif v. Bulgaria*, no. 50963/99, § 119, 20 June 2002; *Ramazanov and Others v. Azerbaijan*, no. 44363/02, § 62, 1 February 2007; *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, no. 14134/02, § 46, ECHR 2007-XI (extracts); *Vlasov v. Russia*, no. 78146/01, § 125, 12 June 2008; *Meltex Ltd and Movsesyan v. Armenia*, no. 32283/04, § 81, 17 June 2008). The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see, for example, *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 31, ECHR 1999-VIII; *S. and Marper*, cited above, § 96).

78. It is not disputed that the power in question in the present case has a basis in domestic law, namely sections 44-47 of the 2000 Act (see paragraphs 28-34 above). In addition, the Code of Practice, which is a public document, sets out details of the manner in which the constable must carry out the search (see paragraphs 35-36 above).

79. The applicants, however, complain that these provisions confer an unduly wide discretion on the police, both in terms of the authorisation of the power to stop and search and its application in practice. The House of Lords considered that this discretion was subject to effective control, and Lord Bingham identified eleven constraints on abuse of power (see paragraph 16 above). However, in the Court's view, the safeguards provided by domestic law have not been demonstrated to constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference.

80. ...

81. ....

82. An additional safeguard is provided by the Independent Reviewer (see paragraph 37 above). However, his powers are confined to reporting on the general operation of the statutory provisions and he has no right to

cancel or alter authorisations, despite the fact that in every report from May 2006 onwards he has expressed the clear view that “section 44 could be used less and I expect it to be used less” (see paragraphs 38-43 above).

83. Of still further concern is the breadth of the discretion conferred on the individual police officer. The officer is obliged, in carrying out the search, to comply with the terms of the Code. However, the Code governs essentially the mode in which the stop and search is carried out, rather than providing any restriction on the officer's decision to stop and search. That decision is, as the House of Lords made clear, one based exclusively on the “hunch” or “professional intuition” of the officer concerned (see paragraph 23 above). Not only is it unnecessary for him to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched. The sole proviso is that the search must be for the purpose of looking for articles which could be used in connection with terrorism, a very wide category which could cover many articles commonly carried by people in the streets. Provided the person concerned is stopped for the purpose of searching for such articles, the police officer does not even have to have grounds for suspecting the presence of such articles. As noted by Lord Brown in the House of Lords, the stop and search power provided for by section 44 “radically ... departs from our traditional understanding of the limits of police power” (see paragraph 23 above).

84. ....

85. In the Court's view, there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration, as the judgments of Lord Hope, Lord Scott and Lord Brown recognised. The available statistics show that black and Asian persons are disproportionately affected by the powers, although the Independent Reviewer has also noted, in his most recent report, that there has also been a practice of stopping and searching white people purely to produce greater racial balance in the statistics (see paragraphs 43-44 above). There is, furthermore, a risk that such a widely framed power could be misused against demonstrators and protestors in breach of Article 10 and/or 11 of the Convention.

86. The Government argue that safeguards against abuse are provided by the right of an individual to challenge a stop and search by way of judicial review or an action in damages. But the limitations of both actions are clearly demonstrated by the present case. In particular, 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.

87. In conclusion, the Court considers that 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. They are not, therefore, “in accordance with the law” and it follows that there has been a violation of Article 8 of the Convention.”

29. It is true that, as noted above, in *Gillan* (at para 64) the Grand Chamber appeared to regard the question of airport security in a different way from random stop and search. It is hard to see why this should be so. We presume that they assumed that those who consent to fly consent to be searched: that there is a contractual, or quasi-contractual legal basis for such searches. However, for the reasons which we have set out above in relation to waiver, we do not consider that this constitutes a straightforward end to the matter. For some destinations, a person may have no option but to fly. If a person were compelled to consent to *any* form of search as a condition of flying, whenever the requirement to undergo it was introduced, however intrusive it may be, however discriminatory, and however arbitrary and unjustified, there might come a point where the consent could not be held to be “true consent”, and the allegedly contractual clause might be regarded as void as a matter of public policy.
30. Turning first to what constitutes the domestic law basis for security screening at airports, it appears (so far as our researches have enabled us to ascertain) to be found in Regulation (EC) 300/2008 of the European Parliament and of the Council of 11<sup>th</sup> March 2008 on common rules in the field of civil aviation security. The European Community has, since 2003, published common rules in the field of civil aviation security. The current text of these rules is contained in Regulation (EC) 300/2008. It is noteworthy that in preamble 10, this Regulation provides that member states shall be allowed *on the basis of a risk assessment* to apply more stringent measures than those laid down in the Regulation. Article 6 provides that such measures are permitted if the measures adopted are:

“relevant, objective, non-discriminatory and proportional to the risk that is being addressed, and communicated to the Commission as soon as possible.”

The “general measures” concerning the methods of screening allowed by virtue of Article 4 of the Regulation are set out in an Annex to the Regulation. These include screening of passengers. “Screening” is defined to mean “the application of technical or other means which are intended to identify and/or detect prohibited articles”.

31. It would appear, therefore, that the legal basis for screening passengers is Regulation (EC) 300/2008. But the matter is not beyond doubt, because on 23<sup>rd</sup> October 2008, the European Parliament passed a further (non-binding) resolution on the impact of aviation security measures and body scanners on human rights, privacy, personal dignity and data protection. In that resolution, the Parliament noted that the Commission had proposed a draft regulation supplementing the common basic standards on civil aviation security to include “body scanners” (“ie machines producing scanned images of persons as if they were naked, equivalent to a virtual strip search”). This implies that the Commission did not consider that such scanners were clearly included within the existing common basic standards contained in the Annex to the Regulation. The Parliament observed that this proposed draft was “far from being merely technical” because it had a serious impact on the right to privacy, the right to data protection and the right to personal dignity and “therefore need[ed] to be accompanied by strong and adequate safeguards”. It also noted that the draft measure was not accompanied by a Commission impact assessment as required by the Commission communication of 27 April 2005 on compliance with the Charter of Fundamental Rights in Commission legislative proposals, and no enquiries had been made into the possible impact of such machines on passenger health. For those reasons, the Parliament suggested that doubts arose in relation to the justification of this proposed measure, and its proportionality and necessity in a democratic society. The Parliament called upon the Commission to carry out necessary assessments (identified in paragraph J1 of the resolution) and called upon the

European Data Protection Supervisor and others to deliver an opinion on body scanners by the beginning of November 2008. We do not know whether that was done, or what (if anything) any such opinion said; but there does not appear to have been an amendment to the Regulation.

32. However, even if, as would appear, Article 6 of the Regulation permits the United Kingdom to set more stringent standards (or alternatively if this form of screening is implicitly permitted by the common basic standards contained in Article 4 and the Annex of the Regulation) that does no more than provide a legislative basis for the use of body scanners. The question that then arises is as to whether or not that EU Regulation, and the UK's rules for operating within it, have the quality of law.
33. The European Court of Justice in *Kadi & Al Barakat International foundation v Council & Commission* Case C-402/05 has established that even provisions with an ostensible basis in European law may yet lack the qualities of law by contravening common European human rights standards and therefore be contrary to common European law. In that case, financial freezing orders against suspected international terrorists, intended to give effect to UN sanctions, were held to address a legitimate aim. Notwithstanding this, the legality of the EC law regime which gave effect to those sanctions was successfully challenged before the European Court of Justice. The ECJ held – in language less robust than that in the opinion of Advocate General Maduro (which it followed), but equally damning – that the EC Regulation and the asset freezing regime violated among others the applicants' rights to a fair hearing and right to respect for their property. Thus, the orders made in the *Kadi* case were struck down because they contravened fundamental rights which

according to settled [ECJ] caselaw ... form a fundamental part of the general principles of law whose observance the ECJ ensures.

(see para 283, see also paras 278-286, 317-328 and 333-372).

34. In our view, there is a good argument that the introduction of full body scanners cannot be regarded as being “in accordance with the law”, because the regime under which this has been done fails to contain sufficient safeguards to protect fundamental rights from arbitrary interference. If so, then the presumptive breach of Article 8(1) described above is not saved by Article 8(2).
35. We note in particular these aspects of the scheme under scrutiny which cause us to reach this conclusion:
- a. The statutory basis for the use of full body scanners is nowhere referred to by Government. In particular the Interim Code does not locate its guidance in any statutory scheme. If the basis for it is said to be Article 4 of Regulation 300/2008, there is some doubt as to whether that justifies the use of such scanners. If it said to be Article 6 of Regulation 300/2008, no explanation or reference has been given to any risk assessment which justifies the UK in applying more stringent standards than the common basic standards required by the whole of the EU and EEA, and there is no indication that the Commission has been informed of any such measure.
  - b. The Interim Code does not indicate the basis for the selection of passengers for scrutiny by full body scanners. It is true that particular bases for the choice of passenger are explicitly ruled out (“personal characteristics (i.e. on a basis that may constitute discrimination such as gender, age, race or ethnic origin)”). But it is impossible to deduce from this what criteria might be left in. If the criterion were to be the selection of passengers acting unusually (identified by reference to behavioural analysis techniques in which BAA are currently training their staff) then this would not be objectionable as this is exactly the kind of ground which can lead to the generation of a reasonable or at least an honest suspicion about a person. But there is no statement to

the effect that this is the basis of choice and no reason to suppose that this is the sole criterion or even one among many.

- c. The Secretary of State for Home Affairs asserted in the House of Commons that the scanners would be used “on a random basis” (H C Debs, 5 January 2010, col 35) but this was not repeated by the Secretary of State for Transport on the day the full body scanners came into operation at the two airports (see H L Debs 1 February 2010 WS1). Furthermore, the Interim Code neither states this nor gives any indication of how random selection could be achieved if this were in fact to be the basis for selection. If selection is neither purely random nor based on behaviour, then it may be that the criteria for selection hinge on nationality, or on the origin of one’s flight or on the pattern of one’s previous travel. The Interim Code pleads security as the reason why none of this is revealed: “Body scanners must be operated in accordance with detailed protocols which contain the security sensitive information on the operation of the body scanner including selection criteria for those to be scanned. The details of the protocol are not published due to the security sensitive content but will comply with the requirements contained in this interim Code of Practice.” In our view, a generalised assertion of this nature cannot be a substitute for law, at least where justifications for the infringement of human rights are concerned.
  
- d. There is nothing like the detail to be found in the codes of practice governing the use of stop and search powers in public areas, whether under the routine powers set out in the Police and Criminal Evidence Act 1984 (as amended) or the exceptional powers to be found in the terrorism legislation (eg Terrorism Act 2000). Nor is there any proposal for independent review of the exercise of these powers analogous to that to be found in mainstream terrorism legislation (ie the annual reports currently the responsibility of Lord Carlisle of Berriew). There is no document available or proposed similar to the guidance drawn up in

2008 by the National Policing Improvement Agency for the Association of Chief Police Officers (ACPO) on stop and search in the context of terrorism. There is no independent complaints mechanism in the current scheme to which recourse could be had in a case of a dispute between a passenger and airport security staff.

- e. It is very likely that some criteria (for example, religious dress, destination, nationality or national origin) would also have an unlawful directly or indirectly discriminatory effect. Furthermore, in the absence of a statutory scheme, there is no safeguard against arbitrary selection for scanning in practice – as occurred in the *Roma Rights* case. We are of the view that there is a serious risk that ostensibly random use of scanners will in fact be discriminatory on protected grounds, particularly religion, race, nationality or national or ethnic origin.
- f. Furthermore, no mechanism exists for proper monitoring to ensure that the application of the scheme is non-discriminatory in practice. The Interim Code requires airport operators to provide those selected for screening “the opportunity to provide details of their age, gender, race, ethnic origin and religion or beliefs” but it does not appear to be likely that this will be an integral part of the screening process. It is to be expected that most passengers will not avail of the opportunity even if they are given the chance to provide the data in a meaningful way. The Interim Code does not therefore contain within its terms an adequate means for monitoring the exercise of this power. In particular as currently drafted there is no obligation on those exercising these powers to compile any record of their use in a way that will allow proper scrutiny of the exercise of the power.
- g. As things stand, there is too much scope for arbitrariness and wrongful discrimination in the process and too little transparency in its operation for the Interim Code to be able properly to function as a source of law for the purposes of compliance with Article 8(2).

## Data Protection

36. The Data Protection Act gives effect to the Data Protection Directive, which (as its preambles explain) is intended to give further effect to Article 8 of the European Convention. Thus, in our view, whether or not there is a breach of Article 8 and whether or not there is a breach of the Data Protection Act are likely to go hand in hand.

37. We note that undertaking full body scans engages the protection of the Data Protection Act because:

- a. the images created by the full body scanners are “data” as defined in section 1(1)(a) Data Protection Act, because it is information which is being processed by means of equipment operating automatically in response to instructions given for that purpose;
- b. the legal body which operates the scanner is the “data controller” as defined in section 1(1) of the Act;
- c. the use of such data, even if it is not recorded or retained, falls within the definition of “processing” contained in section 1(1) of the Act;
- d. the data which is processed is “personal data” as defined in section 1(1), because it is data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of the data controller (should the data controller decide to undertake further analysis or searches).
- e. the person whose image is scanned is a “data subject” as also defined in section 1(1), because he is the subject of the personal data so processed.

- f. the data processed are also sensitive personal data, as defined in section 2 of the Act, because they consist of information as to the data subject's physical condition, and may also consist of information as to the commission or alleged commission by him of an offence.

38. Normally, a data controller must comply with the data protection principles, as defined by section 4 of the Data Protection Act. The eight principles are set out in Schedule 1 Part 1 of the Act. We consider that the first, second, and third data protection principles are potentially engaged in this case.

39. The first data protection principle requires data to be processed "fairly and lawfully", and for an identified purpose. Although "fair processing" is further explained in Part II of Schedule 1 of the Act, it is an overarching concept where issues of consent, waiver, controls over arbitrariness and discrimination must play a part. "Lawfulness" has the same meaning as under Article 8, given its common European background; so compliance with this principle will stand or fall with the issue of legality under Article 8.

40. "Fair and lawful" processing of sensitive personal data also requires that one or more of the conditions set out in Schedules 2 and 3 of the Data Protection Act is made out. Relevant conditions under Schedule 2 are paragraph 1 (consent) or paragraph 5(d) (processing is necessary for the exercise of any functions of a public nature exercised in the public interest by any person). Under Schedule 3 one possibly relevant condition is "explicit consent", under paragraph 1. Another possibly relevant condition is under paragraph 3, where processing is necessary to protect the vital interests of the data subject or another person, in a case where consent cannot be given; or where the consent of the data subject cannot reasonably be expected to be obtained; or in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.

41. The second data protection principle requires personal data to be obtained only for one or more specified and lawful purposes, and not further processed

in a manner incompatible with them. Nothing in the papers before us suggests that the images produced by full body scanners would be used for purposes other than those specified in the Interim Code; however, whether that purpose is “lawful” again stands or falls with the question of legality under Article 8 ECHR.

42. The third data protection principle provides that personal data shall be “adequate, relevant and *not excessive* in relation to the purpose or purposes for which they are processed” (emphasis added). We consider that there is at least an argument that it could be excessive to require a person to undergo a full body scan if (for example) they had a disability, or were pregnant, or had some other reason to be concerned about the implications of a full body scan, and consented to some other adequate means of being searched, such as a thorough body pat-down or partial strip-search.

43. However, by virtue of section 28(1) of the Data Protection Act, the data protection principles do not apply to personal data if the exemption is “required for the purpose of safeguarding national security”. A certificate signed by a Minister of the Crown certifying such exemption is or at any time was required for that purpose is conclusive evidence of that fact, although a “person directly affected by” the issuing of a certificate under subsection 2 may appeal to the Information Tribunal against it (sections 28(2) and (4) Data Protection Act 1998).

44. In practice, for the reasons outlined above, we do not consider that the Data Protection Act takes matters much further than an analysis under Article 8 ECHR.

### **The Equalities Issue**

45. Separate, albeit linked, issues do however arise in relation to equalities. In 2004, the House of Lords held in the *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55 that the practice of

screening those who might overstay and claim asylum in the United Kingdom at Prague Airport was “inherently and systematically” discriminatory, because the overwhelming majority of those stopped were from the Roma group. It did not matter that this might be the group most likely to overstay and claim asylum; such direct discrimination could not be justified.

46. It is common experience that law enforcement powers which are ostensibly neutral on their face are, in practice, used disproportionately against members of one or more groups. For example, young black men are disproportionately likely to be the subject of police stop and search powers. One can easily envisage that, in practice, whether consciously or unconsciously, there may be direct discrimination on grounds of race, nationality or national or ethnic origin, and perhaps also sex, in the way in which individuals are selected for full body scans, although this would be hard to prove unless monitoring statistics were kept, which is not apparently proposed at present under the Interim Code. It is also undoubtedly the case that perceived discrimination on such grounds may have an adverse effect on relations between people of different racial groups; since those who perceive themselves as unfairly “targeted” may become disillusioned and suspicious.
47. One can also see that those who object so strongly to full body scans that they would rather not fly than be subjected to them may also be disproportionately from particular groups (religious, gender, transgender, or disabled). Again, this is not a matter which is susceptible to proof without research or monitoring.
48. Yet there is nothing in the papers, including Lord Adonis’s letter and the various Hansard statements, to suggest that the Secretary of State has complied with either his general or specific equality duties imposed by or under the Race Relations Act 1976, the Sex Discrimination Act 1975 or the Disability Discrimination Act 1995. These are the duties which require him, in the performance of his functions, to give “due regard” to the equality needs which include both elimination of unlawful discrimination, promotion of equality

of opportunity and of good relations between members of different racial groups. In relation to a central government department, undertaking a major, and obviously sensitive initiative which has self-evident ramifications for discrimination (on grounds of race, sex and disability, as well as religion), and for good race relations, this apparent failure is very disappointing. (It should be observed that this is not a matter of which the Secretary of State for Transport could properly plead ignorance. Less than a year ago, the Department also omitted to undertake any proper equality impact assessment when conducting the consultation on a third runway at Heathrow Airport. Following pre-action correspondence from Hounslow Racial Equality Council, it was obliged to agree undertake a further separate consultation on this issue and undertake an equality impact assessment, though at a stage it was arguably already too late to discharge his general equality duties.)

49. The Divisional Court in *R(Judy Brown) v BERR & DWP* [2008] EWHC 3158 (Admin) (written in the context of the disability equality duty, but of application across all three equality strands to which the general duties apply) helpfully summarised the approach from the leading cases, on the basis of submissions advanced before it on behalf of the Commission (intervening).
50. The Divisional Court observed that equality issues had played “regrettably little” part in public decision-making. It said that the purpose of the general equality duties is to

“achieve a climate of change” and “to create a greater awareness on the part of public authorities of the need to take account of disability in all its forms [and race and gender issues] and to ensure that [they] are brought into ‘the mix’ as a relevant factor when decisions are taken that may affect disabled people [or those of particular racial groups or genders].”

The requirements to eliminate discrimination, to promote equality and to foster good race relations are “statutory needs” to which “due regard must be given”. (See paragraphs 30-37, 79-80, and 83-84).

51. It went on to distil the following six propositions from the earlier case law (at paragraphs 90-96):
- a. That a public authority which has to take decisions that do or might affect people from particular equality groups must be made aware of their duty to have due regard to the identified goals. An incomplete or erroneous appreciation of these duties will mean that “due regard” has not been given to them.
  - b. The “due regard” duty must be fulfilled before and at the time that a particular policy that will or might affect those groups is being considered by the public authority in question. It involves a conscious approach and a state of mind. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision are not enough to discharge the duty.
  - c. The duties must be exercised in substance, with rigour and with an open mind. The duties have to be integrated within the discharge of the public functions of the authority. It is not a question of “ticking boxes”. Though the fact that the public authority has not specifically mentioned the statutory provisions containing the general equality duties in carrying out the particular function where it has to have “due regard” to the needs set out in them is not determinative of whether the duty under the statute has been performed, it is good practice for the policy or decision-maker to make reference to the provision and any code or other non-statutory guidance in all cases where those provisions are in play. If it does so, the policy or decision maker is more likely to ensure that that the relevant factors are taken into account, and scope for argument as to whether the duties have been performed will be reduced.
  - d. The duties imposed on public authorities subject to the general equality duties are non-delegable. They will always remain on the

public authority charged with them. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the equality duties. In those circumstances, the duties to have “due regard” to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the “due regard” duties and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its “due regard” duties.

- e. Fifthly, and “obviously” (according to the Court) the duties are continuing ones.
- f. Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their equality duties and pondered relevant questions. Proper record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept, it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the general equality duties.

52. Applying those principles to the introduction of full body scanners at the two airports, it appears from the available materials that consideration of the potential for unlawful discrimination, for adverse discriminatory effects which disproportionately inhibit exercise of free movement by particular groups, and the potential for the use of full body scanners without sufficient clear safeguards to avoid discrimination to adversely affect community relations have played “regrettably little” if any part thus far in the decision.

53. The Secretary of State for Transport would appear to have an incomplete or erroneous appreciation of his obligations under these duties, which may indicate that “due regard” has not been given to them. In particular, it is not

enough to say that “due regard” will be given to these issues at the time when the permanent Code of Practice is introduced, following consultation. It may be that, if the introduction of full body scanners is regarded as an emergency measure, a more perfunctory assessment of the equality implications may be justified at the interim stage; but that is not an excuse for simply failing consciously to address these issues directly at all when introducing such a significant policy change. If, as would appear, the duties have been bypassed, it is in our view inadequate for the Secretary of State to assert that equalities issues have been addressed (for example, in the reference to the fact that there will be ‘no discrimination’ on prohibited grounds in the screening process. Without compliance with the general and specific equality duties, the answer to that assertion must be, “How do you know?”). The duties must be addressed “in substance, with rigour and with an open mind”. In this context, specific limbs of the equality duty require more than a check to ensure non-discrimination. The implications of the full body scan policy for equality of opportunity and good race relations appear to have been overlooked entirely.

54. The Secretary of State may seek to assert that BAA would ensure that full body scans were undertaken in a non-discriminatory way at the operational stage, and so as to give due regard to other limbs of the general equality duty. However, that would not discharge the Department for Transport’s own duties, since as noted above the duties imposed on public authorities subject to the general equality duties must be exercised ‘at a formative stage’ of policy development and are in any event non-delegable.
55. Finally, in the absence of any written records to show that the general equality duties had been considered, a court would be likely to view with considerable scepticism an argument that they had been.
56. Proper compliance with the equality duties, including the specific equality duties, would require the Department for Transport to take a number of specific steps, including (in particular) to ensure that whatever screening

criteria were used to select those stopped for full body searches did not in fact discriminate unlawfully. This would almost inevitably require them to keep monitoring data on those who were subjected to full body scanning, as required by the specific equality duties. The Interim Code implies that no information at all will be kept on those who have been subject to full body scans.

57. In our view, it is therefore very likely that the Department has breached, and remains in breach of, its ongoing general equality duties. Further questions from the Commission on this subject may elicit more information as to what steps, if any, have been taken in pursuance of this duty, and will almost certainly ensure that these will be pursued more actively during the course of the consultation and in addressing the future practice of full body scans.

## **Conclusions**

58. For the reasons we set out above, we consider:

- a. The introducing of full body scanning engages the protection in Article 8 ECHR;
- b. Screening without discrimination may (and we have assumed for the purposes of this opinion, probably would) be regarded as a proportionate and necessary means of protecting the lives of passengers, though there may be some doubt about this in light of the European Parliament's resolution of 23<sup>rd</sup> October 2008 and the apparent decision by the Commission in the light of it not to pursue amendment of Regulation 300/2008.
- c. However, we consider that the current legal regime governing such full body searches does not comply with the requirement in Article 8 ECHR that measures infringing the right to respect for privacy be "in accordance with the law". If this is right, then there will be a breach of

the Data Protection Act 1995, thought his does not in our view take matters any further.

- d. There does not appear to have been any “due regard” to the statutory equality needs by the Department in deciding to introduce full body scanning on the basis of the Interim Code. This is in itself a breach of sections 71 Race Relations Act 1976, 49A Disability Discrimination Act 1995 and 76A of the Sex Discrimination Act 1976 respectively. That view is buttressed by the absence of any reference to the detailed provisions of the specific equality duties, including identification of arrangements for monitoring equality. That is a matter on which the Commission has (unique) power to take enforcement action, and that is a step which it may wish to consider taking.
- e. Failure to have conducted such assessments may also evidence a breach of Article 14 ECHR read with Article 8 (though the case law on this is not developed and such breach may be hard to prove).

59. We would therefore advise that the Commission explore these issues of legality and equality impact assessment further in writing before deciding whether to seek to enforce against this provision by way of judicial review. In particular, the Department could be invited to set out what it regards as the legal basis for its actions; and to disclose the documents which evidence its consideration of the equality impacts of its decision.

60. We would be happy to give further consideration to any of the issues raised within it if so instructed.

HELEN MOUNTFIELD  
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Matrix Chambers  
8<sup>th</sup> February 2010