Anti-Social Behaviour, Crime and Policing Bill

Briefing for House of Commons Report Stage

Amendments to Schedule 7, Terrorism Act 2000

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For further information contact:

Angela Patrick, Director of Human Rights Policy

Tel: (020) 7762 6415 Email: apatrick@justice.org.uk

JUSTICE, 59 Carter Lane, London EC4V 5AQ

Tel: 020 7329 5100 Fax: 020 7329 5055 E-mail: admin@justice.org.uk Website: www.justice.org.uk

JUSTICE considers that the powers in Schedule 7 of the Terrorism Act 2000 are overly broad, arbitrary and discriminatory in their application, and inconsistent with the rights guaranteed by the European Convention on Human Rights and the common law. The powers provide for individuals to be stopped at ports, airports and other borders and questioned for the purpose of determining whether a person appears to be a terrorist.

These powers have recently been brought into particular disrepute following the Schedule 7 detention of David Miranda, the partner of a Guardian journalist responsible for many of the Snowden articles disclosing details of the surveillance activities of US and UK agencies. However, the operation of Schedule 7 has been a consistent cause for concern for many and subject to challenge before both domestic and international courts, not least in connection with its disproportionate impact on people from ethnic minorities and the effect of this discrimination on public confidence among ethnic and religious communities.

JUSTICE welcomes the Government recognition that Schedule 7 requires reform. However, while many of the changes proposed in this Bill are designed to further circumscribe the powers available to officers when a person is stopped, nothing in the proposed reforms would limit the exceptionally broad discretion which allows for individuals to be stopped whether or not any grounds exist for suspecting that they may have an involvement in terrorist activity. Members may wish to ask Ministers to explain why they consider this extraordinary power remains capable of justification. Schedule 7 enables significant interference with individual rights to privacy and liberty – for example, envisaging the seizure, copying and retention of significant personal data when personal electronic devices such as smartphones are seized – without any justification based on reasonable grounds that the person concerned poses a risk. JUSTICE is not persuaded that a power of this scope can be justified. The proposed reforms in the Bill do not go far enough. We therefore support repeal of the power to stop without reasonable suspicion, for the reasons set out below.

Introduction

1. Established in 1957, JUSTICE is an independent law reform and human rights organisation. It is the United Kingdom section of the International Commission of Jurists.

2. Schedule 7 to the Anti-social Behaviour, Crime and Policing Bill ('the Bill') proposes to make a number of changes to Schedule 7 of the Terrorism Act 2000. In this briefing, we consider the powers in Schedule 7 and our concerns about the limited impact of the proposals in the Bill currently before Parliament. To avoid confusion, we refer to the proposals in the Bill as 'the proposed changes' and the underlying powers as Schedule 7 powers. We have produced a separate briefing which covers our concerns about the remainder of the Bill.[1]

3. JUSTICE has a long history of engagement with the human rights issues arising from terrorism and counter-terrorism. We make clear at the outset that we do not consider the problems faced by Government in combating the threat of terrorism are easily solved. However, too often, in the past decade, counter-terrorist legislation has shown our Government willing to curtail fundamental rights unnecessarily and without adequate justification. Many of the counter-terrorism measures adopted have not only been wrong in principle, but have proved ineffective, unnecessary and even counterproductive in practice. We consider that Schedule 7 shares this unfortunate history.

4. JUSTICE does not oppose the use of stop and search without reasonable suspicion in every circumstance. For example, we have recognised that a circumscribed power, subject to time and geographical restriction; designed to allow for blanket searches based on specific intelligence; that supports a real and immediate risk, could be justifiable (for example, an order to search a particular flight, or series of flights from a particular destination or into a particular airport, in connection with a bomb threat). However, compulsory powers of stop and search exercised by State authorities require weighty justification.[2] We regret that the power in Schedule 7 is exceptionally broad

[1] http://www.justice.org.uk/resources.php/350/anti-social-behaviour-crime-and-policing

[2] See for example, JUSTICE Response, Home Office Review of Counter-Terrorism and Security Powers, August 2010, http://www.justice.org.uk/data/files/resources/20/JUSTICE-response-to-CT-review-aug-10.pdf

and accompanied by few safeguards to protect individuals who are detained or to circumscribe the discretion open to individual officers.

Background

5. Schedules 7 and 8 of the Terrorism Act 2000 (TACT 2000) make provision for police, immigration or customs officers to question at a port or border any person in order to determine whether the person appears to be a terrorist; that is a person who 'is or has been concerned in the commission, preparation or instigation of acts of terrorism' (Section 40(1)(b), TACT 2000). The officer need have no grounds or justification for the decision to stop any specific person. TACT 2000 makes no provision for reasonable suspicion or any other standard to be satisfied before a stop may take place. Nevertheless, a person stopped can be questioned for up to nine hours and may be searched, with their belongings held for up to seven days. If a person is detained at a police station their fingerprints and DNA may be taken.

6. In January 2010, the European Court of Human Rights (the Strasbourg Court) in *Gillan and Quinton v UK* (2010) EHRR 45, held that a stop and search power, without provision for reasonable suspicion, in Section 44 TACT 2000 breached the right to respect for privacy guaranteed by Article 8 ECHR because of its lack of safeguards against the arbitrary use of state power. In particular, in that case, the Court expressed concern about the breadth of the discretion afforded to individual officers, and the lack of any clear requirement on the persons authorising the search to make any assessment of the proportionality of the measure. It concluded that weak provisions to limit the geographical area of a search were not a sufficient limit on the power of the executive. Furthermore, the ability to seek judicial review after the event was not an effective safeguard. The Court concluded: '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 properly exercised.' Section 44 has since been repealed and replaced with an alternative, more circumscribed power. Section 47A TACT 2000, now allows for stop and search without suspicion in circumstances where an officer reasonably suspects an act of terrorism is about to take place. JUSTICE considers that without revision, Schedule 7 is open to the same criticism that the Court levelled at Section 44 TACT 2000. These issues are currently being litigated both in domestic courts and at Strasbourg, where the Government seeks to argue that as the powers in Schedule 7 apply only to ports and borders, they

are distinguishable from Section 44.[3] We note, however, the emphasis placed by the Strasbourg Court on the inadequacy of the geographical restrictions in Section 44. Despite the Schedule 7 powers being confined to ports and borders, their use is not proscribed in the legislation by the need to be justified, necessary and proportionate. Without a requirement for officers to show that stops are based on rational grounds, we consider that there is a real risk that these powers will be found to be arbitrary and disproportionate.

7. Statistics on the use of this power already show that the majority of persons subject to stop and search under Schedule 7 are from ethnic minorities (in 2012/13, the figures showed 79 per cent of detainees were not white). The Independent Reviewer of Terrorism Legislation has commented on these disproportionate figures. He has noted that while the figures themselves do not automatically provide a basis for criticism, there is 'no room for complacency' given the possibility for negative impacts on minority communities.[4] Prior research had already found that ethnic minority communities are significantly affected by the operation of without suspicion stops, with reported questioning regularly focussing on religious or cultural activities, including mosque attendance and frequency of prayer.[5]

The Proposed Reforms (Clause 127 & Schedule 7)

8. Following recommendations made by the Independent Reviewer that Schedule 7 be subject to review, accompanied by specific recommendations for reform, the Government launched a consultation on the operation of Schedule 7 in September 2012. However, before the Government response to the consultation exercise was complete, the current proposals in the Bill were published. Clause 127 would give effect to Schedule 7 of the Bill, which proposes the following reforms to the Schedule 7 TACT 2000 power:

    i. The maximum period for questioning is reduced from 9 hours. A distinction is to be drawn between persons stopped pursuant to paragraphs 2 and 3 of Schedule 7 (who may be questioned for up to an hour) and those stopped

[3] See for example, *Malik v UK* App No 32968/11 and *Beghal v DPP* [2013] EWHC 2573.

[4] Report of the Independent Reviewer of Terrorism Legislation (2012), paras 9.23-26.

[5] See Choudhury, T and Fenwick, H, *The impact of counter-terrorism measures in Muslim communities; EHRC Research Report, 72* (EHRC, 2011).

subject to paragraph 6 of Schedule 7 (who may now be questioned up to a maximum of 6 hours);

ii. A periodic review of any detention under Schedule 7 will be introduced. The intervals for any such review are to be specified in delegated legislation;

iii. Only immigration officers designated by the Secretary of State will now be capable of exercising powers under Schedule 7;

iv. The Secretary of State will be required to issue a code of practice on training for officers designated for the purpose of Schedule 7 and governing the procedure for designating such officers;

v. Persons stopped subject to paragraph 2 will not be subject to any intimate search. Only persons stopped pursuant to paragraph 6 of the Schedule can be made subject to a strip search. A strip search may only be conducted if the officer has a reasonable suspicion that the person is concealing evidence that they are involved in terrorist activities and it is authorised by a senior officer not involved in the questioning. The power to take intimate samples is removed;

vi. Additional safeguards currently only applicable to powers exercised under Schedule 7 at police stations, including in respect of access to legal advice, are extended to all instances of detention, including at ports and airports.

9. While JUSTICE welcomes the changes proposed, we are concerned that they do not go far enough to tackle the serious injustice and unfairness which results from the operation of stop and search without suspicion at our ports, airports and other borders. Nothing in these proposals would change the broad discretion afforded to individual officers in deciding whether to conduct a search. It is clear that the stops considered in *Gillan,* which were limited to durations significantly shorter than an hour, engaged Article 8 ECHR and could not be justified without effective circumscription to limit their arbitrary use. Detention under Schedule 7 is still envisaged to last for up to 6 hours (albeit that detention for the maximum limit is expected to be rare). This is a significant period which, in our view, is likely to engage the right to liberty protected by Article 5 ECHR. Although the proposed reforms are welcome, they leave significant powers in the hands of individual officers, which without reasonable grounds to justify the reason for their exercise, may be difficult to justify. While the proposal to introduce a review is welcome, little information is provided on how this would be conducted or the frequency, leaving these to be determined by the Secretary of State. Ultimately, the

value of any review is undermined while detention remains justified without a requirement for reasonable grounds for suspicion.

10. For an example of the breadth of interference imposed on individuals once subject to a stop, consider that there is nothing in the proposed reforms which would restrict the power to seize individual property – including personal data held by individuals on electronic devices such as laptops and smartphones; There is no restriction on the face of the Bill to limit the harvesting of data subject to compulsion and it is difficult to imagine that wholesale gathering and retention of data could be justified in all cases where no reasonable grounds exist to stop the individual concerned, let alone examine and process their personal data. Yet, on the contrary, the proposed reforms clarify that the power to seize includes a power in all cases to make copies of the information seized and to retain that material, including for use as evidence in criminal proceedings. JUSTICE regrets, particularly in light of the controversy surrounding the David Miranda case, that the Government has not taken this opportunity to revisit the application of these compulsory powers in contemplation of the expanding use of personal technology to transport significant amounts of personal information. In considering the proposed reform in new paragraph 11A, Members may wish to consider calling on Ministers to justify the breadth of this power and to challenge its necessity, given that persons will be stopped without any suspicion that they are terrorists, and most will be able to easily demonstrate they are not terrorists. Given the likely limited benefit to the State, compared with the significant impact upon personal privacy, of permitting authorities to cull personal data without reasonable suspicion, or any safeguards as to its use and processing, we consider that this activity is also likely to violate Article 8 ECHR in practice.

11. New paragraph 11A expressly envisages this information – procured by compulsion - being produced as evidence in subsequent criminal proceedings. It is regrettable that the Bill provides for this prospect. Both the Independent Reviewer and the domestic courts have expressed a view that it is likely to be incompatible with the right to a fair trial for the product of this type of procedure to be used in a subsequent criminal trial. There is ongoing litigation in *Beghal* which will consider whether the discretion of the court to exclude prejudicial material in Section 78 PACE 1984 is sufficient to protect

the individual's right to a fair hearing.[6] However, this Bill could be used to expressly clarify that no material gathered using Schedule 7 powers may subsequently be used to convict an individual of a criminal offence. In light of the breadth and nature of this power, JUSTICE considers that the subsequent use of material garnered through the use of Schedule 7 to found a prosecution of an individual would seriously endanger the right to a fair hearing, including the presumption of innocence, as guaranteed by Article 6 ECHR.[7]

12. However, while supplementary reforms to Schedule 7 may reduce the risk that specific issues may give rise to violations of Articles 8 (personal data) and 6 ECHR (subsequent use), without further circumscription of the power itself by the application of an objective requirement for grounds to justify the need to stop an individual, we consider that Schedule 7 will remain vulnerable to challenge as disproportionate, arbitrary and incompatible with the right to privacy and individual liberty. Without such significant amendment, JUSTICE would support repeal of the powers in Schedule 7.

Angela Patrick
JUSTICE
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[6] [2013] EWHC 2573. In this case, the High Court concludes that Section 78 PACE is adequate to protect the right of individuals subject to Schedule 7 questioning to a fair hearing. However, this case is subject to further appeal.

[7] The right not to self-incriminate is not absolute. For example, see *Brown v Stott,* [2003] 1 AC 681 (JUSTICE intervened in that case to argue that Article 6 ECHR did not extend to protection against a requirement to identify the driver of a vehicle).