

## Beghal v The United Kingdom (Application 4755/16)

### Issues considered

*Beghal* considered the lawfulness of Schedule 7 Terrorism Act 2000 (Sch.7) powers. Under this provision police, immigration and customs officers at border crossings can stop, question and detain individuals travelling into and out of the UK. This is to determine if an individual is concerned in the commission, preparation or instigation of acts of terrorism. The power can be used whether or not the officer reasonably suspects that the person is involved in terrorism and is often described as a “suspicionless” power. Sch.7 involves the power to examine and detain a person. It is an automatic offence to wilfully fail to comply with a duty under Sch.7, such as by refusing to answer questions. The maximum penalty for a refusal is a three-month custodial sentence and/or a maximum fine of up to £2,500.

The applicant was returning from a visit to her husband who was detained in custody in France in relation to terrorism offences. She was stopped at the airport and questioned under Sch.7. She refused to answer most questions until her lawyer arrived. She was charged with wilfully failing to comply with a duty under Sch.7. She argued that Sch.7 breached her rights under Articles 5, 6 and 8 of the European Convention on Human Rights (“ECHR”). In *Beghal v DPP* [2015] UKSC 49, the majority of the Supreme Court (SC) ruled that Sch.7 had sufficient safeguards to be ‘in accordance with the law’ and therefore there was no violation of Article 8 (Art.8). Those safeguards were said to include the requirement to permit consultation with a solicitor, the availability of judicial review and supervision by the Independent Reviewer of Terrorism Legislation.

### ECtHR decision

#### *Article 8*

The European Court of Human Rights (“ECtHR”) unanimously held that the applicant’s Art.8 rights were violated. In considering whether this interference was in accordance with the law, the ECtHR held that the power was neither sufficiently circumscribed nor subject to sufficient safeguards to guard against abuse. Due to the absence of a ‘reasonable suspicion’ requirement, examining officers had a broad discretion. This requirement is an important consideration in determining the lawfulness of a power to stop or question and search, but a stop and search power need not necessarily be conditioned by reasonable suspicion to make it lawful<sup>1</sup>.

The ECtHR went on to consider further possible safeguards in Sch.7 which could make this power lawful, namely legal representation, judicial review and independent oversight. No provision is made under Sch. 7 for a solicitor to be in attendance during the examination. Individuals could be examined for up to nine hours, without being formally detained and without having access to a lawyer<sup>2</sup>. Individuals could seek judicial review of the use of Sch.7 powers but domestic case law demonstrated the absence of a ‘reasonable suspicion’ requirement made this difficult, if not impossible<sup>3</sup>. The Court of Appeal previously stated that Parliament set such a low bar for the exercise of Sch.7 that it could be used to ascertain the mere possibility of an act of terrorism<sup>4</sup>.

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<sup>1</sup> *Beghal v The United Kingdom* (Application no 4755/16) at para 94.

<sup>2</sup> *Ibid*, at para 100.

<sup>3</sup> *Ibid*, at para 103 – 105.

<sup>4</sup> *R (David Miranda) v. Secretary of State for the Home Department and Commissioner of Police of the Metropolis* [2016] EWCA Civ 6 at para 58.

The Independent Reviewer provides independent oversight, but their role is limited by the fact that they cannot determine the lawfulness of a stop.<sup>5</sup> Many of the Reviewer's recommendations had not been implemented, despite being supported by the Joint Committee on Human Rights and Home Affairs Select Committee<sup>6</sup>. The Reviewer had repeatedly called for the introduction of a 'reasonable suspicion' requirement, but this was not implemented.<sup>7</sup>

The ECtHR concluded that whilst the absence of a 'reasonable suspicion' requirement did not make the powers under Sch.7 unlawful, the purported safeguards were insufficient to protect individuals from arbitrariness.<sup>8</sup>

### *Other Convention rights*

The applicant argued that her Article 5 and 6 rights were violated. The factors relevant in finding an interference of Article 5 and 8 were the same, therefore consideration of Article 5 was not necessary.<sup>9</sup> Article 6 was not engaged because Sch.7 powers were not used in relation to a criminal charge<sup>10</sup>.

### **Comment**

*Beghal* strengthens the safeguards required to ensure interferences are 'in accordance with the law' and increases the burden on states to justify counter-terrorism powers. While the SC ruled these exact safeguards were 'in accordance with the law', Strasbourg judgement favoured individual rights over national security and demonstrated the value of the ECtHR as a supranational court in circumstances where a domestic court might see fit to demur to Government on matters of national security.

This judgment is a significant step towards preventing the discriminatory use of this power. As Lord Kerr stated in his dissenting judgment in the SC, 'if examining officers exercise Schedule 7 powers... on the basis of an "intuition" that a person "looks like" a terrorist, it is predictable that those of Asian or a Muslim appearance will be disproportionately targeted<sup>11</sup>'. Sch.7 has in fact been used to disproportionately target Asians. They are 23 times more likely than White people to be examined and 80 times more likely than White people to be detained.<sup>12</sup> This is even though they represent a minority of travellers. In 2015, 94% of travellers at Gatwick airport were White whereas only 2% of travellers were Asian<sup>13</sup>. Of the 419,000 individuals that have been stopped under Sch.7 between 2009 and 2019, only 30 have been convicted<sup>14</sup>. That 0.007% of stops have resulted in conviction suggests that this type of racial profiling is ineffective has been largely ineffective and discriminatory.

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<sup>5</sup> see note 1 above at para 106 – 108.

<sup>6</sup> *Ibid*, at para 107.

<sup>7</sup> *Ibid*, at para 107.

<sup>8</sup> *Ibid*, at para 109.

<sup>9</sup> *Ibid*, at para 113.

<sup>10</sup> *Ibid*, at para 121 – 123.

<sup>11</sup> *Beghal v Director of Public Prosecutions* [2015] UKSC 49; [2016] A.C. 88, at para 104.

<sup>12</sup> Faith Matters (2016). In numbers: counter-terrorism powers disproportionately affect ethnic and religious minorities in Britain. [online] Available at: <https://www.faith-matters.org/2016/05/18/numbers-counter-terrorism-powers-disproportionately-affect-ethnic-religious-minorities-britain/>

<sup>13</sup> Civil Aviation Authority (2015). CAA Passenger Survey Report 2015.

<sup>14</sup> CAGE (2019). Schedule 7: Harassment at Borders, The impact on the Muslim community. p.5.

This judgment is consistent with recent case law involving counter-terrorism powers. It mirrors findings that stop and search powers without a 'reasonable suspicion' requirement<sup>15</sup> and the use of mass surveillance regimes by the UK Government are unlawful<sup>16</sup>. However, the ECtHR failed to outline appropriate safeguards to limit the risk of arbitrariness. First, the ECtHR implies that powers without a 'reasonable suspicion' requirement must be subject to safeguards without defining what constitutes a sufficient safeguard. States could introduce minor safeguards which in reality do nothing to limit the effect and operation of such powers.

Second, after considering whether Sch.7 powers were in accordance with the law, the ECtHR failed to consider proportionality. This is an established consideration in determining whether an interference of Art.8 is necessary in a democratic society.<sup>17</sup> The reason for this omission is unclear as proportionality was considered in depth in at the SC.<sup>18</sup> This omission may allow one to imply that national security measures made in accordance with the law are automatically proportionate.

Third, changes have been made to Sch.7 since the applicant was questioned under these powers. As the ECtHR considered Sch.7 powers as they existed at the time,<sup>19</sup> the findings may be of minimal relevance today<sup>20</sup>. Fourth, the ECtHR should have considered whether the lack of access to a lawyer during questioning constituted a violation of Article 6.<sup>21</sup> As Lord Kerr stated, answering questions under Sch.7 may involve self-incrimination therefore, it is wrong to say questioning under Sch.7 is not with a view to prosecution.<sup>22</sup>

Fifth, the ECtHR failed to consider the power to detain individuals under Sch.7, which potentially gives rise to a greater interference of rights. Lastly, the ECtHR implies a 'reasonable suspicion' requirement is a sufficient safeguard. It missed an important opportunity to address the significant risk of discrimination inherent within "reasonable suspicion". For example, the police can stop and search anyone whom they reasonably suspect to be a terrorist.<sup>23</sup> Asians are almost three times more likely than White people to be stopped and searched<sup>24</sup>.

The ECtHR did not take this valuable opportunity to flag appropriate safeguards which might be established to make Sch.7 and other counter-terrorism powers lawful, giving rise to a risk of Art.8 violations in the future. Considering the length of time and expense of making an application to the ECtHR, the extent to which the lawfulness of counter-terrorism measures are a transnational issue and the rights at stake, the ECtHR should have grasped the opportunity to address these issues.

**By Maaha Elahi**

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<sup>15</sup> *Gillan and Quinton v United Kingdom* (Application no 4158/05) [2010] ECHR 28.

<sup>16</sup> *Big Brother Watch v United Kingdom* (Application nos 58170/13, 62322/14 and 24960/15).

<sup>17</sup> *Dudgeon v United Kingdom* (Application no 7525/76) at para 51 – 53.

<sup>18</sup> see note 11 above at para 46 – 51.

<sup>19</sup> see note 1 above at para 110.

<sup>20</sup> Gray, C. (2019). Schedule 7 of the UK Terrorism Act 2000. *European Human Rights Law Review*, 3, pp.318-321.

<sup>21</sup> *Ibid.*

<sup>22</sup> see note 11 above at para 115.

<sup>23</sup> Section 43 Terrorism Act 2000.

<sup>24</sup> see note 12 above.