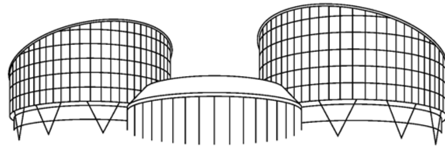

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF BEGHAL v. THE UNITED KINGDOM

(Application no. 4755/16)

JUDGMENT

STRASBOURG

28 February 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Beghal v. the United Kingdom,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Krzysztof Wojtyczek,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski,
Gilberto Felici, *judges,*
and Renata Degener, *Deputy Section Registrar,*

Having deliberated in private on 29 January 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 4755/16) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a French national, Ms Sylvie Beghal (“the applicant”), on 14 January 2016.

2. The applicant was born in 1969 and lives in Leicester. She was represented by Ms N. Garcia-Lora, a lawyer practising in Walsall. The British Government (“the Government”) were represented by their Agent, Mr C. Wickremasinghe of the Foreign and Commonwealth Office.

3. On 22 August 2016 notice of the application was given to the Government.

4. The Government of France did not seek to exercise its right to intervene (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Schedule 7

5. Schedule 7 to the Terrorism Act 2000 (“TACT”) empowers police, immigration officers and designated customs officers to stop, examine and search passengers at ports, airports and international rail terminals. No prior

authorisation is required for the use of Schedule 7 and the power to stop and question may be exercised without suspicion of involvement in terrorism. However, questioning must be for the purpose of determining whether the person appears to be concerned or to have been concerned in the commission, preparation or instigation of acts of terrorism. If someone fails to co-operate he or she is deemed to have committed a criminal offence and could face up to three months in prison, a fine or both.

B. The facts of the present case

6. The applicant, a French national, is ordinarily resident in the United Kingdom. Her husband, who is also a French national, is in custody in France in relation to terrorist offences.

7. On 4 January 2011, following a visit to her husband in France, the applicant and her three children returned to the United Kingdom on a flight from Paris. The flight landed at East Midlands Airport at approximately 8.05 p.m.

8. At the United Kingdom Borders' Agency ("UKBA") desk the applicant and her children were stopped but she was not formally detained or arrested. She was told that she was not under arrest and that the police did not suspect her of being a terrorist, but that they needed to speak to her to establish if she might be "a person concerned in the commission, preparation or instigation of acts of terrorism". She was therefore taken to an examination room with her youngest child. As the applicant had arranged for someone to meet her at the airport, her two older children were permitted to proceed to Arrivals. The applicant's luggage was taken to another room and searched.

9. The applicant asked to consult a lawyer and for an opportunity to pray. At approximately 9.00 p.m., while she was praying, one of the officers spoke with her lawyer and indicated that she would be free to speak to him in fifteen minutes. When she finished praying, she was told that she could telephone her lawyer after she had been searched.

10. At approximately 9.23 p.m., after the applicant had been searched, she spoke with her lawyer by telephone. However, the officers made it clear that they would not delay the examination pending his arrival.

11. In or around 9.30 p.m. the applicant was taken to an examination room and served with a form TACT 1 (see paragraph 42 below). The contents of the form were also read to her. In response, she informed the officers that she would only answer questions after her lawyer arrived. Thereafter, she was asked a number of questions about her family, her financial circumstances and her recent visit to France. She refused to answer most of those questions.

12. At around 10.00 p.m., following the conclusion of the examination, the applicant was cautioned and reported for the offence of failing to

comply with her duties under Schedule 7 by refusing to answer questions. She was also told that she was “free to go”.

13. The applicant’s lawyer arrived at approximately 10.40 p.m.

14. The applicant was subsequently charged with three offences: wilfully obstructing a search under Schedule 7; assaulting a police officer contrary to section 89 of the Police Act 1996; and wilfully failing to comply with a duty under Schedule 7. The first and second charges were eventually dismissed.

15. On 12 December 2011 the applicant appeared before Leicester Magistrates’ Court, where she pleaded guilty to the third charge and was sentenced to be conditionally discharged. That plea followed a ruling by the District Judge that he had no power to stay the proceedings as an abuse of process on the grounds advanced by the applicant; namely, that the powers given to the police under Schedule 7 had infringed her rights under Articles 5, 6 and 8 of the Convention and her right to freedom of movement between Member States of the European Union under Articles 20 and 21 of the Treaty on the Functioning of the European Union.

16. The applicant appealed to the High Court against the District Judge’s ruling.

C. The judgment of the High Court

17. On appeal, the applicant alleged that there had been an abuse of process based on a violation of her rights under Articles 5, 6 and 8 of the Convention and her freedom-of-movement rights. She also sought a declaration of incompatibility; or, if no declaration were to be granted, she contended that her rights under the above-mentioned Convention Articles had been infringed.

18. With respect to her Convention rights, she argued that the powers under Schedule 7 were in breach of Articles 5 and 8 of the Convention because they were neither sufficiently circumscribed nor subject to adequate safeguards to be “in accordance with the law”; or, in the alternative, that the interference with her Article 8 rights was not proportionate. She further argued that her rights under Article 6 had been engaged at the latest when she was obliged to answer questions exposing her to the risk of self-incrimination without her lawyer in attendance.

19. The High Court delivered its judgment on 28 August 2013. In respect of the Article 8 complaint, the court considered that the present case was distinguishable from that of *Gillan and Quinton v. the United Kingdom*, no. 4158/05, ECHR 2010 (extracts). Unlike the Code of Practice relating to the powers exercised under section 44 of TACT (the provisions under consideration in *Gillan and Quinton*), in the present case the relevant Home Office Code of Practice and accompanying Practical Advice (see paragraphs 42 and 43 below) afforded a measure of legal protection against arbitrary

interferences by the Executive. Moreover, port and border control was very different from the power to stop and search, exercisable anywhere in the jurisdiction, and conclusions as to the arbitrariness of the latter did not readily translate to conclusions as to the former. The United Kingdom, as an "island nation", concentrated controls at its national frontiers and the court was therefore of the view that it was to be accorded a wide margin of appreciation in carrying out these controls.

20. Not being constrained by the authority of *Gillan and Quinton*, the court went on to find that the Schedule 7 powers were sufficiently circumscribed and were therefore "in accordance with the law". First, it noted that many exercises of Schedule 7 powers were unlikely even to engage Article 8 as the intrusions would fall below the threshold of a minimum level of seriousness. Secondly, it considered that the arguments which served to distinguish *Gillan and Quinton* likewise served to emphasise the important and particular position of port and border controls and the need for such powers. Thirdly, the Schedule 7 powers were applicable only to a limited category of people: namely, travellers in confined geographical areas. Furthermore, while there was no room for complacency, the statistics collated by the Independent Reviewer (see paragraphs 48-49 and 56-61 below) did not suggest arbitrary overuse or misuse in respect of members of ethnic-minority communities. Fourthly, the Schedule 7 powers could only be exercised in respect of that limited category for the purpose of determining whether the person questioned appeared to be a person who was or had been concerned in the commission, preparation or instigation of acts of terrorism, and these limitations told against the powers being arbitrary. Fifthly, the Schedule 7 powers were principally an aspect of port and border control rather than of a criminal investigation and it was therefore not surprising that there was no requirement of "reasonable suspicion" for the powers to be exercised. Sixthly, the court noted that the underlying purpose of the Schedule 7 powers was to protect the public from terrorism.

21. In this regard, the court observed:

> "The manifest importance of that purpose and the utility of the powers do not, of course and of themselves, entail the conclusion that these powers are not arbitrary and thus compatible with Art. 8. However, the exercise of Schedule 7 powers is subject to cumulative statutory limitations. Their exercise is governed by the Code. Over and above the possibility of legal challenge if misused in an individual case, they are subject to continuing review by the Independent Reviewer. The absence of a requirement of reasonable suspicion is both explicable and justifiable. For the reasons already given, we are not at all persuaded that these powers render the public vulnerable '...to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than for which the power was conferred' – Lord Bingham's test for arbitrariness, in *Gillan (HL)*, at [34], set out above. Equally, we are not persuaded that these are unfettered powers, falling foul of the test applied in *Gillan (Strasbourg)*, at [76] – [77], also set out above; for our part, the 'level of

> precision' of these powers (*ibid*) falls and falls comfortably on the right side of the line."

22. The court also found that the exercise of Schedule 7 powers was proportionate. For the reasons already given, it did not accept that they were too broad. Furthermore, it noted that there was an objective justification for the focus on ports, airports and border areas, which, in the United Kingdom, provided a particularly appropriate venue for detecting, deterring and disrupting potential terrorist activity. With regard to the circumstances of the applicant's case, the court found that the interference with her Article 8 rights had been justified. As she had been returning to the United Kingdom after visiting her husband, who was imprisoned in France for terrorism offences, she was not stopped and examined on a random basis. Moreover, the questions asked of her were rationally connected to the statutory purpose and were in no way disproportionate.

23. In view of the court's conclusions in respect of Article 8, it found that the applicant's Article 5 argument could be dealt with summarily. As the respondent accepted that there had been an interference with the applicant's rights, and the applicant accepted that the interference was "in order to secure the fulfilment of any obligation prescribed by law", the only issue to be determined was whether the interference was "lawful", and the conclusions in respect of Article 8 had determined that it was.

24. Finally, the court considered the applicant's argument under Article 6 of the Convention. However, it found that on the facts of her case, Article 6 was not engaged as her examination under Schedule 7 was not an inquiry preparatory to criminal proceedings but rather an inquiry related to border control with the specific public interest of safeguarding society from the risk of terrorism. Furthermore, the examination was not carried out for the purpose of obtaining admissions or evidence for use in such proceedings, and the fact that the applicant's answers might have yielded information potentially of evidential value did not of itself suffice to engage Article 6. Even if the applicant's rights had been engaged, the court found that there would have been no violation since it was fanciful to suppose that permission would be granted in criminal proceedings for any admissions obtained pursuant to a Schedule 7 examination to be adduced in evidence.

D. The judgment of the Supreme Court

25. The applicant was granted permission to appeal to the Supreme Court, which gave judgment on 22 July 2015.

26. Prior to the judgment, Schedule 7 was amended by the Anti-Social Behaviour, Crime and Policing Act 2014, which required examining officers to take a person into detention if they wished to examine him or her for longer than one hour; reduced the maximum period of detention from nine hours to six hours; required the periodic review of detention by a

review officer; provided that the questioning of an examinee should not commence until after the arrival of a requested solicitor; and stipulated that examining officers should be designated and trained for this purpose (see paragraphs 52-53 below). The Code of Practice was amended to reflect these changes (see paragraphs 54-55 below). In considering the applicant's complaints, the Supreme Court had regard to the amended Schedule 7 power.

1. *The opinion of the majority*

(a) Article 8

27. With regard to the Article 8 complaint, Lord Hughes (with whom Lord Hodge agreed) also considered that *Gillan and Quinton* (cited above) was distinguishable on its facts since the Schedule 7 power was confined to those passing through ports of entry/exit, while the section 44 power was exercisable in relation to any person anywhere in the street. Furthermore, while there was evidence that the safeguards provided in the case of section 44 were ineffective, none of these applied to the powers under Schedule 7. Having regard to the safeguards which applied in respect of Schedule 7, their Lordships were satisfied that the principle of legality was met. In particular, they had regard to the restriction of the power to those passing in and out of the country; the restriction to the statutory purpose; the restriction to specially trained and accredited police officers; the restrictions on the duration of questioning; the restrictions on the type of search; the requirement to give explanatory notice to those questioned, including a procedure for complaint; the requirement to permit consultation with a solicitor and the notification of a third party; the requirement for records to be kept; the availability of judicial review; and the continuous supervision of the Independent Reviewer.

28. Lords Neuberger and Dyson agreed that there were important differences between the statutory provisions and *modus operandi* of the Schedule 7 system and section 44 system, and that those differences established that the powers in the case at hand were more foreseeable and less arbitrary than those considered in *Gillan and Quinton*.

29. Lords Hughes and Hodge further accepted that the interference with the applicant's private life had been proportionate: the intrusion itself had been comparatively light, as it was not beyond the reasonable expectations of those who travel across the United Kingdom's international borders, and, in view of the relevant safeguards, a fair balance could be said to have been struck between the rights of the individual and the rights of the public at large. Lords Neuberger and Dyson agreed that the appeal, insofar as it was based on proportionality, should fail, given that the interference was slight, the independent justification was convincing, the supervision impressive,

the safeguards and potential benefits substantial, and no equally effective but less intrusive proposal had been forthcoming.

30. Lords Neuberger and Dyson added that:

> "Legality is said to give rise to a problem for the powers granted under paragraph 2 of Schedule 7 because those powers can be exercised randomly. However, it is important to the effectiveness of these powers that they can be exercised in this way. Furthermore, if the power to stop and question under Schedule 7 infringes the Convention because it is exercisable randomly, the logical conclusion must be either that the valuable power must be abandoned or the power must be exercised in a far more invasive and extensive way, namely by stopping and questioning everyone passing through ports and borders. The former alternative would be unfortunate in terms of deterring and hindering terrorism, whereas the latter alternative would seem to put proportionality and legality in irreconcilable tension."

(b) Article 5

31. Although Lords Hughes, Hodge, Neuberger and Dyson agreed with the Divisional Court that the comments made in relation to safeguards in the context of Article 8 also applied in respect of Article 5, in their view it did not follow that the power of detention was automatically justified. The level of intrusion occasioned by detention for up to six hours was of a different order to the intrusion occasioned by compulsory question and search, and safeguards which were adequate for one would not necessarily be sufficient for the other. Furthermore, it did not follow that the fair balance between the rights of the individual and the interest of the public would fall in the same place. However, although their Lordships expressed doubts about whether detention for as long as six hours could ever be justified, on the facts of the present case they found that, to the extent that there was any deprivation of liberty, it was clear that it was for no longer than necessary to complete the process and therefore there had been no breach of Article 5.

(c) Article 6 § 1

32. In respect of the applicant's complaint under Article 6, Lords Hughes, Hodge, Neuberger and Dyson accepted that the privilege against self-incrimination did not apply where a person was being questioned pursuant to Schedule 7. However, their Lordships considered port questioning and search under Schedule 7 to be separate from a criminal investigation and, since the applicant had been at no time a defendant to a criminal charge, no question of a breach of her right to a fair trial could arise. In reaching this conclusion, they noted that any use in a criminal prosecution of answers obtained under compulsion would breach Article 6 of the Convention; consequently, Schedule 7 material could never be adduced in a subsequent criminal trial (unless the prosecution concerned the failure to comply with the Schedule 7 duty).

2. *Lord Kerr's dissenting opinion*

(a) Legality

33. Lord Kerr disagreed with the majority that the Schedule 7 powers were "in accordance with the law". In fact, he considered that comparison with the section 44 powers illustrated the greater ambit of the Schedule 7 powers. In particular, he observed that no authorisation was required for an examining officer to have resort to the Schedule 7 powers; the examining officer did not have to consider the use of those powers expedient for the prevention of acts of terrorism; there was no geographical or temporal limitation on the use of those powers, other than that they were to be used at a port of entry into or exit from the United Kingdom; and there was no provision for their automatic lapse, nor was there any question of their renewed authorisation being subject to confirmation. Furthermore, Lord Kerr noted that certain features were common to both sets of powers: the width of the powers was similar (in both instances there was no requirement of either reasonable or even subjective suspicion) and challenges to their use on conventional judicial review grounds faced the same difficulties identified in *Gillan and Quinton* (namely, if an examining officer was not required to have a reasonable suspicion, how was the proportionality of the exercise of his powers to be reviewed?).

34. In response to the majority's reliance on the fact that Schedule 7 powers could only be used in respect of persons passing through ports of entry or exit, Lord Kerr made two points. First, being subjected to border controls, such as the requirement to provide proof of identity and entitlement to enter, was entirely different from being required to answer questions about one's movements and activities and facing criminal sanction for refusing. Secondly, and more importantly, the fact that people were accustomed to intrusion moving through ports of entry or exit did not bear on the question of whether the circumstances in which the Schedule 7 powers could be exercised were too widely drawn to satisfy the test of "in accordance with the law". In other words, an unfettered power which might be arbitrarily or capriciously used did not become legal just because people generally did not take exception to its use.

35. Furthermore, given that there were 245 million passenger movements through United Kingdom ports every year, the fact that the Schedule 7 power was used sparingly could have no bearing on its legality. A power on which there are insufficient legal constraints does not become legal simply because those who may have resort to it exercise self-restraint. It was the potential reach of the power – and not its actual use – which had to be judged. In any case, although the percentage of travellers subjected to the use of the power was small, in absolute terms the number was not inconsequential, since on average five to seven people each day were examined for more than an hour.

36. Finally, Lord Kerr expressed concern about the potential for arbitrary and discriminatory exercise of the power since there was no clearly obvious means of policing the requirement that persons should not be stopped and questioned just because of their ethnic background or religion. In any case, the Code of Practice contemplated that ethnic origin or religious adherence could be at least one of the reasons for exercising the power, just so long as it was not the sole ground. Lord Kerr considered that the fact that the legislation authorised the use of a coercive power, at least partly, on grounds of race and religion should be starkly confronted since it permitted direct discrimination, which was entirely at odds with the notion of an enlightened, pluralistic society all of whose members were treated equally.

(b) Proportionality

37. Lord Kerr was not persuaded that the interference with the applicant's rights under Articles 5 and 8 was "necessary". In this regard, he noted that there was no evidence that a suspicion-less power to stop, detain, search and question was the only way to achieve the goal of combatting terrorism.

(c) Privilege against self-incrimination

38. Lord Kerr considered the requirement that a person questioned under Schedule 7 must answer on pain of prosecution for failing to do so to be in breach of that person's common law privilege against self-incrimination and therefore incompatible with Article 6 of the Convention. In Lord Kerr's opinion, it was inescapable that there was a real and appreciable risk of prosecution if the answers to the questions asked proved to be self-incriminating, and the fact that the applicant in the present case was not suspected of being a terrorist was nothing to the point. If she was asked questions designed to establish whether she appeared to be a terrorist, the potential of her answers to incriminate her if they were of an inculpatory character was indisputable. This remained the case even if those self-incriminating answers could not be adduced in evidence, as they might prompt enquiry which could lead to the obtaining of independent evidence.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Terrorism Act 2000 ("TACT") (as in force at the relevant time)

39. Section 40(1)(b) of TACT defines a "terrorist" so as to include a person who has been concerned in the commission, preparation or instigation of acts of terrorism. Section 1 of TACT defines "terrorism" as follows:

"(1) In this Act "terrorism" means the use or threat of action where—

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

(2) Action falls within this subsection if it—

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation."

40. Schedule 7 of TACT, which is headed "Port and Border Controls", provided as relevant:

"Power to stop, question and detain

2.—(1) An examining officer may question a person to whom this paragraph applies for the purpose of determining whether he appears to be a person falling within section 40(1)(b).

(2) This paragraph applies to a person if—

(a) he is at a port or in the border area, and

(b) the examining officer believes that the person's presence at the port or in the area is connected with his entering or leaving Great Britain or Northern Ireland.

(3) This paragraph also applies to a person on a ship or aircraft which has arrived in Great Britain or Northern Ireland.

(4) An examining officer may exercise his powers under this paragraph whether or not he has grounds for suspecting that a person falls within section 40(1)(b).

... ...

6.—(1) For the purposes of exercising a power under paragraph 2 or 3 an examining officer may—

(a) stop a person or vehicle;

(b) detain a person.

... ...

(3) Where a person is detained under this paragraph the provisions of Part I of Schedule 8 (treatment) shall apply.

(4) A person detained under this paragraph shall (unless detained under any other power) be released not later than the end of the period of nine hours beginning with the time when his examination begins.

... ...

8(1) An examining officer who questions a person under paragraph 2 may, for the purpose of determining whether he falls within section 40(1)(b)—

(a) search the person;

(b) search anything which he has with him, or which belongs to him, and which is on a ship or aircraft;

(c) search anything which he has with him, or which belongs to him, and which the examining officer reasonably believes has been, or is about to be, on a ship or aircraft;

(d) search a ship or aircraft for anything falling within paragraph (b).

... ...

(3) A search of a person under this paragraph must be carried out by someone of the same sex.

... ...

Offences

18.—(1) A person commits an offence if he—

(a) wilfully fails to comply with a duty imposed under or by virtue of this Schedule,

(b) wilfully contravenes a prohibition imposed under or by virtue of this Schedule, or

(c) wilfully obstructs, or seeks to frustrate, a search or examination under or by virtue of this Schedule.

(2) A person guilty of an offence under this paragraph shall be liable on summary conviction to—

(a) imprisonment for a term not exceeding three months,

(b) a fine not exceeding level 4 on the standard scale, or

(c) both.”

41. Pursuant to Schedule 8 a person detained under Schedule 7 acquires rights which he or she did not have prior to detention (for example, to have a named person informed, and to consult a solicitor) but also obligations (for example, to give fingerprints, non-intimate and intimate DNA samples).

B. Home Office (2009) Examining Officers under the Terrorism Act 2000 Code of Practice ("the Code")

42. The Code, which is issued by the Secretary of State for the Home Department pursuant to paragraph 6(1) of Schedule 14 of TACT and is a public document admissible in evidence in criminal and civil proceedings, contains detailed provisions as to the exercise by examining officers of their functions under that legislation. It provides, as relevant:

> "9. The purpose of questioning and associated powers is to determine whether a person appears to be someone who is or has been concerned in the commission, preparation or instigation of acts of terrorism. The powers, which are additional to the powers of arrest under the Act, should not be used for any other purpose.
>
> 10. An examining officer may question a person whether or not he suspects that the person is or has been concerned in the commission, preparation or instigation of terrorism and may stop that person for the purposes of determining whether this appears to be the case. Examining officers should therefore make every reasonable effort to exercise the powers in such a way as to minimise causing embarrassment or offence to a person who is being questioned.
>
> **Notes for guidance on paragraphs 9 and 10 [in bold in the original]**
>
> **The powers to stop, question, detain and search persons under Schedule 7 do not require an examining officer to have any grounds for suspicion against any individual prior to the exercise of the powers. Therefore examining officers must take into account that many people selected for examination using Schedule 7 powers will be entirely innocent of any unlawful activity. The powers must be used proportionately, reasonably, with respect and without unlawful discrimination. All persons being stopped and questioned by examining officers must be treated in a respectful and courteous manner.**
>
> **Examining officers must take particular care to ensure that the selection of persons for examination is not solely based on their perceived ethnic background or religion. The powers must be exercised in a manner that does not unfairly discriminate against anyone on the grounds of age, race, colour, religion, creed, gender or sexual orientation. To do so would be unlawful. It is the case that it will not always be possible for an examining officer working at a port to know the identity, provenance or destination of a passenger until they have stopped and questioned them.**
>
> **Although the exercise of Schedule 7 powers is not based on an examining officer having any suspicion against any individual, the powers should not be exercised arbitrarily. An examining officer's decision to exercise their Schedule 7 powers at ports must be based on the threat posed by the various terrorist groups active in and outside the United Kingdom. When deciding whether to exercise their Schedule 7 powers, examining officers should base their decisions on a number of considerations, including factors such as:**

- **known or suspected sources of terrorism;**
- **individuals or groups whose current or past involvement in acts or threats of terrorism is known or suspected, and supporters or sponsors of such activity who are known or suspected**
- **any information on the origins and/or location of terrorist groups**
- **possible current, emerging and future terrorist activity**
- **the means of travel (and documentation) that a group or individuals involved in terrorist activity could use**
- **emerging local trends or patterns of travel through specific ports or in the wider vicinity that may be linked to terrorist activity.**

Selections for examinations should be based on informed considerations such as those outlined above and must be in connection with the threat posed by the various terrorist groups active in and outside the United Kingdom. A person's perceived ethnic background or religion must not be used alone or in combination with each other as the sole reason for selecting the person for examination.

Schedule 7 powers are to be used solely for the purpose of ascertaining if the person examined is or has been concerned in the commission, preparation or instigation of acts of terrorism. The powers must not be used to stop and question persons for any other purpose. An examination must cease and the examinee must be informed that it has ended once it has been ascertained that the person examined does not appear to be or to have been concerned in the commission, preparation or instigation of acts of terrorism.

Unless the examining officer arrests the person using powers under the Act, a person being examined under Schedule 7 need not be cautioned.

11. The examining officer should explain to the person concerned either verbally or in writing that they are being examined under Schedule 7 of the Terrorism Act 2000 and that the officer has the power to detain that person should they refuse to co-operate and insist on leaving. The examining officer should keep the length of the examination to the minimum that is practicable. An examination begins after a person has been stopped and screening questions have been asked. Once an examination lasts for one hour, an explanatory notice of examination, a TACT 1 form (...), must be served by the examining officer on the person. The contents of the TACT 1 form should be explained to the person by the examining officer. Where a person's examination is protracted or where it is thought likely to be protracted, the examining officer should make arrangements to ensure that the person has the opportunity to have refreshments at regular intervals.

... ...

Records

14. Records of all examinations should be kept locally at a port, border area or police station in the event of a complaint or query but in addition a record of all exams over an hour should be held centrally for statistical purposes. The record should include the name of the person examined; the total duration the examination from the start until completion; whether the person was detained and if so when detention began and ended.

15. Records of examination that last under an hour or in the case of a child of any duration should be kept at the port, border area or at a police station for reference purposes in the event of a complaint or query. Records of examination that last over an hour, however, should be kept centrally for statistical purposes.

... ...

Searches

28. An examining officer may search a person who is being questioned for the purpose set out in paragraph 9 above, and their belongings, including baggage. He may also under paragraph 10 authorise another person to carry out a search on his behalf. As under paragraph 10 above every reasonable effort should be made to reduce to a minimum the potential embarrassment or offence that may be caused to a person being searched. ...

29. A personal search should only be carried out by someone of the same sex."

C. 2009 National Policing Improvement ("NPIA") Practice Advice ("the Practice Advice")

43. The Foreword to the Practice Advice provides:

"Special Branch ports officers carry a significant responsibility as part of the police contribution to ensuring National Security. It is vital that they are equipped with powers that enable them to carry out their role effectively and efficiently.

Schedule 7 ... provides these officers with unique powers to examine people who pass through the United Kingdom's borders. It is essential that they are applied professionally so that the police maintain the confidence of all sections of the public. Any misuse of these powers could have a far-reaching negative impact on police community relations and hinder progress made in support of the Government's counter-terrorism strategy."

D. The report of the Independent Reviewer of Terrorism Legislation on the operation of the Terrorism Acts in 2011

44. The report provided the following figures concerning the frequency of the exercise of Schedule 7 powers:

"In the year to 31 March 2011, over the UK as a whole:

(a) There was a total of 85,423 Schedule 7 examinations, 20% down on 2009/10.

(b) 73,909 of those examinations were on people, and 11,514 on unaccompanied freight.

(c) 2,291 people (3% of those examined - a similar percentage to 2009/10) were kept for over an hour.

(d) 915 people were detained after examination (1% of those examined, up from 486 in 2009/10).

(e) 769 people had biometric samples taken.

(f) There were 31 counter-terrorism or national security-related arrests. However 25 of those were in a single force area, reflecting that force's policy (since amended)

as regards the action they take for those withholding or giving of false information during an examination.

(g) 101 cash seizures by the police thought to relate to counter-terrorism were made, amounting in total to £844,709, mostly at airports.

These figures have to be set against the numbers of passengers travelling through UK airports (213 million), UK seaports (22 million) and UK international rail ports (9.5 million) during the year. In total, only 0.03% of passengers were examined under Schedule 7 in 2010/11."

45. With regard to the ethnic origin of the persons stopped, the report summarised the data in tabular form:

2010/11	**White**	**Black**	**Asian**	**Other**	**Mixed or not stated**
Examined < 1 hour	46%	8%	26%	16%	4%
Examined > 1 hour	14%	15%	45%	20%	6%
Detained	8%	21%	45%	21%	5%
Biometrics	7%	21%	46%	20%	6%

46. The report continued:

"No ethnicity data are collected for port travellers generally. It may well be that the proportion of ethnic minorities among those using UK ports and airports for travel is higher than the proportion in the UK population as a whole. It is most unlikely however that white people are in a minority among travellers. Detentions (plainly) and examinations (almost certainly) are thus imposed on members of minority ethnic communities – particularly those of Asian and other (including North African) ethnicity – to a greater extent than their presence in the travelling population would seem to warrant.

That fact alone does not mean that examinations and detentions are misdirected. As I argued in my last annual report (paras 9.14-9.21), Schedule 7 should not be used (as section 44 stop and search was from time to time used) in order to produce a racial balance in the statistics: that would be the antithesis of intelligence-led policing. The proportionate application of Schedule 7 is achieved by matching its application to the terrorist threat, rather than to the population as a whole.

There is however no room for complacency. The ethnic breakdown of the terrorist threat is hard to pin down: but ... [e]ven in Great Britain ... white people constitute approximately a quarter of those arrested and charged with terrorist offences – a proportion that would no doubt rise considerably if Northern Ireland data were included. ...

The ethnicity figures provide, in themselves, no basis for criticism of the police. They do however underline the need for vigilance, particularly when some minority

communities are understandably sensitive about the application of Schedule 7. It is important for all involved with the application of Schedule 7 to remember that:

(a) perceived ethnic background or religion should not be used, alone or in combination with each other, as the sole reason for selecting a person for examination;

(b) UK terrorists are of all colours: a substantial proportion of them (even outside Northern Ireland) are white; and that

(c) apparently innocuous decisions (for example, to check the plane from Pakistan rather than the plane from Canada) may reflect unconscious racial bias."

47. Although the report indicated that certain groups (most notably Muslims) felt that they were being singled out, between 1 July 2011 and 23 May 2012 only twenty complaints had been received.

48. In concluding that the utility of Schedule 7 powers was not in doubt, the report noted:

"Schedule 7 examinations have certainly been instrumental, first of all, in securing evidence which assists in the conviction of terrorists. That evidence does not take the form of answers given in interview (which because of the compulsion to answer would almost certainly be inadmissible in any criminal trial) but rather consists of physical possessions or the contents of mobile phones, laptops and pen drives.

It is fair to say that the majority of examinations which have led to convictions were intelligence-led rather than based simply on risk factors, intuition or the copper's nose. Indeed, despite having made the necessary enquiries, I have not been able to identify from the police any case of a Schedule 7 examination leading directly to arrest followed by conviction in which the initial stop was not prompted by intelligence of some kind.

...

Secondly, Schedule 7 examinations have been useful in yielding intelligence about the terrorist threat. Sometimes words spoken in interview, though not themselves admissible as evidence, may start a train of enquiry that leads to a prosecution. Of great importance, however, is intelligence of a more indirect kind – which may come from intelligence-led stops or from stops on the basis of risk factors. Schedule 7 examinations are perhaps most prized by the police and security services for their ability to contribute to a rich picture of the terrorist threat to the United Kingdom and UK interests abroad.

...

Thirdly, Schedule 7 examinations may assist disruption or deterrence. Young, nervous or peripheral members of terrorist networks can sometimes be dissuaded from plans e.g. to travel abroad for training by the realisation – communicated by a port stop – that the police have an idea of who they are and what they are about.

...

Finally, a Schedule 7 examination – once it has been completed, and this has been made clear to the person examined – may serve as an opportunity for the identification of those who may agree to be recruited as informants."

E. The report of the Independent Reviewer of Terrorism Legislation on the operation of the Terrorism Acts in 2012

49. In this report the Independent Reviewer specifically addressed whether Schedule 7 should include a requirement of "reasonable suspicion". In particular, he sought to explore with police and intelligence services the extent to which stops which were not intelligence-led or otherwise based on suspicion were useful. He observed that general arguments for a no-suspicion power included the following:

> "Were reasonable suspicion (or even just subjective suspicion) to be required for all stops:
>
> (a) The substantial deterrent threat of Schedule 7 in its current form could be avoided altogether by using "clean skins" to transport the tools of the terrorist's trade.
>
> (b) Anybody who was stopped would know that the police had evidence on which to suspect them: the mere fact of a stop could thus alert the traveller to the existence of surveillance, whether human or technical, with consequences that could include the ending of effective surveillance and the endangering of a human source.
>
> (c) The authorities would be unable to stop and question the travelling companion(s) of a person whom they suspect of involvement in terrorism: the mere fact of travelling with a suspected person will not be enough to constitute a reasonable suspicion of involvement in terrorism."

50. The Independent Reviewer was briefed by MI5 and by the police on a number of no-suspicion stops in recent months which had brought significant benefits in terms of disrupting potential terrorists. These included both untargeted and targeted examinations, since there could be intelligence on somebody sufficient to merit a stop without the threshold of reasonable suspicion being reached. While he accepted that a number of such stops had been "of real value in protecting national security", he recognised that that did not automatically make them proportionate. He considered this was ultimately a matter for Parliament, but noted that any requirement of suspicion would

> "reduce the potential efficacy of Schedule 7. Equally, however, they would give a measure of protection to persons who may currently be selected for these attentions without even being suspected of any crime."

51. The Independent Reviewer also addressed the compulsion to answer questions under Schedule 7. In this regard, he indicated that:

> "Compulsion to answer questions under Schedule 7 is of the essence of the power, its utility beyond question when it comes not only to identifying people as terrorists but to gathering intelligence – an important by-product of the Schedule 7 examination, albeit one that can never serve as the prime motive for a stop.
>
> Such a strong power requires strong safeguards on the use to which answers can be put. At the least, it is essential that answers are not used in proceedings where they could incriminate the person who gave them. I believe it to be generally accepted that

answers given under compulsion in Schedule 7 interviews could never be used in a criminal trial ...”

F. The Anti-Social Behaviour, Crime and Policing Act 2014

52. The Anti-Social Behaviour, Crime and Policing Act 2014 (“the 2014 Act”) made several changes to the Schedule 7 powers. Most notably, it required examining officers to take a person into detention if they wished to examine him or her for longer than one hour; it reduced the maximum period of detention from nine hours to six hours; it introduced a requirement for the periodic review of detention by a review officer; and it required that the questioning of an examinee should not commence until after the arrival of a requested solicitor, unless postponing questioning would be likely to prejudice the determination of the relevant matters.

53. The 2014 Act further required that examining officers should be designated for this purpose by the Secretary of State and a Code of Practice should be issued which provided for the training to be undertaken by them.

54. A new version of the Code of Practice was promulgated in July 2014 to reflect those amendments and also the judgment of the Supreme Court in the applicant’s case. In particular, it provided that the Schedule 7 powers could only be used by police officers who had been accredited by their chief officer as having met a national standard in the use of the powers; and it confirmed that the exercise of the powers should not be arbitrary.

55. It further provided that detained persons were entitled to consult a solicitor in private at any time, and that the examining officer had to postpone questioning until the person had consulted a solicitor in private, unless the examining officer reasonably believed that postponing questioning would be likely to prejudice the purpose of the examination.

G. Subsequent annual reports of the Independent Reviewer of Terrorism Legislation

1. 2013

56. In his review of the operation of the terrorism legislation in 2013, the Independent Reviewer made some remarks about the apparent “considerable ‘disproportionality’” between the ethnic classification of those examined and detained under Schedule 7 and the ethnic classification of the port-using (or airport-using) public. In particular, he noted that the Schedule 7 power was not intended to be exercised randomly but rather to gain information about persons concerned in the commission, preparation or instigation of acts of terrorism. As terrorists were not, at any one moment in time, evenly distributed across the various ethnic groups, if the power was being skilfully used, one would expect its exercise to be ethnically “proportionate” not to the United Kingdom population, nor even to the airport-using population,

but rather to the terrorist population that travels through United Kingdom ports. In conclusion he stated that he had no reason to believe that Schedule 7 powers were being exercised in a racially discriminatory manner.

57. Although the Independent Reviewer welcomed the amendments being introduced by the Anti-Social Behaviour, Crime and Policing Act 2014, he identified three issues he had previously addressed which remained outstanding:

"a) the fact that no suspicion is required for the exercise of most Schedule 7 powers, including the power to detain and to download the contents of a phone or laptop;

b) the fact that answers given under compulsion are not expressly rendered inadmissible in criminal proceedings; and

c) the need for clear and proportionate rules governing the data taken from electronic devices."

58. He recommended, *inter alia*, that detention should be permitted only when a senior officer is satisfied that there are grounds for suspecting that the person appears to be a person falling within section 40(1)(b) and that detention is necessary in order to assist in determining whether he is such a person; that on periodic review, a detention may be extended only when a senior officer remains satisfied that there continue to be grounds for suspecting that the person appears to be a person falling within section 40(1)(b), and that detention continues to be necessary in order to assist in determining whether he is such a person; and that a statutory bar should be introduced to the introduction of Schedule 7 admissions in a subsequent criminal trial.

59. Finally, he expressed his belief that his recommendations would improve fairness and accountability without reducing the efficacy of the Schedule 7 powers or exposing the public to additional risk from terrorism. He observed that his recommendations had been endorsed by the Joint Committee on Human rights, which fully agreed with them, save as to the thresholds for detention and for copying data, which it continued to advise should require reasonable suspicion; and the Home Affairs Select Committee, which expressed the view that the introduction of a suspicion test for the ancillary powers, the use of answers given under compulsion in a criminal court and the treatment of legally privileged material, excluded material and special procedure material should be subject to further review.

2. 2015

60. In his review of the operation of the terrorism legislation in 2015, the Independent Reviewer repeated the following recommendations:

"(a) that a suspicion threshold should be applied to detention and to the copying of data from personal electronic devices;

(b) that safeguards should be provided in respect of legally privileged material, excluded material and special procedure material;

(c) that safeguards should be applied to private electronic data gathered under Schedule 7; and

(d) that there should be a statutory bar to the introduction of Schedule 7 admissions in a subsequent criminal trial."

3. 2016 and 2017

61. Finally, in his review of the operation of the terrorism legislation in 2017, the Independent Reviewer indicated that while there had been a significant decline in the total number of examinations in recent years, there had been an increase in the number of "resultant detentions". According to the Independent Reviewer, this was not a particularly worrying pattern, and was likely due to better capture of passenger manifest data across the United Kingdom, and better use of targeting techniques.

H. The Counter-Terrorism and Border Security Bill

62. The purpose of the Bill, which was introduced on 5 June 2018, is to "make provision in relation to terrorism; to make provision enabling persons at ports and borders to be questioned for national security and other related purposes".

63. The Bill contains a bar on the admissibility in court of answers to questions when an individual is stopped at a port or border under Schedule 7 of TACT.

64. Schedule 3 of the Bill further contains a power – modelled on Schedule 7 of TACT – for "examining officers" to question any person who is in a port in the United Kingdom or in the Northern Ireland border area for the purpose of determining whether the person appears to be, or has been, engaged in "hostile activity". As with Schedule 7, the power to examine a person can be exercised whether or not there are grounds for suspecting that a person is engaged in hostile activity.

I. Relevant case-law

1. R (David Miranda) v. Secretary of State for the Home Department and Commissioner of Police of the Metropolis *[2016] EWCA Civ 6*

65. Mr Miranda is the spouse of a journalist who had received encrypted material from Edward Snowden. The data, which contained United Kingdom intelligence material, had been stolen from the National Security Agency. Mr Miranda was detained for nine hours by officers of the Metropolitan Police at Heathrow Airport on 18 August 2013, purportedly under paragraph 2(1) of Schedule 7 of TACT. He was questioned and items

in his possession, notably encrypted storage devices, were taken from him. The Security Service had asked the police to make the stop, with the principal objective of mitigating the risk to national security that the material in Mr Miranda's possession might pose.

66. In judicial review proceedings Mr Miranda claimed that the use of the Schedule 7 power against him was unlawful because (i) the power was exercised for a purpose not permitted by the statute; and (ii) its use constituted a disproportionate interference with his rights under Articles 5, 8 and 10 of the Convention. He also claimed that the use of the power was incompatible with the rights guaranteed by Article 10 of the Convention in relation to journalistic material.

67. The Court of Appeal accepted that the police exercised the power for its own purpose of determining whether Mr Miranda appeared to be a person falling within section 40(1)(b) of TACT. The fact that the exercise of the Schedule 7 power also promoted the Security Service's different (but overlapping) purpose did not mean that the power was not exercised for the Schedule 7 purpose. In this regard, the police had clearly recognised that they could not act as a conduit for the furtherance of the Security Service's purposes, and had had to be persuaded that the conditions for a lawful Schedule 7 stop had been met before they agreed to proceed. Moreover, as Parliament had set the bar for the exercise of the Schedule 7 power at quite a low level, the power having been given to provide an opportunity for the ascertainment of a possibility, the court accepted that the power was exercised for a lawful purpose. In assessing proportionality, the court accepted that the Schedule 7 stop was an interference with press freedom, but held that the compelling national security interests clearly outweighed Mr Miranda's Article 10 rights on the facts of the case.

68. However, with regard to the compatibility of the Schedule 7 powers with Article 10 of the Convention, the court found that the constraints on the exercise of the powers did not afford effective protection of journalists' Article 10 rights. The court's central concern was that disclosure of journalistic material (whether or not it involved the identification of a journalist's source) undermined the confidentiality that was inherent in such material and which was necessary to avoid the chilling effect of disclosure and to protect Article 10 rights. If journalists and their sources could have no expectation of confidentiality, they might decide against providing information on sensitive matters of public interest. Consequently, it was of little or no relevance that the Schedule 7 powers could only be exercised in a confined geographical area or that a person could not be detained for longer than nine hours. Similarly, while the fact that the powers had to be exercised rationally, proportionately and in good faith provided a degree of protection, the only safeguard against the powers not being so exercised was the possibility of judicial review proceedings. However, while judicial review might be an adequate safeguard in the context of Articles 5 and 8, it

would provide little protection against the damage done if journalistic material was disclosed and used in circumstances where this should not happen.

2. R (CC) v. Commissioner of Police of the Metropolis and another [2012] 1 WLR 1913 and R (on the application of Elostra) v. Commissioner of Police of the Metropolis *[2014] 1 WLR 239*

69. In *R(CC)* the High Court upheld a challenge by an individual against the use of the Schedule 7 power on the basis that the examining officers were not in fact exercising it for the purpose of determining whether he appeared to be a terrorist. The claimant was a British national who had been arrested in Somaliland and deported to the United Kingdom. In anticipation of his return, a control order was made against him. The High Court found that the Schedule 7 powers were exercised on his arrival for the purpose of getting information – untainted by any torture allegations – which might confirm the propriety of the making of the control order. According to the court, this had nothing to do with determining whether he appeared to be a terrorist in any particular way and as a consequence the power had not been used lawfully. However, in reaching this conclusion the judge remarked:

> "I have no doubt that this is a very rare case and that this decision will not damage the efficacy of the powers. They are properly given a wide construction for the reasons I have set out but cannot extend to the facts of this case."

70. In *R(Elostra)* the High Court held that an examination under Schedule 7 which was conducted without adherence to the proper safeguards was unlawful. More particularly, it held that a person who was detained under Schedule 7 – at a police station or elsewhere – was, by virtue of the Code of Practice, entitled to insist on legal advice before answering any questions.

3. R. v. Gul *[2013] UKSC 64*

71. The principal issue in this appeal was the definition of "terrorism" in section 1 of TACT; more precisely, whether it included military attacks by non-State armed groups against national or international armed forces in a non-international armed conflict. The Supreme Court held that there was no basis for reading the natural, very wide, meaning of section 1 of TACT restrictively. The definition had clearly been drafted in deliberately wide terms so as to take account of the various and possibly unpredictable forms that terrorism might take, and the changes which may occur in the diplomatic and political spheres. Moreover, the United Kingdom's international obligations could not require it to define "terrorism" more narrowly, since there was no accepted definition of "terrorism" in international law.

72. The court noted, however, that the very wide definition of "terrorism" gave rise to certain concerns. While the case did not concern the use of Schedule 7 powers, it observed that:

> "63. The second general point is that the wide definition of "terrorism" does not only give rise to concerns in relation to the very broad prosecutorial discretion bestowed by the 2000 and 2006 Acts, as discussed in paras 36-37 above. The two Acts also grant substantial intrusive powers to the police and to immigration officers, including stop and search, which depend upon what appears to be a very broad discretion on their part. While the need to bestow wide, even intrusive, powers on the police and other officers in connection with terrorism is understandable, the fact that the powers are so unrestricted and the definition of 'terrorism' is so wide means that such powers are probably of even more concern than the prosecutorial powers to which the Acts give rise.
>
> 64. Thus, under Schedule 7 to the 2000 Act, the power to stop, question and detain in ports and at borders is left to the examining officer. The power is not subject to any controls. Indeed, the officer is not even required to have grounds for suspecting that the person concerned falls within section 40(1) of the 2000 Act (i.e. that he has 'committed an offence', or he 'is or has been concerned in the commission, preparation or instigation of acts of terrorism'), or even that any offence has been or may be committed, before commencing an examination to see whether the person falls within that subsection. On this appeal, we are not, of course, directly concerned with that issue in this case. But detention of the kind provided for in the Schedule represents the possibility of serious invasions of personal liberty."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

73. The applicant complained that the exercise of Schedule 7 powers breached her rights under Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

74. The Government contested that argument.

A. Admissibility

75. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Whether there was an interference with the applicant's rights under Article 8 of the Convention

76. The Government accepted that, taken as a whole, the applicant's examination pursuant to Schedule 7 of TACT gave rise to an interference with the right guaranteed to her under Article 8 of the Convention. In the present case, in addition to being stopped and questioned, the applicant and her luggage were searched. In *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 63, ECHR 2010 (extracts) the Court held that the use of "coercive powers" to require an individual to submit to a "detailed search of his person, his clothing and his personal belongings" amounted to a clear interference with the right to respect for private life. While the Court expressly recognised the potential distinction between the "stop and search powers" under section 44 of TACT and "the search to which passengers uncomplainingly submit at airports or at the entrance of a public building" (see *Gillan and Quinton*, cited above, § 64), Schedule 7 powers were clearly wider that the immigration powers to which travellers might reasonably expect to be subjected. In view both of this fact, and of the Government's concession, the Court would accept that there was an interference with the applicant's rights under Article 8 of the Convention.

2. Whether that interference was "in accordance with the law"

(a) The parties' submissions

(i) The applicant

77. The applicant submitted that the Schedule 7 powers were insufficiently circumscribed and contained inadequate safeguards to be "in accordance with the law". In the year of her examination, more than 68,000 people were stopped pursuant to Schedule 7. The absence of any requirement for objective grounds for suspicion, or even subjective suspicion, meant that an officer could exercise powers based on no more than a hunch, which in turn gave considerable scope for extraneous factors and motives – such as biases and ingrained stereotypes – to influence how an officer selected individuals to stop and question.

78. More particularly, the applicant contended that the powers under the Schedule 7 regime were more intrusive than the stop and search powers under sections 44-45 of TACT, which the Court had held not to be "in accordance with the law" in *Gillan and Quinton*. First of all, section 44 required a senior officer to give authorisations if he thought it "expedient for

the prevention of acts of terrorism". In contrast, Schedule 7 powers applied at all times at all ports. Secondly, while powers under sections 44 and 45 were directed at the narrow purpose of "searching for articles of a kind that could be used in connection with terrorism", Schedule 7 powers had a much broader purpose and permitted a far wider investigation into an individual's activities, beliefs and movements. Thirdly, section 45 only permitted an officer to search a person's outer clothing and possessions, and detention was only permitted to the extent necessary to carry out that limited search. In contrast, a Schedule 7 suspicion-less examination could take place at a police station, could permit detailed and intrusive searches, and at the time the applicant was stopped, detention could last for up to nine hours. Fourthly, section 45 contained no power to interrogate, whereas Schedule 7 permitted a lengthy interrogation that a person was required by law to answer. Finally, section 45 permitted an officer to retain items found during the search of a person only if the officer reasonably suspected that the item was intended to be used in connection with terrorism. Schedule 7, on the other hand, permitted any item to be retained for seven days for examination, regardless of whether or not such suspicion existed.

79. According to the applicant, there were also important similarities between the section 44 and Schedule 7 powers: they both fell within the same framework of counter-terrorism legislation under TACT; they both involve intrusive measures which might be used without subjective grounds for suspicion; the use of both sets of powers had a significantly disproportionate impact on persons of non-white ethnic origin; and the safeguards relied on by the Government were similar.

80. In this regard, the applicant acknowledged that some safeguards existed, notably those identified by Lord Hughes in the Supreme Court. However, she argued that they were insufficient to meet the requirement of legality. To begin with, given the large number of people passing through United Kingdom ports every day, the fact that the Schedule 7 powers were restricted to travellers at ports did not significantly reduce their impact. Moreover, Schedule 7 powers could not be equated with immigration powers, to which travellers might reasonably expect to be subjected. They were based at ports because they were "choke points" and not because they had any specific connection to a person's travel.

81. Furthermore, restriction to the statutory purpose, restriction to specially trained and accredited officers, and restrictions on the type of search and duration of questioning provided negligible safeguards which did not cure the risk of arbitrariness in the exercise of a broadly defined, suspicion-less power. This was especially so given that the Code in force at the time of the applicant's examination did not tell examining officers how to determine whether the exercise of Schedule 7 powers was proportionate, nor did it require them to keep to a minimum all interferences with fundamental rights. Although individuals were entitled to consult a solicitor,

this offered no protection against the risk of arbitrary selection in the first place, and in any case officers were permitted to interrogate a person in the absence of a solicitor (as happened in this case).

82. In addition, the explanatory notice given to those questioned was generic; examining officers were not required to explain the reasons why a particular individual was selected for examination under Schedule 7. There was also no requirement for officers to record the reason why a particular individual was selected for examination, and since the lawful exercise of the powers was not conditional on any suspicion (reasonable or otherwise) the scope for using judicial review proceedings to challenge a particular Schedule 7 examination was extremely limited. Finally, the Independent Reviewer only carried out a post-hoc review of a small number of Schedule 7 stops, since his capacities did not stretch to a thorough port-by-port monitoring, and the Government was not obliged to give effect to any changes he proposed.

(ii) The Government

83. The Government contended that the exercise of a power on a "no suspicion" basis could be "in accordance with the law". In such a case, the relevant factors to be considered were the field covered by the measure in issue (being relevant to the level of precision required); and the relevant law together with how the system worked in practice.

84. As to the field covered by the measure, the Government stated that it was focussed on entry and exit points to the United Kingdom. As these points were the first line of defence against the entry and exit of terrorists, they provided a unique opportunity to target checks where they were likely to be the most effective.

85. Regarding the relevant law, the Government argued that there were sufficient effective safeguards in the manner of its operation to meet the requirements of legality. In particular, they drew attention to the factors identified by Lord Hughes and Lord Hodges, which were adopted by Lord Neuberger and Lord Dyson, namely: the restriction to those passing into and out of the country; the restriction to the statutory purpose; the restriction to specially trained and accredited police officers; the restrictions on the duration of questioning; the restrictions on the type of search; the requirement to give explanatory notice to those questioned, including the procedure for complaint; the requirement to permit consultation with a solicitor and the notification of a third party; the requirement for records to be kept; the availability of judicial review; and the continuous supervision of the Independent Reviewer.

86. Moreover, there was no evidence that the powers had been used in a racially discriminatory fashion, and in fact such a use was expressly prohibited by the Code of Practice.

(b) The Court's assessment

(i) General principles

87. 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 therefore 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).

88. 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, *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 77, ECHR 2010 (extracts)). 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; *Gillan and Quinton*, cited above, § 77; and *Ivashchenko v. Russia*, no. 61064/10, § 73, 13 February 2018).

(ii) Application of those principles to the case at hand

89. The Court notes that the power in question has a legal basis in domestic law, namely Schedule 7 of TACT and the accompanying Code of Practice. In view of the applicant's complaint, the principal question for the Court to address in the present case is whether, at the time the applicant was stopped at East Midlands airport, the safeguards provided by domestic law sufficiently curtailed the powers so as to offer her adequate protection against arbitrary interference with her right to respect for her private life. In making this assessment, it will consider the following factors: the geographic and temporal scope of the powers; the discretion afforded to the authorities in deciding if and when to exercise the powers; any curtailment

on the interference occasioned by the exercise of the powers; the possibility of judicially reviewing the exercise of the powers; and any independent oversight of the use of the powers.

(α) The geographic and temporal scope of the powers

90. The Schedule 7 powers can only be exercised by police officers at ports and border controls. The majority of the Supreme Court considered that this restriction distinguished the case from *Gillan and Quinton*, cited above, since the "stop and search powers" under section 44 of TACT could be exercised throughout the whole of the United Kingdom (see paragraph 27 above). However, Lord Kerr, in his dissenting opinion, considered that the Schedule 7 powers were much broader than the "stop and search" powers, since they were not subject to any express authorisation and they were not temporally or geographically limited. As a consequence, they had the potential to affect the 245 million people who pass through the United Kingdom's ports and borders every year (see paragraphs 33-36 above).

91. Although the Court sees the logic behind the comparison to *Gillan and Quinton*, the important question is not whether the Schedule 7 powers are wider or narrower than the "stop and search" powers, or how the safeguards which curtail the exercise of both powers measure up, but rather whether the Schedule 7 scheme, assessed as a whole, contains sufficient safeguards to protect the individual against arbitrary interference.

92. In this regard, while the Court would accept that in view of their permanent application at all ports and border controls, the Schedule 7 powers are wide in scope, this does not, in itself, run contrary to the principle of legality. The Court has expressly acknowledged both the very real threat that Contracting States currently face on account of international terrorism (see, for example, *Chahal v. the United Kingdom*, 15 November 1996, § 79, Reports of Judgments and Decisions 1996-V; *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 181, ECHR 2009; *A. v. the Netherlands*, no. 4900/06, § 143, 20 July 2010; *Trabelsi v. Belgium*, no. 140/10, § 117, ECHR 2014 (extracts); and *Othman (Abu Qatada) v. United Kingdom*, no. 8139/09, § 183, ECHR 2012).) and the importance of controlling the international movement of terrorists (see, for example, *McVeigh, O'Neill and Evans v United Kingdom* (1981) 5 EHRR 71, § 192). Ports and border controls will inevitably provide a crucial focal point for detecting and preventing the movement of terrorists and/or foiling terrorist attacks. Indeed, all States operate systems of immigration and customs control at their ports and borders, and while these controls are different in nature to the Schedule 7 powers, it is nevertheless the case that all persons crossing international borders can expect to be subject to a certain level of scrutiny.

(β) The discretion afforded to the authorities in deciding if and when to exercise the powers

93. The Schedule 7 powers may be exercised by examining officers for the purpose of determining whether a person is concerned in the commission, preparation or instigation of acts of terrorism. Examining officers therefore enjoy a very broad discretion, since "terrorism" is widely defined (see *R. v. Gul*, at paragraphs 71-72 above) and the Schedule 7 powers may be exercised whether or not he or she has objective or subjective grounds for suspecting that a person is concerned in the commission, preparation or instigation of acts of terrorism.

94. In *Gillan and Quinton* the Court criticised the fact that officers could exercise the stop and search powers without having to demonstrate the existence of any reasonable suspicion (see *Gillan and Quinton*, cited above, § 83). Similarly, in *Ivashchenko* the Court was concerned by the fact that the customs authorities had been able to examine and copy data contained on the applicant's laptop and storage devices without at least "some notion of a reasonable suspicion" that he had committed an offence (*Ivashchenko*, cited above, §§ 84-85). A requirement of reasonable suspicion is therefore an important consideration in assessing the lawfulness of a power to stop and question or search a person; however, there is nothing in either case to suggest that the existence of reasonable suspicion is, in itself, necessary to avoid arbitrariness. Rather, this is an assessment for the Court to make having regard to the operation of the scheme as a whole and, for the reasons set out below, it does not consider that the absence of a requirement of reasonable suspicion by itself rendered the exercise of the power in the applicant's case unlawful within the meaning of Article 8 § 2 of the Convention.

95. First of all, the Court has repeatedly held that the national authorities enjoy a wide margin of appreciation in matters relating to national security (see, among many examples, *Konstantin Markin v. Russia* [GC], no. 30078/06, § 134, ECHR 2012 (extracts)) and there is clear evidence that the Schedule 7 powers have been of real value in protecting national security. According to the Independent Reviewer, they were "instrumental" in "securing evidence which assists in the conviction of terrorists" (see paragraph 48 above). While the majority of examinations which led to convictions were intelligence-led, examinations could be useful even if they did not lead to a conviction. Intelligence gathered during the examinations contributed to a rich picture of the terrorist threat to the United Kingdom and its interests abroad, and could assist in the disruption or deterrence of terrorists' plans (see paragraph 48 above). Were "reasonable suspicion" to be required, terrorists could avoid the deterrent threat of Schedule 7 by using people who had not previously attracted the attention of the police ("clean skins"); and the mere fact of a stop could alert a person to the existence of surveillance (see paragraph 49 above).

96. Secondly, it is important to distinguish between the two distinct Schedule 7 powers, being the power to question and search a person; and the power to detain a person. As the power to detain would, under normal circumstances, entail a greater interference with a person's rights, and therefore has greater potential for abuse, it may well have to be accompanied by more stringent safeguards. However, as the applicant in the present case was not formally detained, the Court must limit its examination to the lawfulness of the power to question and search.

97. Thirdly, the Court considers it relevant that the Schedule 7 power – and in particular the power to question and search – is a preliminary power of inquiry expressly provided in order to assist officers stationed at ports and borders to make counter-terrorism inquiries of any person entering or leaving the country. While there was no requirement of "reasonable suspicion", guidance was nevertheless provided to examining officers which attempted to clarify when the discretion could be exercised. According to the Guidance Notes accompanying the Code of Practice in force at the time of the applicant's examination, the power had to be used proportionately and officers had to take particular care to ensure that the selection of persons for examination was not solely based on their ethnic background or religion. Instead, the decision to exercise Schedule 7 powers had to be based on the threat posed by the various active terrorist groups and be based on a number of considerations, including the following factors: known or suspected sources of terrorism; individuals or groups whose current or past involvement in acts or threats of terrorism is known or suspected, and supporters or sponsors of such activity who are known or suspected; any information on the origins and/or location of terrorist groups; possible current, emerging and future terrorist activity; the means of travel (and documentation) that a group or individuals involved in terrorist activity could use; and emerging local trends or patterns of travel through specific ports or in the wider vicinity that may be linked to terrorist activity (see paragraph 42 above). While not relevant to the Court's assessment of the case at hand, it nevertheless notes that pursuant to the Anti-Social Behaviour, Crime and Policing Act 2014 and the new Code of Practice, examining officers now have to be accredited by their chief officer as having met a national standard in the use of the powers (see paragraphs 54-55 above).

98. Fourthly, the reports of the Independent Reviewer would suggest that the powers are not, in fact, being abused (see paragraphs 44-51 and 56-61 above). In 2011, only 0.03% of passengers travelling through ports were examined under Schedule 7. In the following years, the Independent Reviewer noted a significant decline in the total number of examinations. Furthermore, although persons of minority ethnic communities, and especially those of Asian and North African ethnicity, were stopped more often than their percentage in the travelling population

would objectively warrant, as noted by the Independent Reviewer, this did not mean that examinations were misdirected. Therefore, although the Independent Reviewer recommended vigilance, he considered that the figures in themselves provided no basis for criticism of the police.

99. In light of the foregoing, the Court considers it necessary to assess whether the other safeguards in respect of the exercise of the Schedule 7 powers are sufficient to protect individuals from its arbitrary exercise.

(γ) Any curtailment on the interference occasioned by the exercise of the powers

100. At the time the applicant was examined, Schedule 7 provided that a person detained under that power had to be released not later than the end of a period of nine hours from the beginning of the examination (see paragraph 40 above). The Code of Practice further required that the examining officer keep the length of the examination “to the minimum that is practicable”. At the beginning of the examination, the examining officer had to explain to the person concerned either verbally or in writing that she was being examined under Schedule 7 of TACT and that the officer had the power to detain her should she refuse to co-operate and insist on leaving. A record had to be kept of the examination; at the port, if the examination lasted less than one hour, or centrally, if it lasted longer (see paragraph 42 above). However, despite the fact that persons being examined were compelled to answer the questions asked, neither TACT nor the Code of Practice in force at the relevant time made any provision for a person being examined (who was not detained) to have a solicitor in attendance. Consequently, persons could be subjected to examination for up to nine hours, without any requirement of reasonable suspicion, without being formally detained, and without having access to a lawyer.

101. The legislation has since been amended by the Anti-Social Behaviour, Crime and Policing Act 2014 (see paragraphs 52-53 above), which requires examining officers to take a person into detention if they wish to examine him or her for longer than an hour. It further provides that the questioning of an examinee should not commence until after the arrival of a requested solicitor, unless postponing questioning would be likely to prejudice the determination of the relevant matters, and gives the person being examined the right (insofar as practical) to have a named person informed of his or her whereabouts. The 2014 Act also reduced the maximum period of detention from nine hours to six hours and required the periodic review of detention by a review officer.

102. Nevertheless, the Court must have regard to the legislation in force at the time the applicant was examined pursuant to the Schedule 7 powers, when the only safeguard capable of curtailing the interference occasioned by the exercise of those powers was the requirement that she be released not

later than the end of a period of nine hours from the beginning of the examination.

(δ) The possibility of judicial review of the exercise of the powers

103. While it is possible to seek judicial review the exercise of the Schedule 7 powers, the applicant argues that the absence of any obligation on the part of the examining officer to show "reasonable suspicion" would make it difficult, if not impossible, to prove that the power was improperly exercised. The Court accepted a similar argument in *Gillan and Quinton*, finding that the right of an individual to challenge a stop and search by way of judicial review or an action in damages had clear limitations (*Gillan and Quinton,* cited above, § 86).

104. Those limitations would appear to be equally relevant to challenges to the Schedule 7 power by way of judicial review. In *R (Elostra)* the claimant successfully challenged his detention under Schedule 7 on the basis that the police officers had not waited for his solicitor to arrive at the airport before beginning to question him, as required by the Code of Practice. The judge therefore found that the officer's actions had been unlawful (see paragraph 70 above). However, challenges to the lawfulness of the decision to exercise the Schedule 7 power would appear to have been less successful. In *R* (*David Miranda)*, the Court of Appeal accepted that the detention of a journalist's spouse at the request of the security service, which was principally concerned with determining whether the material he carried posed a threat to national security, was nevertheless lawful since before agreeing to the stop the police confirmed that the statutory grounds had been made out. In reaching this conclusion, the court observed that "Parliament had set the bar for the exercise of the Schedule 7 power at quite a low level, the power having been given to provide an opportunity for the ascertainment of a possibility" (see paragraph 65-68 above). While in *R(CC)* the court found that the examining officers had not exercised the power for the purpose of determining whether the individual appeared to be a terrorist or not, the judge remarked that it was "a very rare case" since the powers were "properly given a wide construction" (see paragraph 69 above).

105. It would therefore appear that the absence of any obligation on the part of the examining officer to show "reasonable suspicion" has made it difficult for persons to have the lawfulness of the decision to exercise the power judicially reviewed.

(ε) Any independent oversight of the use of the powers.

106. The use of the powers is subject to independent oversight by the Independent Reviewer of Terrorism Legislation. The Independent Reviewer, a role that has existed since the late 1970s, is an independent person, appointed by the Home Secretary and by the Treasury for a

renewable three-year term and tasked with reporting to the Home Secretary and to Parliament on the operation of counter-terrorism law in the United Kingdom. These reports are laid before Parliament, to inform the public and political debate on anti-terrorism law in the United Kingdom. The significance of the role lies in its complete independence from government, coupled with access based on a very high degree of clearance to secret and sensitive national security information and personnel.

107. The oversight provided by the Independent Reviewer should not, therefore, be underestimated. Nevertheless, his reviews are invariably *ad-hoc* and insofar as he is able to review a selection of examination records, he would not be in a position to assess the lawfulness of the purpose for the stop. Moreover, while his reports are scrutinised at the highest level (the Government in fact publishes its formal response to his annual reports), a number of important recommendations have not been implemented, despite having received support from the Joint Committee on Human Rights and the Home Affairs Select Committee. In particular, the Independent Reviewer has repeatedly called for the introduction of a suspicion requirement for the exercise of certain Schedule 7 powers, including the power to detain and to download the contents of a phone or laptop; and criticised the fact that answers given under compulsion are not expressly rendered inadmissible in criminal proceedings (see paragraphs 57-60 above). Although the Counter-Terrorism and Border Security Bill contains a bar on the admissibility in court of answers to questions when an individual is stopped at a port or border under Schedule 7 of TACT (see paragraph 63 above), the Government have not introduced any suspicion threshold for the exercise of the power to detain.

108. Therefore, while of considerable value, the Court does not consider that the oversight of the Independent Reviewer is capable of compensating for the otherwise insufficient safeguards applicable to the operation of the Schedule 7 regime.

(iii) Conclusion

109. In conclusion, the Court considers that when the applicant was stopped at East Midlands airport in January 2011, the power to examine persons under Schedule 7 of TACT was neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. While it does not consider the absence of any requirement of "reasonable suspicion" alone to have been fatal to the lawfulness of the regime, when considered together with the fact that the examination could continue for up to nine hours, during which time the person would be compelled to answer questions without any right to have a lawyer present, and the possibility of judicially reviewing the exercise of the power would be limited, the Court finds that the Schedule 7 powers were not "in accordance with the law". It follows that there has been a violation of Article 8 of the Convention.

110. In reaching this conclusion the Court has only had regard to the Schedule 7 power to examine as it was at the time the applicant was stopped. It has not considered the amendments which flowed from the Anti-Social Behaviour, Crime and Policing Act 2014 and the updated Code of Practice; nor has it considered the power to detain under Schedule 7, which has the potential to result in a much more significant interference with a person's rights under the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

111. The applicant further complained that she had been deprived of her liberty within the meaning of Article 5 § 1 of the Convention, and that the deprivation gave rise to a violation of Article 5 of the Convention as it was not "in accordance with the law".

112. The Government contested that argument.

113. As this complaint is based on the same facts as the applicant's Article 8 complaint, it must also be declared admissible. However, having regard to the finding relating to the Article 8 complaint (see paragraphs 109-110 above), the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 5 (see, for example, *Gillan and Quinton*, cited above, § 57).

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

114. The applicant further complained that the exercise of coercive police powers to compel her to provide answers that might have been incriminating, without any prior and effective assurance that her answers would not be used against her in a criminal trial, violated her rights under Article 6 of the Convention.

115. Article 6 of the Convention provides, insofar as relevant:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

116. The Government argued that the process of examining the applicant was entirely removed from any criminal investigation. A Schedule 7 investigation was not an investigation into an offence that had been committed; the applicant was not notified that she was subject to any criminal allegation; and no criminal proceedings were brought. Consequently, no issue arose under Article 6.

117. The applicant contended that compulsory questioning by police officers engaged the right to a fair trial under Article 6 of the Convention, since the purpose of the investigation was to enable the police to determine whether the person being questioned appeared to be a "terrorist". Although

the definition of "terrorist" was extremely broad, in most cases such an inquiry would include an investigation into whether someone had personal involvement in criminal offences. Moreover, the Schedule 7 powers had the substantive characteristics of a police power to investigate criminal activity.

118. The applicant further submitted that there had been a violation of Article 6 on account of the degree of coercion and the absence of any statutory safeguards relating to the subsequent use of the material obtained from her, which extinguished the very essence of the privilege against self-incrimination. She did not complain about her subsequent prosecution for failing to comply with a duty under Schedule 7; rather, her complaint concerned the absence of safeguards preventing material obtained during a Schedule 7 examination from being used in any possible subsequent prosecution for a terrorism-related offence.

119. The Court has repeatedly held that the protections afforded by Article 6 § 1 apply to a person subject to a "criminal charge", within the autonomous Convention meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see *Deweer v. Belgium*, 27 February 1980, §§ 42-46, Series A no. 35; *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51; *McFarlane v. Ireland* [GC], no. 31333/06, § 143, 10 September 2010; and, more recently, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 249, ECHR 2016 and *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 110, 12 May 2017.

120. Thus, for example, a person arrested on suspicion of having committed a criminal offence (see, among other authorities, *Heaney and McGuinness v. Ireland*, no. 34720/97, § 42, ECHR 2000-XII, and *Brusco v. France*, no. 1466/07, §§ 47-50, 14 October 2010), a suspect questioned about his involvement in acts constituting a criminal offence (see *Aleksandr Zaichenko v. Russia*, no. 39660/02, §§ 41-43, 18 February 2010; *Yankov and Others v. Bulgaria*, no. 4570/05, § 23, 23 September 2010; and *Ibrahim and Others*, cited above, § 296) and a person who has been formally charged, under a procedure set out in domestic law, with a criminal offence (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 66, ECHR 1999-II, and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 44, ECHR 2004-XI) can all be regarded as being "charged with a criminal offence" and claim the protection of Article 6 of the Convention. It is the actual occurrence of the first of the aforementioned events, regardless of their chronological order, which triggers the application of Article 6 in its criminal aspect (*Simeonovi*, cited above, § 111).

121. None of those events occurred in the present case. The applicant was neither arrested nor charged with any (terrorism-related) criminal offence. Although she was questioned for the purpose of determining whether she appeared to be concerned or to have been concerned in the commission, preparation or instigation of acts of terrorism, this cannot, of itself, engage Article 6 of the Convention. First of all, the Schedule 7 power did not require police officers to have "reasonable suspicion" that she was concerned in the commission, preparation or instigation of acts of terrorism. As such, the mere fact of her selection for examination could not be understood as an indication that she herself was suspected of involvement in any criminal offence. On the contrary, the applicant was explicitly told by police officers that she was not under arrest and that the police did not suspect her of being a terrorist (see paragraph 8 above). Moreover, the questions put to her were general in nature and did not relate to her involvement in any criminal offence (see paragraph 11 above). The Court has already noted that the Schedule 7 power is a preliminary power of inquiry expressly provided in order to assist officers stationed at ports and borders to make counter-terrorism inquiries of any person entering or leaving the country (see paragraph 97 above). While it would not exclude the possibility that it could be exercised in such a way as to engage Article 6 of the Convention, there is no evidence to suggest that it was so exercised in the present case.

122. In light of the forgoing, the Court does not consider that Article 6 of the Convention was engaged by the applicant's examination under Schedule 7 of TACT. It does not consider it necessary to examine the second aspect of the applicant's complaint, which concerned the absence of any safeguards relating to the subsequent use of material obtained in interview. Although it would not exclude the possibility that Article 6 could be engaged by the use of any statements made during a Schedule 7 examination in subsequent criminal proceedings (see *Saunders v. the United Kingdom*, 17 December 1996, § 67, *Reports of Judgments and Decisions* 1996-VI), that was not the case here.

123. Accordingly, the applicant's Article 6 complaint must be rejected as incompatible *ratione materiae* with the provisions of the Convention within the failing to comply with a duty under Schedule 7 meaning of Article 35 § 3 (a) of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

124. Article 41 of the Convention provides:

> “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

125. The applicant seeks “just satisfaction commensurate to any finding of a violation of [her Article 8, 5 and 6 rights] by the Court”. She has not, therefore, expressly claimed any pecuniary or non-pecuniary damage (see, by way of comparison, *Mihu v. Romania*, no. 36903/13, §§ 82-84, 1 March 2016). Nevertheless, the Court may exercise a degree of flexibility in respect of non-pecuniary damage, by, for instance, agreeing to examine claims for which applicants did not quantify the amount, instead “leaving it to the Court’s discretion” (see, among many other examples, *Guzzardi v. Italy*, 6 November 1980, §§ 112-14, Series A no. 39; *Frumkin v. Russia*, no. 74568/12, §§ 180-82, 5 January 2016; *Svetlana Vasilyeva v. Russia*, no. 10775/09, §§ 43-45, 5 April 2016; *Sürer v. Turkey*, no. 20184/06, §§ 49-51, 31 May 2016).

126. That being said, the Court does not consider it appropriate to make an award in respect of non-pecuniary damage in the present case. First of all, it has found a violation of Article 8 only. Secondly, as the breach of Article 8 was linked to the quality of the law in force at the relevant time, it has not been called upon to assess the proportionality of the applicant’s examination. Thirdly, it notes that the applicant does not contend that in her case the Schedule 7 power was exercised in an arbitrary or discriminatory fashion.

B. Costs and expenses

127. The applicant also claimed GBP 37,196.46 for the costs and expenses incurred before the Court. This figure is comprised of GBP 15,624 for Senior Counsel; GBP 14,545 for two junior counsel; GBP 6,985.51 for the solicitor; and GBP 38.95 for postage.

128. The Government argued that it had not been shown that these costs had been actually and necessarily incurred. The relevant legal issues had already been argued in the Supreme Court; there was no sufficient basis for three counsel to be instructed, together with a solicitor; and the applicant’s observations were not of such length of complexity to justify the amounts claimed.

129. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its

possession and the above criteria, the Court considers it reasonable to award the sum of EUR 25,000 covering costs under all heads.

C. Default interest

130. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning Articles 5 and 8 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 5 of the Convention;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement; and
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 28 February 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Linos-Alexandre Sicilianos
Deputy Registrar	President