Neutral Citation Number: [2022] EWHC 1676 (Admin)

Case No: CO/3427/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 July 2022

Before :

LADY JUSTICE NICOLA DAVIES
MR JUSTICE JAY

- -

Between :

MR HAKAN CIFCI	**Appellant**
- and –	
CROWN PROSECUTION SERVICE	**Respondent**

- -
- -

Adam Straw QC and Tayyiba Bajwa (instructed by **Morgan Has**) for the **Appellant**
Tom Little QC (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 9 June 2022

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Approved Judgment

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LADY JUSTICE NICOLA DAVIES and MR JUSTICE JAY:

1. This is the judgment of the court in respect of an appeal by way of case stated by the appellant arising from his conviction before the Chief Magistrate, sitting in the Westminster Magistrates' Court on 1 July 2020 for an offence of wilfully obstructing or seeking to frustrate a search or examination contrary to para. 18(1)(c) of Schedule 7 ("Sch.7") to the Terrorism Act 2000 ("TA 2000").

2. The appellant is a member of the Kurdistan National Congress ("KNC"). On 19 March 2020 at St Pancras International he was stopped by a police officer, questioned, searched and detained for 3-4 hours and various items of his property were copied or seized pursuant to Sch.7 including his mobile phone and laptop computer. The conviction was founded upon a wilful refusal by the appellant to provide his PIN and password for devices seized during the search.

Facts

3. At the trial the evidence adduced comprised a statement of agreed facts and oral evidence from the examining officer PC Ross. The appellant did not give evidence. Within the agreed facts was the following:

   (a) The appellant was served with a Notice of Detention which explained that the purpose of exercising the powers under Sch.7 was to determine whether the appellant appeared to be a person who has been concerned in the commission preparation or instigation of acts of terrorism.

   (b) The appellant was informed of his rights under detention. He said he would like his headquarters to be told, the KNC and named a solicitor whom he would like to consult.

   (c) The appellant was asked to provide the PIN number for his phone. He said that he could not give that information; he referred to a matter of privacy and ethics. He was asked to provide the access code for his laptop computer and the USB stick he was carrying; the appellant refused saying it was a matter of privacy. The appellant said there was nothing political on his devices that could constitute a criminal offence and nothing that related to any proscribed terrorist organisation.

   (d) The appellant was arrested for the offence of wilfully obstructing or seeking to frustrate a Sch.7 search or examination, he was cautioned and made no reply.

   (e) Subsequently at an interview under caution, and accompanied by a solicitor, he answered no comment to all questions which included a repeat request for the PIN number to his mobile telephone, the password to his laptop and the passwords to his USB devices.

   (f) On 27 March 2020 the appellant was charged with the Sch.7 offence, cautioned and made no reply.

4. At the hearing before the Chief Magistrate, PC Ross confirmed that in interview he asked the appellant questions about the nature of his political beliefs in relation to the self-determination of Kurdish people, his political activity with the KNC, and any

association he might have with the Kurdish group named the "YPG". PC Ross confirmed that neither the KNC nor the YPG were proscribed. He did not think he asked the appellant about his affiliation with any other groups. The re-examination of PC Ross by counsel on behalf of the CPS included the following:

"Q: To the extent that his ethnicity and political views played any part was that integral to your determination about his involvement in terrorism or separate?

A: It would have been a separate – could have been a factor in the reason why he was stopped.

JUDGE GOLDSPRING: I am afraid I did not catch that.

Q: I think your answer was it could have been a factor in why he was stopped.

A: Yes…

Q: To the extent that Mr Cifci's ethnicity or political interests played any part in your decision to conduct the examination were those factors integral to your making a determination about his involvement in terrorism or were they separate?

A: Well his ethnicity is not a factor, but his political interests would be a factor in the determination."

PC Ross did not further clarify the matters in his evidence.

5. In closing submissions, counsel for the Crown relied upon the authority of *Rabbani v DPP [2018] 2 Cr App R 28* ("*Rabbani*") (paras. 22-29) in support of its contention that the "examination" by the police officers was conducted for the statutory purpose contained in Sch.7. If it were found to be the statutory purpose, then any question relating to the appellant's political views was integral to making the determination as to terrorism and any question relating to a protected characteristic was integral to that finding and therefore lawful.

6. The appellant in *Rabbani* was made the subject of a Sch.7 stop and search at Heathrow airport. In answering questions he refused to provide the PIN and password for his mobile phone and laptop computer. He appealed his conviction for an offence of wilfully obstructing or seeking to frustrate a search or examination, contrary to para 18(1)(c) of Sch.7 to the TA 2000. The evidence before the court was that the stop was not random. There was no evidence from the defence which raised the question of legality of the stop nor one which raised a concern which might have called for an answer. The relevant passages of this authority are as follows:

"22. Mr Blaxland submitted that there was a burden on the Crown in any such case to call evidence to establish the legality of the stop… If the search was random, then the legality might be established simply by evidence that the individual conducting the stop was authorised under the Act to exercise the power, and that he or she was doing so within the general purposes of the statute. However where the search was not random, as here, Mr Blaxland submitted that more was required, to demonstrate that the search was not "arbitrary". If there was information or intelligence which could not be communicated to the defendant, then the court should convene a closed or ex parte

hearing, and the interests of the defendant could be safeguarded by the instruction of a special advocate to protect his interests….

24. Mr Tom Little QC for the Crown responded to these submissions….. There was no special need to call evidence to establish the legality of the stop. The officers were acting in the execution of duty. There had been no submission of abuse of process before the Chief Magistrate. There was no evidence from the defence which raised a question of illegality of the stop, or even raised a concern which might have called for an answer. There had of course been evidence of the lawful use of the power, in the sense that the powers were exercised by police officers authorised to do so, and exercised for the statutory purpose. There was no call for more evidence. It was illogical for a random search to be regarded as lawful (as Mr Blaxland accepted such a search would be) if a search which was not random called for an explanation in evidence before it could be lawful. The extent of the powers, their lawful basis and the proportionality of the powers were all made clear by the Supreme Court in *Beghal*….

27. In my judgment, this ground fails and fails clearly. There was no basis on which the legality of the stop or the request for the PIN and password was called into question. There was the basic evidence from the officers as I have indicated. I see no basis for a requirement for more.

28. Further, in the absence of some specific factors being advanced, I can see no logic to the proposition that a random exercise of the powers of stop and search would be lawful, but an exercise of the powers based on intelligence or knowledge of the individual would be unlawful without some evidence of the material which prompted the stop."

7. Counsel on behalf of the appellant relied upon the authority of *Nagarajan v London Regional Transport [2000] 1 AC 501* ("*Nagarajan*") in support of the contention that if the interview of the appellant were found to be focused on legitimate political beliefs held by the appellant then discrimination was made out. It was submitted that on the evidence adduced, the court could not be sure that the appellant's political belief in Kurdish independence was not a significant or important cause in the decision to stop him. Allowing for that doubt, together with the fact that the burden is upon the Crown to prove that the stop was lawful, the appellant should be acquitted.

8. In an extempore judgment following closing submissions, the Chief Magistrate stated that he agreed with the Crown's analysis of paras. 22–28 of *Rabbani*. He said that in addressing the issue as to whether or not the stop was lawful the court was required to ask (1) were the officers properly qualified to conduct the examination? the Chief Magistrate answered that in the affirmative; and (2) was the court satisfied to the criminal standard that the examining officer, PC Ross, was carrying out the Sch.7 stop for its statutory purpose in essence to establish whether or not there was a terrorism offence either being committed, will be committed or had been committed? The Chief Magistrate relied on an answer given by PC Ross in re-examination to support a conclusion that the stop was not discriminatory at all. The Chief Magistrate stated "… as I have already indicated it is impossible to disentangle completely, although I accept the limits that counsel for the appellant puts on it, political affiliations or views along with terrorism. After all, for the reasons I articulated they are inherently linked. His answer to that question satisfies me so that I am sure that his purpose was the statutory one and that it was not discriminatory."

Case stated

9. On 28 September 2021 the Chief Magistrate produced a case stated for the opinion of the High Court which identified two questions of law for the opinion of the court namely:

(i) Was I correct in my interpretation of *Rabbani v DPP [2018] EWHC 1156 (Admin)* that any issue of discrimination had to be determined within my finding of whether to stop was conducted for statutory purpose?

(ii) If I was correct in that interpretation, was I permitted to find, on the evidence before me, that there was no unlawful discrimination by the requesting officer and so the stop was lawfully carried out for the statutory purpose set out in Sch.7 to the TA 2000?

10. The production of the case stated was not without complications. The first draft was subject to an application to amend by the appellant. The final version is the subject of a further application to amend by the appellant.

11. The final case stated contains the following

"11. I tried the single charge, there was a statement of agreed facts produced pursuant to section 10 Criminal Justice Act 1967 and the only live witness was the requesting officer, the applicant did not give evidence, I found the following facts:
a. Mr Cifci was stopped by police officers at St. Pancras International railway station
b. The officers were appropriately accredited to perform stops under Schedule 7 to the Terrorism Act 2000 ("TACT")
c. The stop was performed for the statutory function as defined in TACT
d. The stop was not discriminatory at all
e. Mr Cifci wilfully obstructed the examination by refusing to provide either PIN or password for electronic devices found in his possession
12. On behalf of the applicant it was submitted that the stop was motivated mainly or wholly on the basis of the applicant's political affiliation. It was said that since political beliefs have been held, in *McEleny v Ministry of Defence [2019] UKET 4105347/2017*, to be protected by the terms of the Equality Act 2010 that any less favourable treatment, such as the stop and request in this case, was rendered unlawful.
13. It was further submitted that the Crown were required to prove to the criminal standard that the exercise of the TACT powers was not discriminatory.
14. On behalf of the respondent it was submitted, both in writing and orally that the High Court in *Rabbani v Director of Public Prosecutions [2018] EWHC 1156 (Admin)* had determined the evidence that the prosecution needed to adduce to establish that an examination had been lawfully commenced, was that the stop had been carried out by accredited officers and for the statutory purpose.
15.Whilst in this case the applicant had raised the allegation that the police stop was motivated in whole or substantially on the basis of his political beliefs, the respondent argued that the question of discrimination was considered within the evaluation of whether the stop was made for the statutory purpose.
16.The cases of *Rabbani* and, in relation to sentencing, *Beghal v Director of Public Prosecutions [2016] AC 88* were cited in submissions.
17.Relying on *Rabbani* I ruled that the submissions made by Mr Main for the Crown

are an accurate analysis of the law and that any issue of unlawful discrimination must fall to be decided as part of the consideration of whether the stop was for the statutory purpose or not.
18.A finding of unlawful discrimination would indicate that the stop had not been carried out for the statutory purpose and the defendant would be entitled to be acquitted.
19.Additionally I found, on the evidence of the officer, that the respondent had made me sure that the stop in this case was for the statutory purpose. In doing so I considered it of relevance that in interview the defendant indicated the reason he refused to provide the information was for "Privacy" reasons and that the political belief of the applicant had not been raised until court proceedings began, albeit I did not draw an adverse inference from his failure to give evidence.
20.Even if it had been raised, I found it cannot have been Parliament's intention in empowering specific police officers to make enquiries to ascertain a person's involvement in terrorism to neuter that power because the subject asserts a political belief
21.As stated in *Rabbani*, some evidence that there was discrimination is required. The Crown must then satisfy the court, to the criminal standard, that there was no unlawful discrimination.
22.Finally, I found that a person's political beliefs are likely to be inextricably linked with a potential requirement to answer questions for the statutory purpose given the definition of terrorism in section I of the Terrorism Act 2000.
23.It was submitted to me on behalf of the defence that because the officer had accepted that political belief was a factor there must be doubt that the stop was carried out wholly or substantially on the basis of that prejudice. In re-examination, the officer confirmed that Mr Cifci's ethnicity was not a factor, but his political interests would be a factor in the determination.
24.Consequently, I was satisfied to the criminal standard that the stop and request were carried out by accredited officers for the statutory purpose and I convicted the applicant."

12. We accept that the Chief Magistrate erred in stating at paras 12, 15 and 23 that the appellant's case was that the stop was motivated mainly or wholly on the basis of the applicant's political affiliation. The submission made by the appellant was that the Chief Magistrate could not be sure that the appellant's political belief had not had a significant influence on the decision to stop him which was sufficient to make out discrimination. The submission was contained in the appellant's skeleton argument and their statement of issues. Accordingly this court will amend the relevant paragraphs to correctly state the appellant's case. The amended case stated is set out at Appendix A.

13. Further amendments were sought by the appellant in the written submissions which were not pursued with any vigour at the appeal hearing. The court was provided with a transcript of the closing submissions of counsel and of the reasoning/judgment of the Chief Magistrate. In our view, the provision of the transcript addresses any outstanding concerns of the appellant as to the adequacy of the case stated. No further amendment is necessary.

Grounds of appeal

14. The appellant contends that the Chief Magistrate's decision was wrong in law upon the following grounds:

Ground 1: The District Judge misdirected himself. He failed to ask whether the decision to stop the appellant was unlawfully discriminatory in that the appellant's protected characteristic had a significant influence on it.

Ground 2: The District Judge found that the Crown was required to prove no more than 'basic evidence' that the stop was conducted by an accredited officer for the statutory purpose. That was an error: where (as here) there is evidence that the stop was discriminatory, the Crown must prove it was not, including proving that the appellant's protected characteristic did not have a significant influence on the decision to stop. It must disclose all prosecution material that is potentially relevant to whether the stop was discriminatory in that sense.

Ground 3: The District Judge appeared to conflate terrorism and legitimate political beliefs. He wrongly held that, because terrorism may be committed for a political cause, a person can be lawfully stopped on the basis of their legitimate political beliefs.

Ground 4: The District Judge's finding that he was sure that the stop was not discriminatory was not reasonably open to him.

The law

The Terrorism Act 2000

15. The relevant provisions of Sch.7 are as follows:

"Para 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(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)….

5(a): A person who is questioned under paragraph 2 or 3 must–
(a) give the examining officer any information in his possession which the officer requests …

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….."

Section 40 states:

"Terrorist: interpretation.

(1) In this Part "*terrorist*" means a person who –

(a) has committed an offence under any of sections 11, 12, 15 to 18, 54 and 56 to 63, or

(b) is or has been concerned in the commission, preparation or instigation of acts of terrorism."

The Equality Act 2010 ("EA 2010")

The following provisions are relevant:

"10: Religion or belief

…(2) *Belief* means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

(3) In relation to the protected characteristic of religion or belief –

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief; ….

13. Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

The appellant's submissions

Ground 1

16. It is the appellant's case, relying on the authority of *Nagarajan* that discrimination is made out if a protected characteristic was the principal reason for the stop or if not the principal reason, it was a significant influence on the decision to stop the appellant. In *Nagarajan* Lord Nicholls at p.104H stated:

"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out…."

17. The Crown accepted that it was necessary for the court to determine the question of whether unlawful discrimination had taken place. However, the Crown appeared to treat the question of the stop for a statutory purpose and the issue of discrimination as a binary choice either the stop was for the statutory purpose or it was discriminatory, and that any issue of unlawful discrimination must fall to be decided as part of the consideration of whether the stop was for the statutory purpose or not. This approach appears to have been adopted by the Chief Magistrate in his judgment and in the cases stated. He appeared to consider that if the principal purpose of the stop was the Sch. 7

statutory purpose then there could be no discrimination. The Chief Magistrate did not recognise the need to separate the statutory purpose and any questions as to political belief. This was a material error of law. Had the correct test been applied there is a real prospect that further information would have been disclosed by the Crown and the appellant would have been acquitted. Further, para 21 of the case stated would appear to indicate that the Chief Magistrate accepted that evidence of a political belief could amount to discrimination and if the issue of discrimination arose then it was for the Crown to satisfy the court to the criminal standard that there was no unlawful discrimination.

18. As to the evidence of discrimination, the appellant relies on the oral evidence of the PC Ross. Firstly, for the questions which he asked at interview about the nature of the appellant's political beliefs and any associations he might have with two identified proscribed groups. Secondly, for his first answer in re-examination that the appellant's political views could have been a factor in the reason why he was stopped. In his final answer the officer stated that the appellant's political interests would be a factor in the determination as to his involvement in terrorism. That answer does not represent a detraction from the first answer. In essence the appellant's case is that if the appellant's political belief was a reason for him being stopped, then that would be unlawful even if the purpose of the stop had been to determine whether the appellant was involved in terrorism for a political cause. The Chief Magistrate accepted that questions regarding political views are related to a protected characteristic.

19. On the evidence the court could not be sure that the appellant's political belief in Kurdish independence was not a significant or important cause in the decision to stop and in the circumstances a doubt has arisen. Given that the burden remains with the Crown it must follow that the appellant should have been acquitted.

Ground 2

20. Mr Straw QC, on behalf of the appellant, realistically accepted that ground 2 added little to ground 1.

Ground 3

21. The Chief Magistrate appears to have conflated the issue of terrorism and legitimate political beliefs. There are two separate questions to be asked namely (1) was the stop because of a protected characteristic, what was the reason for the stop? (2) if there is no discriminatory reason, was the purpose of the stop to determine if the individual appeared to be concerned in terrorism or was the stop linked to racial, religious or political views which would be unlawful under the provisions of the Equality Act 2010? The Chief Magistrate stated that political views and terrorism are inherently linked which led to his finding that the stop was for the statutory purpose and not discriminatory.

22. The appellant contends that there is a critical difference between legitimate political beliefs or activities and terrorism.

23. The Chief Magistrate appears to have considered that because terrorism may be committed for the purpose of advancing a political cause then a person can be lawfully stopped on the basis of legitimate political beliefs. That was an error of law. It is

unlawful for the Sch.7 power to be exercised in respect of a protected characteristic of legitimate political belief.

Ground 4

24. The essence of the appellant's case is that in order to be sure that the stop was not discriminatory, the Chief Magistrate had to be sure that the appellant's legitimate political belief did not have a significant influence on the decision to examine him. The only relevant evidence on the issue was that of PC Ross and on the basis of that evidence the Chief Magistrate could not be sure that the appellant's legitimate political belief did not have that influence.

The respondent's submissions

25. The respondent does not accept that the appellant did raise a credible issue of discrimination but in any event the prosecution need go no further than establishing the elements of the offence to the criminal standard and in the context of Sch.7 that means the decision to stop was carried out by a person authorised to do so and that was undertaken lawfully with the consequential elements relating to the detained person's failures and state of mind which are undisputed. The prosecution adduced more than basic evidence. PC Ross made clear what had been and what had not been taken into account which did not as a matter of law amount to unlawful discrimination.

26. Further, it is the Crown's contention that *Rabbani* was correctly applied by the Chief Magistrate to the facts of the case. It was not incumbent on the Chief Magistrate to determine a threshold level of influence relating to the appellant's political opinion because he concluded that the stop was not discriminatory at all.

27. As to ground 3 there is a difference between legitimate political opinion and terrorism, questions directed to the issue of terrorism can involve questions about political opinions. Taken to its logical conclusion the appellant's argument would lead to a position where someone with a terrorist mindset could avoid being questioned by relying on an asserted legitimate political belief and upon that basis a Sch.7 stop would be unlawful.

28. Further, the primary focus of a criminal court is to determine whether the prosecution has proved its case and not determine what are described as "granular issues" arising under various parts of the EA 2010.

29. The underlying issue is what is the threshold for a conclusion that a stop was not for a statutory purpose but discriminatory. Mr Little QC relies upon the Code of Practice for examining officers and review officers under Sch.7 to the TA 2000 (March 2015), in particular para 18 which states:

> "Schedule 7 powers must be exercised in a manner which is proportionate and which does not discriminate against anyone on the grounds of age, race (including colour, nationality, ethnic or national origin), religion or belief, gender or sexual orientation. To do so would be unlawful. Examining officers must take particular care to ensure that the selection of persons for examination is not solely based on their background or religion."

30. Mr Little identifies the tension between the Code of Practice and the authority of *Nagarajan*. Further he contends that it is not appropriate to conduct an analysis as to what fraction of influence could undermine the statutory purpose. It is accepted by the respondent that the Code of Practice, although admissible as to the approach to be taken, it is not binding on the court.

Discussion and conclusion

31. The powers contained in Sch.7 are broad and intrusive. The exercise of the power to stop and question a person does not require there to be any suspicion of an offence. As the Supreme Court recognised in *Beghal v Director of Public Prosecutions [2015] 2 Cr App R 34; [2016] AC 88*, the power represents an interference with an individual's private life and must be exercised lawfully and proportionately. As a consequence, safeguards are necessary in order to ensure compliance with Articles 8 and 10 ECHR and to provide sufficient safeguards to prevent arbitrary and discriminatory use of the power. Underlying those powers is the fundamental premise that the decision to search or examine must be lawful. If the decision is not in accordance with the statutory purpose set out in para 2(1) of Sch.7, it is not lawful. It follows that a person cannot be convicted under para 18(1)(c) of the TA 2000 unless the decision to search or examine is lawful.

32. A decision to search or examine will not be lawful if it represents unlawful discrimination contrary to the EA 2010. If there is evidence of unlawful discrimination, it is for the Crown to satisfy the court so that it is sure, that there was no unlawful discrimination before a conviction may be imposed.

33. Section 13 EA 2010 provides that a person discriminates against another if, because of a protected characteristic, person A treats person B less favourably than A treats or would treat others. Protected characteristics include any philosophical belief. It is accepted that the appellant's political belief was a protected characteristic for the purpose of section 10(2) EA 2010. It is undisputed that PC Ross did ask the appellant questions about his political beliefs.

34. We have considered the answers given by PC Ross in re-examination and we are satisfied that they provide evidence that the political beliefs of the appellant were a factor in the police officer's decision to stop the appellant. The issue of a protected characteristic having been raised in the evidence, it was incumbent upon the Chief Magistrate to ask whether he was sure that the police officer's decision to stop did not represent unlawful discrimination of the appellant. The Chief Magistrate appeared to consider that the stop would be lawful if it was for the Sch.7 statutory purpose and that discrimination was relevant only if it showed that the stop was not for the statutory purpose. Adopting the Crown's approach, the Chief Magistrate appears to have regarded the issue of the purpose of the stop as a binary question: either the purpose was statutory (and the stop was lawful); or it was not, for example, because it was discriminatory (and the stop was unlawful).

35. In taking this approach we find that the Chief Magistrate erred in law as this was not a binary question. Decisions can be reached for more than one reason, even if the main purpose of the stop was the statutory purpose, on the evidence before the court, it should have proceeded to a second question namely was there evidence of unlawful discrimination?

36. Such an approach is not inconsistent with the authority of *Rabbani.* The critical distinction as between *Rabbani* and the facts of this case is that in *Rabbani*, there was no evidence from the defence which raised a question of the legality of the stop or even raised a concern which might have caused for an answer. The legality of the stop in *Rabbani* was not called into question on the basis that it contravened the EA 2010. This point was directly relevant to the court's finding at paras 27 and 28 that what was required was "basic evidence" from the officers who stopped the appellant so as to satisfy the court that the stop fell within the statutory provisions. It is of note that at para 28 the court recognised that the existence of specific factors could provide a basis for the requirement of further evidence as to what prompted the stop. *Rabbani* did not address the Crown's obligations where there was evidence that the examination or search could constitute unlawful discrimination. In this case such an issue was raised and in those circumstances it was for the Crown to satisfy the court that the stop was not discriminatory.

37. In our judgment, based upon the evidence in this case, there are two relevant questions to be answered by the court: (i) was the purpose of the stop the Sch.7 statutory purpose? (ii) did the appellant's protected characteristic have a significant influence on the decision to stop? They are separate questions and each must be asked.

38. As to the formulation of the second question, the respondent contends that there is a tension between the Code of Practice (para 29 above) and the authority of *Nagarajan,* in particular the words of Lord Nicholls at 104H and following. Accepting, as we do, that *Nagarajan* was a challenge based upon the provisions of the Race Relations Act 1976, it is an authority of the highest court in England and Wales and since 1999 has been followed in cases of discrimination in areas other than race and before different courts and tribunals. In *Law Society v Bahl [2003] IRLR 640* at [83] Elias J stated:

> "…the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a "significant influence".

39. We accept that the court is able to take account of the Code of Practice but the court is not bound by it. It may be, that when the words of Lord Nicholls and the guidance given in paragraph 18 of the Code of Practice are carefully considered, the distinction between the two is limited. In any event, we are satisfied that for the purpose of this appeal the authority to be followed is that of *Nagarajan*. If, in any future case, it is the intention of the respondent to take this point then the submission should be prepared on the basis of full and considered argument including the provision of relevant authorities, which this was not.

The two questions for this court

40. The first question to be determined by this court is whether the Chief Magistrate was correct in his interpretation of *Rabbani.* Identifying the reasoning of the Chief Magistrate in his extempore judgment has not been straightforward. Accepting, as we do, the pressures on the court to provide a determination, it would have been of assistance to the parties and to the court had a pause been taken in proceedings prior to the giving of the judgment.

41. We accept the appellant's contention that the Chief Magistrate, in adopting the Crown's interpretation of *Rabbani* and with it a binary question, appeared to consider that the stop would be lawful if it was for the statutory purpose and that discrimination was relevant only if it demonstrated that the stop was not for statutory purpose. As this appeared to represent the Chief Magistrate's understanding of the authority of *Rabbani* then in that respect he erred in law.

42. Accordingly, and in answer to the first question, we find that the Chief Magistrate was incorrect in his interpretation of *Rabbani* in concluding that any issue of discrimination had to be determined within his finding of whether the stop was for a statutory purpose.

43. We are satisfied that in approaching the issue of whether this was a lawful stop or unlawful by reason of discrimination, a court must address two questions namely: (i) was the purpose of the stop for the statutory purpose set out in para 2(1) of Sch.7? and (ii) did the appellant's protected characteristics have a significant influence on the decision to stop? These are separate questions and each must be asked.

Grounds 3 and 4

44. It is appropriate to take these two grounds together.

45. We accept the appellant's contention that there is a critical difference between legitimate political beliefs or activities and terrorism. The former is a protected characteristic under the EA 2010 and Article 14 ECHR. It is protected by Article 10 ECHR and is of fundamental importance to that right. Terrorism is different. It includes the use of serious violence, aimed at influencing a government for a political cause.

46. It follows that if the purpose of the stop were simply to ask questions about a person's legitimate political beliefs or activities, rather than anything related to terrorism, the issue of unlawful discrimination should be at the forefront of the court's concern.

47. That said, we have difficulty with the appellant's contention that in a case such as this there is a distinction to be drawn between the reason or reasons for a stop and the purpose or purposes of a stop. The police officer will question an individual for the purpose of determining whether s/he appears to be a terrorist.

48. In practical terms it may be impossible to maintain a strict line of demarcation between legitimate political beliefs and terrorism as there is an obvious overlap between these matters. A police officer questioning a person for the purpose of determining whether s/he is a terrorist will wish to explore the nature and intensity of that person's beliefs and mindset, and will not know at the outset of the questioning on which side of the line that person falls. X may have strongly held views in support of the right to self-determination of a political group, nation or people. Those views may be legitimate; they may cross the line into terrorism, the only difference (and it is a critically important one) lies in the means sought to be deployed to bring about the desired objective. It is only at the end of the enquiry that the police officer will be in a position to reach any sort of conclusion within the ambit of the statutory condition.

49. We accept that questions relating to an issue of legitimate political opinion will be more nuanced than, for example, questions as to race. Questions may be necessary to explore

political belief which are unnecessary in a racial context. The difficulty arises here only because PC Ross sought to explore what may have been legitimate political opinion in order to determine whether or not it strayed beyond being purely a protected characteristic into the domain of potential terrorism. In our view, it would be appropriate for a police officer to enquire if the belief held represented a legitimate political belief or was a political belief which was directly relevant to a link to terrorism.

50. It is in this context that we consider the answers given by PC Ross in re-examination. The officer accepted that the political views of the appellant could have been a factor in the reason why he was stopped and further that his political interest would be a factor in making a determination about his involvement in terrorism. We are satisfied that these were questions which were properly asked in order to determine whether or not the appellant was a terrorist within the meaning of s.40 of the TA 2000. As such the question would provide the basis for a finding that the stop was for the statutory purpose set out in Sch.7.

51. Notwithstanding our conclusion that the Chief Magistrate erred in law in his interpretation of *Rabbani,* we are satisfied that had he asked the correct question he would have been permitted to find on the evidence before the court that there was no unlawful discrimination by the requesting officer as the questions asked by PC Ross were properly directed to issue of whether the appellant was a terrorist within the meaning of s.40 TA 2000 and thus would satisfy the statutory purpose set out in Sch.7.

52. Accordingly, and in answer to the second question, we find that the Chief Magistrate, although in error in his interpretation of *Rabbani*, was permitted to find on the evidence before him that there was no unlawful discrimination by the requesting officer and so the stop was lawfully carried out for the statutory purpose set out in Sch.7 to the TA 2000.

53. Given the court's answer to the second question, the appellant's appeal by way of Case Stated must be dismissed.

Disclosure

54. The appellant contends that the error of law perpetrated by the Chief Magistrate namely the application of the wrong test to the issue of discrimination, was material to the outcome of his case for an additional or alternative reason namely that had the Chief Magistrate applied the correct test not only to the issue of discrimination but also that of disclosure, it is plausible that documentation would have been provided that would or might have undermined the Crown's case.

55. It is clear from the case stated that the appellant made two applications for disclosure during the course of the proceedings. These were wide-ranging and ambitious, and were directed in the main to the issue of discrimination: whether, in particular, the police targeted the appellant on account of his political beliefs. By a skeleton argument dated 19 November 2020, the appellant submitted that discrimination "requires only that the relevant protected characteristic has a material or significant influence on the relevant treatment". On 21 October the Crown had submitted that, given that the test was "sole or predominant purpose", there was no additional material to be disclosed. That submission was repeated in slightly different terms on 21 November. At a contested hearing on 25 November the Chief Magistrate accepted the Crown's argument.

56. It is the appellant's submission that the Chief Magistrate made the same error at all material times, and that had the correct approach been applied further documentary material would or might have been provided.

57. Mr Little QC opposes this submission on three bases. First, he submitted that this was a new point that had not featured in the appellant's original application to state a case and grounds of appeal (it was raised for the first time at para 57 of the appellant's skeleton argument). Secondly, he submitted that the issue was not apt to be raised on an appeal by way of case stated under s. 111 of the Magistrates' Courts Act 1980. Thirdly, he submitted that it was speculative to say that further documentation might have been forthcoming if, which is denied, the wrong test was applied.

58. It is unnecessary to rule on the first submission; the second and third submissions are well-founded. The Chief Magistrate's refusal to order any additional disclosure on 25 November 2020 is not part of the appeal to this court by way of case stated for the purposes of s. 111(1) of the 1980 Act. The Chief Magistrate has stated a case solely in relation to his decision given on 1 July 2021, and the appellant is out of time to challenge any earlier decision. The two questions posed for the consideration of this court do not touch on the issue of disclosure, and it would be wrong in principle for this matter to be investigated, long after the event, through the current appeal route. It is not the role of this court in conducting an appeal under s. 111 to undertake a wide-ranging inquiry into the overall safety of a conviction. In any event, Mr Little's argument that had *arguendo* the correct test been applied the outcome must be seen as speculative has force. The Crown's disclosure failures, if any, would not be an adequate or proper basis for allowing this appeal.

Appendix A

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

HAKAN CIFCI

(Appellant)

V

WESTMINSTER MAGISTRATES' COURT

(Respondent)

Case stated by Senior District Judge (Chief Magistrate) Paul Goldspring in respect of his adjudication as a Magistrates' Court sitting at Westminster Magistrates' Court on 1st July 2021

Stated Case for the

Opinion of the High Court

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1. I am asked to state a case by Hakan Cifci who is aggrieved by my decision to convict him of an offence contrary to paragraphs 18(I)(c) and (2) of schedule 7 to the Terrorism Act 2000, in that on the 19th March 2020 he wilfully obstructed a search or examination under or by virtue of schedule 7 to the Terrorism Act 2000 by failing to provide on request passwords or PINs to access seized electronic devices.
2. In accordance with section 111(2) MCA 1980 and rule 35.2(1)(a) Criminal Procedure rules 2015 (CPR 2015) I received, in writing, from the defendant an application to state a case. In accordance with rule 35.2(5) CPR the prosecution was invited to make representations on the defendants' applications and did so within the 14-day limit.
3. The parties having complied with the statutory time limits under section 111 of the Magistrate's Court Act 1980 (MCA 1980), I confirmed that I did not consider the application to be frivolous and that I would draft the case for consideration by the High Court.
4. The first hearing in this matter was on 4th May 2020 before the then Senior District Judge (Chief Magistrate) Arbuthnot. On 6th October 2020 a defence case statement was served alleging that the decision to stop Mr Cifci was an "unlawful and discriminatory attempt to interfere with his legitimate political activities". The defence went on to request disclosure of a number of items:
    a. Any and all records relating to previous stops of the defendant pursuant to Schedule 7, including but not limited to the Book 500, record of interview, the Examination Officer's Notes, any Notice of Detention;

b. Any and all information relating to the purpose of stopping the defendant on 19 March 2020. This should include a S015 Ports Tasking Proforma, and a redacted SO15 - P. Squad Port Report Proforma.
c. Any and all information relating to whether the defendant was the subject of surveillance and any records deriving from such surveillance;
d. Any policies in place relating to the use of Terrorism Act powers targeting the Kurdish population, those believed affiliated with Kurdish political activism, those believed to be affiliated with the PKK, and/or those believed to be affiliated with the YPG;
e. Any and all information relating to:
    i. The number of Kurdish individuals stopped pursuant to Schedule 7;
    ii. The number of individuals affiliated with or believed to be affiliated with Kurdish political activism stopped pursuant to Schedule 7;
    iii. The number of individuals affiliated with or believed to be affiliated with the PKK stopped pursuant to Schedule 7."

5. The defence case statement went further, requesting confirmation of:
    a. whether a sensitive schedule has been prepared;

    b. whether the prosecutor has been informed separately of the existence of the material deemed too sensitive to be included in the schedule; and

    c. (in the event that either of the above apply) whether the prosecutor has decided that they are not under a duty to disclose such material, and whether an application has been (or is to be) made to the court for an order of non-disclosure of any material.

6. By way of response the Crown indicated on 21st October 2020 that "the sole or predominant purpose is detailed in the statements of PC Ross, served as part of the Prosecution case. There is no additional material to be disclosed."
7. The defence then pursued a focussed application for disclosure under section 8 of the Criminal Procedure and Investigations Act 1996 seeking:
    a. Any and all records relating to previous stops of the defendant pursuant to Schedule 7, including but not limited to the Book 500, record of interview, the Examination Officer's Notes, any Notice of Detention;

    b. Any and all information relating to the purpose of stopping the defendant on l9 March 2020. This should include a SOl5 Ports Tasking Proforma, and a redacted SO15 - P. Squad Port Report Proforma

8. The Crown again responded, on 21st November 2020, accepting that evidence of unlawful discrimination might indicate that the officers had not acted for the statutory purpose but that in the present case there was no material to be disclosed.
9. A contested hearing then took place on 25th November 2020 in relation to the disclosure point. The application was refused on the basis that the Crown had confirmed that following a careful review there was no material meeting the disclosure test relating to the allegation that the stop of the Applicant was discriminatory.
10. The case came to trial at Westminster Magistrates' Court under the Special Jurisdiction of the Senior District Judge (Chief Magistrate) on 1st July 2021 having been somewhat delayed by the global pandemic.
11. I tried the single charge, there was a statement of agreed facts produced pursuant to section 10 Criminal Justice Act 1967 and the only live witness was the requesting officer, the applicant did not give evidence, I found the following facts:

a. Mr Cifci was stopped by police officers at St. Pancras International railway station

b. The officers were appropriately accredited to perform stops under Schedule 7 to the Terrorism Act 2000 ("TACT")

c. The stop was performed for the statutory function as defined in TACT

d. The stop was not discriminatory at all

e. Mr Cifci wilfully obstructed the examination by refusing to provide either PIN or password for electronic devices found in his possession

12. On behalf of the applicant it was submitted that ~~the stop was motivated mainly or wholly on the basis of the applicant's political affiliation~~. I could not be sure that the applicant's political belief had a significant influence on the decision to stop him which was sufficient to make out discrimination. It was said that since political beliefs have been held, in *McEleny v Ministry of Defence [2019] UKET 4105347/2017*, to be protected by the terms of the Equality Act 2010 that any less favourable treatment, such as the stop and request in this case, was rendered unlawful.
13. It was further submitted that the Crown were required to prove to the criminal standard that the exercise of the TACT powers was not discriminatory.
14. On behalf of the respondent it was submitted, both in writing and orally that the High Court in *Rabbani v Director of Public Prosecutions [2018] EWHC 1156 (Admin)* had determined the evidence that the prosecution needed to adduce to establish that an examination had been lawfully commenced, was that the stop had been carried out by accredited officers and for the statutory purpose.
15. Whilst in this case the applicant had raised the argument that I could not be sure that the applicant's political belief had a significant influence on the decision to stop him ~~allegation that the police stop was motivated in whole or substantially on the basis of his political beliefs~~, the respondent argued that the question of discrimination was considered within the evaluation of whether the stop was made for the statutory purpose.
16. The cases of *Rabbani* and, in relation to sentencing, *Beghal v Director of Public Prosecutions [2016] AC 88* were cited in submissions.
17. Relying on *Rabbani* I ruled that the submissions made by Mr Main for the Crown are an accurate analysis of the law and that any issue of unlawful discrimination must fall to be decided as part of the consideration of whether the stop was for the statutory purpose or not.
18. A finding of unlawful discrimination would indicate that the stop had not been carried out for the statutory purpose and the defendant would be entitled to be acquitted.
19. Additionally I found, on the evidence of the officer, that the respondent had made me sure that the stop in this case was for the statutory purpose. In doing so I considered it of relevance that in interview the defendant indicated the reason he refused to provide the information was for "Privacy" reasons and that the political belief of the applicant had not been raised until court proceedings began, albeit I did not draw an adverse inference from his failure to give evidence.
20. Even if it had been raised, I found it cannot have been Parliament's intention in empowering specific police officers to make enquiries to ascertain a person's involvement in terrorism to neuter that power because the subject asserts a political belief.

21. As stated in *Rabbani*, some evidence that there was discrimination is required. The Crown must then satisfy the court, to the criminal standard, that there was no unlawful discrimination.
22. Finally, I found that a person's political beliefs are likely to be inextricably linked with a potential requirement to answer questions for the statutory purpose given the definition of terrorism in section I of the Terrorism Act 2000.
23. It was submitted to me on behalf of the defence that because the officer had accepted that political belief was a factor there must be doubt that the applicant's political belief had a significant influence on the decision to stop ~~stop was carried out wholly or substantia1ly on the basis of that prejudice.~~ In re-examination, the officer confirmed that Mr Cifci's ethnicity was not a factor, but his political interests would be a factor in the determination.
24. Consequently, I was satisfied to the criminal standard that the stop and request were carried out by accredited officers for the statutory purpose and I convicted the applicant.
25. The questions of law for the opinion of the High Court are:
    a. Was I correct in my interpretation of *Rabbani v DPP [2018] EWHC 1156 (Admin)* that any issue of discrimination had to be determined within my finding of whether the stop was conducted for the statutory purpose?

    b. If I was correct in that interpretation, was I permitted to find, on the evidence before me, that there was no unlawful discrimination by the requesting officer and so the stop was lawfully carried out for the statutory purpose set out in Schedule 7 to the Terrorism Act 2000?

28th September 2021

Paul Goldspring

Senior District Judge (Chief Magistrate) for England and Wales

Westminster Magistrates' Court