Trinity Term
[2015] UKSC 49
On appeal from: [2013] EWHC 2573 (Admin)

JUDGMENT

Beghal (Appellant) *v* Director of Public Prosecutions (Respondent)

before

Lord Neuberger, President
Lord Kerr
Lord Dyson
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

22 July 2015

Heard on 12 and 13 November 2014

Appellant
Matthew Ryder QC
Steven Powles
Edward Craven
(Instructed by Abrahams Law)

Respondent
John McGuiness QC
Duncan Atkinson

(Instructed by Crown Prosecution Service Appeals Unit)

Intervener (Secretary of State for the Home Department)
James Eadie QC
Jonathan Hall QC
(Instructed by Treasury Solicitor)

Intervener (Equality and Human Rights Commission)
Dan Squires

(Instructed by Leigh Day)

Intervener (Liberty)
Alex Bailin QC
Iain Steele
(Instructed by Liberty)

Intervener (Islamic Human Rights Commission, Muslim Council Britain and Cage Advocacy UK Limited))
Thomas De La Mare QC
Ravi Mehta
(Instructed by Leigh Day)

LORD HUGHES: (with whom Lord Hodge agrees)

1. The appellant was questioned at an airport under Schedule 7 to the Terrorism Act 2000 ("TA 2000"), which requires a person in her position to answer questions asked by police officers, immigration officers and customs officers for the purpose there set out. She refused to answer the questions and was subsequently convicted of the offence of wilfully failing to do so, contrary to paragraph 18 of that Schedule. Her appeal against her conviction raises the issue whether Schedule 7 is compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), and in particular with articles 8 (right to respect for private and family life), 5 (right to liberty) and 6 (privilege against self-incrimination).

The statutory power

2. Schedule 7 of TA 2000 has been somewhat amended, by the Anti-Social Behaviour, Crime and Policing Act 2014 ("the 2014 Act"), since the date when the appellant was questioned, but the issues of compatibility remain substantially the same. Since the argument before this court has in effect been concerned with its future application as well as with the appellant's particular case, it is convenient to set out the statute in its present form, unless necessary to draw attention to any change which has been made.

3. Paragraph 2 of Schedule 7 creates the power which was exercised. So far as material, it provides:

> "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 or his travelling by air within Great Britain or within Northern Ireland.

(3) This paragraph also applies to a person on a ship or aircraft which has arrived at any place in Great Britain or Northern Ireland (whether from within or outside 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)."

4. The statutory purpose for which the questions may be asked is thus for determining whether the person questioned appears to fall within section 40(1)(b). That in turn defines "terrorist" for the purposes of the Act, and does so in these terms:

"(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."

So the statutory purpose for which the questions may be asked is for determining whether the person appears either to be, or to have been, concerned in the commission, preparation or instigation of acts of terrorism.

5. "Terrorism" is defined for the purposes of the Act in section 1. Shorn of inessential detail it means the use or threat of action which meets all of three conditions: (1) it must be done for the purpose of advancing a political, religious, racial or ideological cause, (2) it must be designed to influence the government or an international governmental organisation or to intimidate the public and (3) it must involve serious violence to a person or to property, danger to life or serious risk to public health or the risk of serous interference with an electronic system. "Acts of terrorism" are therefore to be construed as acts or omissions having these characteristics.

6. Whilst the statute creates some new offences, most acts of terrorism once committed will in any event constitute long-established criminal offences such as murder, infliction of grievous bodily harm, criminal damage, explosives offences or the like. The TA 2000 is largely concerned with the essential process of counter-terrorism, much of which is preventative in character. Part II deals with the

proscription of terrorist organisations. Part III prohibits fund-raising for terrorist purposes and makes provision for the disclosure of terrorist property. Part IV contains provisions for terrorist investigations, which are not confined to inquiry into known criminal acts which have already occurred but, clearly necessarily, extend to planned or prospective acts, including the commission, preparation or instigation of acts of terrorism. It is within Part IV that Schedule 7, containing the power now under consideration, is given effect. Schedule 7 is headed "Port and Border Controls".

7. It follows that what Schedule 7 paragraph 2 does is to create a power to stop and to question people passing through ports or borders in order to see whether they appear to be terrorists in the sense defined by section 40(1)(b), that is to say whether they are or have been concerned in the commission, preparation or instigation of acts of terrorism.

8. This core power to question is supplemented by subsequent provisions of Schedule 7 which give the officer additional powers in relation to a person questioned under paragraph 2. These are as follows:

(i) to stop; under paragraph 6 the officer may stop the person in order to question him;

(ii) to require production of documents carried; under paragraph 5 the person questioned must give the officer any information in his possession which the officer requests, provide his passport or other document verifying his identity, and hand over any document requested if he has it with him;

(iii) to search; under paragraph 8 the person may be searched, an intimate search is not permitted and a strip search is allowed only when there are reasonable grounds for suspecting concealment of something which may be evidence that the individual falls within section 40(1)(b), and then only on the authority of a second and senior officer;

(iv) to copy and retain material; paragraph 11 (and now paragraph 11A (inserted by the 2014 Act)) contain provisions for the retention of material handed over or found; this includes power to copy and retain electronic data contained on any device carried, the detail of which it will be necessary to consider later;

(v) to detain; under paragraph 6 (and now paragraph 6A (inserted by the 2014 Act)) the officer may detain the person, for the purpose of exercising the questioning power under paragraph 2; by paragraph 6A he may not continue the questioning beyond one hour without invoking the more formal rules which attend detention; these are found in separate provisions in both Schedule 7 and Schedule 8 and include regular reviews by a different officer senior to the examining officer; it is necessary to note that at the time of the appellant's questioning this power to detain was limited to nine hours, but now it is limited to six hours (the latter including the first hour).

9. The sanction in the event that the person stopped wilfully fails to comply with the obligations of Schedule 7 is conviction of a specific offence created by paragraph 18. That paragraph provides:

> "(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."

The penalty available is a fine and/or imprisonment with a maximum of three months, together of course with the generally available lesser penalties of discharge or community orders; an amendment passed in 2003 to increase the maximum imprisonment to 51 weeks has never been brought into force.

10. These statutory powers are supplemented by a Code of Practice for officers exercising them, issued by the Home Secretary under Schedule 14 paragraph 6, laid before Parliament, published generally and available wherever the powers may be exercised.

11. This power of questioning, and its associated provisions, is separate from the general power to arrest, detain and question persons who are reasonably suspected of having committed an offence, and, in the context of terrorism, from the specific power to arrest on reasonable suspicion of having been concerned in the

commission, preparation or instigation of an act of terrorism. That latter separate power is provided for by section 41 and different consequential provisions are made by Schedule 8 for the conduct of detention which is consequent upon such an arrest. The power in issue in the present case is a preliminary power of inquiry in aid of the prevention of terrorism. It is not dependent on the existence of any reasonable suspicion of either a past offence or act of terrorism or a plan to commit such in future. It is 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. If such inquiries lead to a reasonable suspicion of terrorism or offence then the different provisions appropriate to such a case become operative.

The appellant's case

12. The appellant Mrs Beghal passed through East Midlands Airport on 4 January 2011. She was returning from Paris where she had visited her husband, who is a French national in custody, so the courts have been told in this litigation, "in relation to terrorist offences". (The court was given no further information about him.) She was accompanied by her three children. She was not arrested and was told that whilst the police did not presently suspect her of being a terrorist they needed to speak to her in order to establish whether or not she was a person concerned in the commission, preparation or instigation of acts of terrorism. Someone was meeting her, so her two older children continued through to the land side of the airport to join that person. She elected to keep the youngest with her. She asked to consult with a lawyer. She requested an opportunity to pray, which was granted, and whilst she did so one of the officers contacted her lawyer. She was permitted to speak to him on the telephone. In the meantime she was searched. The police officers made it clear that the questions would not await the arrival of the lawyer, and proceeded to ask them. The questions concerned, inter alia, (i) her reasons for travel, (ii) where she had stayed, (iii) whether she had travelled on beyond France, (iv) the identity of the person meeting her, (v) whether she had been arrested in the past, (vi) her relationship with her husband given his imprisonment for terrorism, (vii) whether she was employed or supported by benefits, (viii) how she had paid for the flight, (ix) whether she had a motor car, (x) the details of her parents and siblings, (xi) her nationality status, (xii) how long she had lived in England and (xiii) whether she was carrying a mobile telephone. She was not formally detained. She remained at the airport. Including arrangements for the children, time for prayer (approximately 20 minutes) and time to find and speak to her solicitor, the process appears to have lasted about an hour and three quarters from her being stopped to her being told that she was free to go. The questions, plus reporting her for the failure to answer them, lasted a little under half an hour.

13. She refused to answer most of the questions. She was charged with the offence of wilful failure to comply with the requirement to answer questions. In due course, after an unsuccessful application to the District Judge to stay the proceedings

as an abuse of process, she pleaded guilty to the offence of wilfully failing to answer questions asked under Schedule 7 paragraph 2. She was sentenced to be conditionally discharged.

History of the power

14. Although now contained in the TA 2000, the power to question at ports and borders in relation to possible terrorism has been in existence in the UK for 40 years. It was amongst powers introduced, initially as temporary measures, by the Prevention of Terrorism (Temporary Provisions) Act 1974, which was passed in response to the then threat of IRA terrorism and the bombing campaigns associated with it. Terrorism legislation has been subject to almost continuous scrutiny ever since. Other powers introduced by the 1974 Act have not survived, notably a power for the Secretary of State, of his own motion, to remove from Great Britain, and thereafter to exclude, any person he was satisfied was a terrorist, even UK citizens unless they were long term residents. But the power to question at ports and borders has been re-enacted at regular intervals since 1974. It was re-enacted annually until 1984, and then replaced by the Prevention of Terrorism (Temporary Provisions) Act of that year. That in turn was replaced by the Prevention of Terrorism (Temporary Provisions) Act 1989, which itself was renewed annually until replaced by the TA 2000.

15. Quite apart from the examination involved in repeated Parliamentary re-enactment, there have been both specific inquiries and continuous review. A review of the then new 1974 Act was undertaken shortly afterwards by Lord Shackleton (Review of the operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976 (Cmnd 7324), August 1978). A further wholesale independent inquiry into terrorism legislation was undertaken in 1995-1996 by Lord Lloyd of Berwick, then, as a Law Lord, one of the UK's most senior judges (Inquiry into Legislation Against Terrorism (Cm 3420), October 1996). The occasion for his review was the then current hope for a peaceful accord in Northern Ireland, and he reported on the situation as it might be if that occurred; the prospect was subsequently confirmed by the Good Friday Agreement of 1998. The government then conducted a public consultation on terrorist legislation in 1998. More recently, in 2012-2013, the government undertook a further public consultation specifically in relation to the Schedule 7 powers and, independently of any tabled legislative proposal, the joint committee on human rights of the Houses of Parliament then examined the powers in 2013 and produced a public report. In addition to those specific inquiries, there has been in existence since 1984 the office of Independent Reviewer of terrorism legislation, currently pursuant to section 36 of the Terrorism Act 2006. The reviewers have been distinguished independent lawyers, charged with reporting at least annually on the structure and working of the legislation. Their reports must be laid before Parliament and thus the public. Lord Lloyd, successive Independent Reviewers, and the joint committee have all advised that the port

questioning power should remain, in some cases with suggested modifications, some of which have been made.

16. The power to detain was originally limited to 12 hours. It was reduced to nine hours in 1998 after Lord Lloyd had suggested a six hour limit. It was further reduced to the present six hours by the 2014 Act, following the 2012-2013 consultation. At the same time other alterations were made to the Schedule 7 powers by Schedule 9 to the 2014 Act:

(i) searches were confined to non-intimate searches, with the restrictions on strip searches described above introduced (para 8(3) to (7));

(ii) the power to take blood and urine samples was removed;

(iii) a person detained was ensured the right to have a third person informed, when detained at the port as well as if taken to a police station (Schedule 8 paragraph 6(1))

(iv) similarly all persons detained were ensured the right to consult a solicitor, and the questioning is now to be postponed until his arrival unless that would prejudice the inquiry being made (Schedule 8 paragraph 7A);

(v) A new requirement for periodic review of detention by a senior officer was introduced (Schedule 8, Part 1A); and

(vi) the power to retain documents or data was supplemented by a specific power to copy them, with the same limit to seven days or during a criminal or deportation inquiry.

The Code of Practice

17. The current Code of Practice was issued in 2014. Amongst its provisions are the following:

(i) examining officers must be specially trained and authorised for the purpose and must normally be police officers; an immigration or customs officer is in effect to be used only exceptionally and when

specifically designated by the Secretary of State after consultation with the chief officer of police on both his training and the proposal for his designation (paras 8 to 13);

(ii) officers are advised that it will often be helpful to ask initial screening questions without compulsion and that this may avoid the need for the exercise of Schedule 7 powers (para 20);

(iii) emphasis is placed upon the need to avoid discrimination and/or arbitrary action, by selecting persons only for the statutory purpose; selection must not be based solely upon the ethnic background or religion of the individual but rather must be informed by considerations relating to the threat of terrorism (paras 18-19);

(iv) persons questioned must be informed clearly of the statutory basis for what is being done and of the procedure for feedback or complaint (para 22);

(v) if a person questioned but not detained asks to notify a third party and/or to consult a solicitor, these requests should be granted (paras 41-42);

(vi) records must be kept of the fact and duration of each examination and detention and, from April 2015 when the equipment will be in place, examinations of those in detention must be audio-recorded (paras 43 and 66-68);

(vii) guidance is given as to when it may be appropriate to exercise the power of detention; essentially this will be when detention is made necessary by lack of co-operation; officers are instructed that if questioning is to last longer than an hour, formal detention must take place before the hour elapses (paras 45-46).

Use of the power

18. The Independent Reviewers have set out the use of, inter alia, the Schedule 7 powers. In 2013 there were approximately 245m passenger movements through the ports of the UK. In 2012-2013, 61,145 were examined under Schedule 7, and in 2013-2014 47,350 were. Others were asked screening questions, but these entailed the use of no compulsory powers. It follows that the proportion of passengers

examined under compulsion was between 0.02% and 0.025%, or between 1 in 4,000 and 1 in 5,000. Of the 47,350 examined in 2013-2014, before a decision on detention was required to be made within the first hour, all but 1,889 were dealt with within that time and only 517 were detained (a fraction over 1% of those examined or very roughly 1 in 500,000 passengers). The Reviewers' reports show that the numbers examined have been falling steadily over the past five years. The Reviewers themselves, whilst concluding that the Schedule 7 questioning power should be retained, have consistently counselled against its over-use, and have not detected such. They have also reported favourably on the manner in which they have observed the power being exercised.

The independent reviewer: recent reports

19. There has been broad consensus over recent years in the conclusions of successive Independent Reviewers as to the Schedule 7 powers. It will suffice to refer to the most recent reports of David Anderson QC.

20. These reports make clear the conclusion that the presence of a port questioning and search power which does not require prior objectively established suspicion on reasonable grounds has undoubted utility in the struggle against terrorism. The June 2012 report sets out these conclusions at para 9.43ff, and subsequent reports make clear that they still hold good. The questioning and search powers are found to have three principal values and one ancillary one:

(a) in providing evidence which assists in the conviction of terrorists;

(b) in furnishing intelligence about the terrorist threat;

(c) in disrupting and deterring terrorist activity; and, as an ancillary benefit;

(d) in enabling the recruitment of informants.

21. The principal source of evidence subsequently used either in evidence or in investigations leading to conviction is material found on persons questioned, especially the contents of mobile telephones, laptops or data storage devices such as pen-drives. The Reviewer catalogued five different examples, over a four year period, of convictions deriving from evidence produced from the exercise of Schedule 7 powers.

22. Even more potent, the Reviewer concluded, has been the gathering of valuable intelligence. Sometimes this may trigger a train of inquiry which leads directly to a prosecution; on far more occasions it is the accumulation of individually small pieces of intelligence which, combined, may inform both particular and general responses to the terrorist threats confronting this country. It is a commonplace of detective or security work that a 'jigsaw' approach can yield vital results beyond the significance initially apparent from any single piece of information.

23. The Reviewer has satisfied himself that port checks can help to dissuade young, nervous or peripheral members of terrorist networks from their plans. Stops not based on intelligence can help to inhibit the use of "clean skins" or persons selected for their absence of any prior known connection with terrorism. The knowledge of port stops can help to disrupt plans which involve international travel.

24. The Reviewer has attended training sessions for examining officers and has watched them at work. His conclusion is that the examinations he saw were "non-confrontational, considerate … and no longer than necessary" (June 2012 report, para 9.61). He comments specifically on being "struck by the light touch and professionalism displayed by nearly all the ports officers … observed." (*ibid* para 9.58).

25. In his June 2014 report Mr Anderson expressly considered the potential for ethnically discriminatory use of these powers. The Strasbourg court had adverted in *Gillan v United Kingdom* (2010) 50 EHRR 1105 to this potential in the context of the different powers there studied (see below), and the Equality and Human Rights Commission had addressed the same issue, as it helpfully has before this court. The Reviewer found that there was a significantly higher incidence of the use of Schedule 7 powers in relation to persons of Asian origin than there was for those of white, black or other origin. He made adjustments for the lower proportion of Asian persons travelling through ports than in the population generally, but there remained a clearly greater use of the powers in the case of such persons. He concluded that if Schedule 7 were intended to be operated on a random basis, this would be worrying, but that since the powers were, as required by the Code, to be operated having regard to the nature of the terrorist threat confronted by this country, this was, in conditions of the present threat, inevitable and indeed an indication that the Schedule was being properly used. His conclusion was expressed at paras 7.11 and 7.14 as follows:

> "If Schedule 7 is being skilfully used, therefore, one would expect its exercise to be ethnically "proportionate" not to the UK population, nor even to the airport-using population, but rather to the terrorist population that travels through UK ports.

…

> I have no reason to believe that Schedule 7 powers are exercised in a racially discriminatory manner. The so-called 'disproportionality' identified by the EHRC is not evidence (and not suggested to be evidence) of this. What matters is that Schedule 7 should be operated responsively to the terrorist threat. The ethnicity figures are not indicative of a failure to do this."

26. The Reviewer made several recommendations for changes in Schedule 7. To the extent that these have been adopted either by statute or the Code (see paras 16 and 17 above) they need not be further rehearsed. He also made recommendations which have not been adopted, the principal of which were as follows (July 2014 report, paras 19ff):

(a) that detention should be permitted only when a senior officer is satisfied that there are (subjectively judged) grounds for suspicion that the person falls within section 40(1)(b);

(b) that a similar condition should govern the copying and retention of data downloaded from electronic devices; and

(c) that a statutory bar be introduced on the admission of anything said in a Schedule 7 interview in any subsequent criminal trial.

The different powers

27. In analysing the lawfulness of Schedule 7 it is convenient to break them down into (a) the power of port questioning and search, (b) the power of detention and (c) the power to inspect data on any electronic device carried and to copy and retain that data.

Port questioning and search: article 8

28. There was, rightly, no dispute before us that Schedule 7 questioning and search under compulsion constitutes an interference with the private life of a person questioned. It does not follow that screening questions without compulsion do so, and they would appear not to pass the threshold of interference, but that issue does not arise on the facts of this case. The issue here, accordingly, is whether the

interference by questioning and search under compulsion is justified under article 8(2). In order for it to be justified, it must be (1) in accordance with the law and (2) a proportionate means to a legitimate end.

In accordance with the law

29. It is well established that the primary constituent of the requirement that interference with an ECHR right must be in accordance with the law ("legality") is that there must be a lawful domestic basis for it, that this law must be adequately accessible to the public and that its operation must be sufficiently foreseeable, so that people who are subject to it can regulate their conduct. An example of a case which failed these primary tests is *Malone v United Kingdom* (1985) 7 EHRR 14, where it was found to be impossible to say with any reasonable certainty what elements of the powers to intercept communications were incorporated in legal rules and what elements remained within the discretion of the executive.

30. The requirement of legality, however, is now established to go further than this. It calls for the law to contain sufficient safeguards to avoid the risk that power will be arbitrarily exercised and thus that unjustified interference with a fundamental right will occur. This proposition has often been re-stated by the European Court of Human Rights ("ECtHR"). An example is *S & Marper v United Kingdom* (2008) 48 EHRR 1169, para 95:

> "The court recalls its well established case-law that the wording 'in accordance with the law' requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise (see *Malone v United Kingdom* 1984 7 EHRR 14, paras 66-68; *Rotaru v Romania* (2000) 8 BHRR 449, para 55; and *Amann v Switzerland* (2000) 30 EHRR 843, para 56)."

31. Legality in this latter sense may be failed, for example, where there is an over-rigid regime which does not contain the flexibility which is needed to avoid an unjustified interference with a fundamental right. This was the situation in both *MM v United Kingdom* [2012] ECHR 1906 and *R (T) v Chief Constable of Greater*

Manchester Police (Liberty intervening) [2014] UKSC 35, [2015] AC 49. In those cases the statutory rules under which recordable convictions and cautions were automatically retained and compulsorily disclosed upon applications for particular forms of employment were held to fail the test of legality. This was in large part because they were without any flexibility or discretion to allow for the case where the recorded matter was irrelevant to the proposed employment and thus disclosure would constitute an unjustified (disproportionate) interference with article 8 rights. The safeguards (there of discretion or flexibility) were required in order to guard against automatic operation of the rule resulting in disproportionate interference with article 8 rights. It was in this context that Lord Reed observed in *R(T)*, at para 114, that to satisfy the test of legality there must be sufficient safeguards in place to demonstrate that the State has properly addressed the issue of the proportionality of any interference and enabled it to be examined in a particular instance.

32. In other situations, however, legality is relevant to the reverse case of discretionary power. Here what legality may require is that the safeguards should be present in order to guard against overbroad discretion resulting in arbitrary, and thus disproportionate, interference with Convention rights. The present is a case where the complaint of lack of legality is of this latter kind.

33. In both kinds of case, the issue of legality is thus, whilst distinct from proportionality, closely linked to it. In both kinds of case, legality is a prior test which is designed to ensure that interference with Convention rights can be proportionate. It does not, however, subsume the issue of proportionality, whether the issue is the proportionality of the measure as a whole or the proportionality of its application in a particular case.

34. As recorded above, there has been unanimity amongst all the independent reviews of the port questioning power as to its utility. This is clearly relevant to the question of the proportionality of the power, but it does not contribute significantly to the question of its legality. It is obvious that an arbitrary power can be useful, but it is not legitimate.

35. In *Gillan v United Kingdom* (2010) 50 EHRR 1105 the Strasbourg court applied these principles to a different set of counter-terrorist provisions of the TA 2000 and, differing from the House of Lords (*R (Gillan) v Comr of Police of the Metropolis* [2006] 2 AC 307), found that those failed the test of legality. There, the provisions in question were sections 44-46 TA 2000, which enabled a senior police officer to designate an area for a period of 28 days as one in which police officers could stop and search any person for articles of a kind which could be used in connection with terrorism. The power to stop and search did not depend on the existence of any objectively judged grounds for suspicion relating to the person intercepted. That characteristic is shared by the Schedule 7 power of port

questioning here under consideration. The appellant in the present case relies heavily on that decision and contends that the port questioning power similarly fails the test of legality.

36. The fact that the power was exercisable without depending on any prior suspicion, subjective or objective, was one of the reasons for the Strasbourg court's conclusion in *Gillan*. At para 83 the court said this:

> "Of still further concern is the breadth of the discretion conferred on the individual police officer. The officer is obliged, in carrying out the search, to comply with the terms of the Code. However, the Code governs essentially the mode in which the stop and search is carried out, rather than providing any restriction on the officer's decision to stop and search. That decision is, as the House of Lords made clear, one based exclusively on the "hunch" or "professional intuition" of the officer concerned. Not only is it unnecessary for him to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched. The sole proviso is that the search must be for the purpose of looking for articles which could be used in connection with terrorism, a very wide category which could cover many articles commonly carried by people in the streets. Provided the person concerned is stopped for the purpose of searching for such articles, the police officer does not even have to have grounds for suspecting the presence of such articles. As noted by Lord Brown of Eaton-under-Heywood in the House of Lords [at para 74], the stop-and-search power provided for by section 44, 'radically ... departs from our traditional understanding of the limits of police power'."

37. Whilst that factor is common to the provisions considered in *Gillan* and the present ones, there are otherwise very significant differences between that case and this.

38. First, the section 44 power was exercisable in relation to any person anywhere in the street, whereas the Schedule 7 power is confined to those who are passing through ports of entry/exit. The public in this country has historically enjoyed the right to free movement about the streets and the power to stop and search is, as Lord Brown observed, a substantial intrusion upon it. In this country, there is no general requirement for identity documents to be carried and produced on demand when a citizen is out and about. By contrast, those who pass through our ports have always been adjusted to border controls, including the requirement to identify oneself and to submit to searches and answer questions in aid of general security. The potential importance of intercepting, detecting and deterring terrorists at border points is

generally recognised. The current public concern about those leaving this country with a view to joining terrorist groups abroad is simply an example. The intrusion inherent in stopping for questioning and/or search is accordingly less at border points.

39. As long ago as 1981 the European Commission on Human Rights referred in *McVeigh, O'Neill and Evans v United Kingdom* (1981) 5 EHRR 71, para 192 to this factor, and to the widely recognised importance of controlling the international movement of terrorists. In his 1996 report Lord Lloyd identified it in the following passage:

> "10.27 As an island nation it has long been the British way to concentrate controls at its national frontiers, and to maintain a correspondingly greater freedom from random checks inland. This is not always the practice adopted in continental countries which have long land frontiers. But our geography gives us a unique opportunity to target checks where they are likely to be most effective; namely at the 'choke points' provided by our ports and airports. That, of course, is where immigration and customs controls are also to be found. But it is only by virtue of the PTA [ie the then Prevention of Terrorism (Temporary Provisions) Act 1989] that the police have any power to stop and question people passing through ports. Immigration checks on EU nationals having in most eases been reduced to a simple passport check, only a separate police check is likely to identify a terrorist suspect if he is a national of an EU country."

Lord Lloyd added at para 10.47 that the port powers were among the less controversial of the provisions in the statute and that very few of those who submitted evidence to him took exception to them. Those who did were comprised chiefly of those who were regular travellers to and from Ireland, who might at that time experience frequent questioning, together with pilots who wished to use airfields which were not authorised and port operators who wished to speed up the movement of travellers through their domains.

40. This distinction between port controls and street searches is by no means confined to the UK. In the USA, for example, border searches of persons or packages are a long recognised exception to the Fourth Amendment's prohibition on searches without probable cause and a warrant: see for example the decision of the Supreme Court in *United States v Ramsey* 431 US 606 (1977). Similarly, the Canadian Supreme Court referred in *R v Simmons* [1988] 2 RCS 495, 528 (in the context of holding that a contraband search based on reasonable suspicion of the presence of smuggled material is an exception to the usual requirements for searches imposed by section 8 of the Charter) to the fact that the degree of personal privacy reasonably

expected at customs is lower than in most other situations. Delivering the majority opinion, Dickson CJ observed:

> "People do not expect to be able to cross international borders free from scrutiny. … Consequently, travellers seeking to cross national boundaries fully expect to be subject to a screening process. This process will typically require the production of proper identification and travel documentation and involve a search process …"

Of course, the powers there under consideration differed from the present, as did the grounds for their exercise. The relevance of the cases is the recognition that public expectations are different at borders and that the intrusion represented by checks, questioning and searches is less than it is elsewhere.

41. Second, the Strasbourg court in *Gillan* had great regard to the manner in which the section 44 power was actually being used, and in which controls over it provided by the statute were in fact not working. It identified several different failings.

(a) Although there was an authorisation procedure for designation of a particular area, it depended only upon the senior police officer determining that such designation was "expedient", which, unlike a test of necessity, betokened no assessment of proportionality (para 80).

(b) Although authorisation required the approval of the Secretary of State, he had no power to alter the geographical scope of it, nor was there any evidence that he ever altered the time limit (para 80).

(c) Much more significantly, for some years there had been, in the Metropolitan Police district, continuous rolling authorisations for the whole of the area, with each 28 day period being succeeded immediately by another (para 81). The result was that in the whole of Greater London any person might be subject to stop and search anywhere in the streets at any time. The same did not apply in other cities even when there might be specific reason for heightened terrorist alert (para 40). There was thus every sign that the authorisations were not responsive to particular calls for them, as they were clearly intended to be. This misuse of authorisations had been identified by the then Independent Reviewer, Lord Carlile, in 2002. It contrasted with the position at the time of Lord Lloyd's inquiry six years earlier,

when he had reported (at para 10.22) that the power was used "with great discretion".

(d) The evidence recorded by the Independent Reviewer showed a rapidly mushrooming use of the power of stop and search, from about 33,000 in 2004/2005 to triple that (117,000) in 2007/2008 (para 83).

(e) The Independent Reviewer was an additional safeguard but although he had been calling for some years for the power to be used less, this had not been heeded (para 82).

(f) The Independent Reviewer had, moreover, found that "poor and unnecessary use" of section 44 abounded, and he reported evidence of cases where the person stopped was so obviously far from any known terrorist profile that there was, realistically, not the slightest possibility that he or she was a terrorist, and there was no other reason for the stop (para 84). He had concluded that the evidence showed that section 44 was in some cases being used unacceptably as an instrument to aid non-terrorism policing (para 43).

(g) There was evidence of the section 44 power being used in a discriminatory fashion against black and Asian persons and indeed of a practice developing of stopping white people for no other reason than to produce greater racial balance in the statistics (para 85).

(h) There was a real risk of the section 44 power being misused against demonstrators and protestors in breach of articles 10 or 11 (para 85).

42. These factors demonstrated in *Gillan* that the apparent safeguards against disproportionate interference with Convention rights which were provided in the case of section 44 were ineffective. None of these factors, however, applies to port questioning and search powers. By contrast, in relation to them, the frequency of use has diminished, the Independent Reviewer endorses their continuation without expressing anxiety of misuse, his suggestions for improvements have been heard, and additional safeguards for the individual have been introduced as set out at paras 16 and 17 above.

43. Although it is obvious that questioning is in one sense a different power from search, there are in the case of port questioning and search powers sufficient effective safeguards in the manner of operation to meet the requirement of legality. They include:

(i) the restriction to those passing into and out of the country;

(ii) the restriction to the statutory purpose;

(iii) the restriction to specially trained and accredited police officers;

(iv) the restrictions on the duration of questioning;

(v) the restrictions on the type of search;

(vi) the requirement to give explanatory notice to those questioned, including procedure for complaint;

(vii) the requirement to permit consultation with a solicitor and the notification of a third party;

(viii) the requirement for records to be kept;

(ix) the availability of judicial review; the contention of the appellant and of Liberty that judicial review would be ineffective is overstated; judicial review is available if bad faith or collateral purpose is alleged, and also via the principle of legitimate expectation where a breach of the Code of Practice or of the several restrictions listed above is in issue; courts are well used to requiring police officers to justify their actions and to drawing the correct inference if there is material to do so; use of the power for a collateral purpose, such as to investigate a non-terrorism suspected offence, would be likely to become apparent, as it did in the case of section 44 – see para 41(f), (g) and (h) above.

(x) the continuous supervision of the Independent Reviewer is of the first importance; it very clearly amounts to an informed, realistic and effective monitoring of the exercise of the powers and it results in highly influential recommendations for both practice and rule change where needed.

44. The fact that questioning is not dependent on the existence of objectively established grounds for suspicion does not by itself mean that there are not adequate safeguards or that the power is not in accordance with the law. If that had been

enough, the long discussion in *Gillan* of the failures of the safeguards would have been unnecessary. That is also to an extent illustrated by *Colon v Netherlands* (2012) 55 EHRR SE45 where a power of universal or random search in aid of public order in a particular area was held to meet the requirement of legality, although not grounded on any basis of suspicion. Certainly the power was granted for a short period, but that does not affect the principle. In the particular instance of the exercise of the power which had there occurred the searching had been universal, which meant that there was no potentially arbitrary selection by police officers, but the power did not have to be exercised in that way; random selection for search was equally permitted. The applicant's contention in that case appears to have been limited to the absence of prior judicial approval, but the court reviewed *Gillan* and it seems clear that if it had concluded that the power failed for want of a suspicion-based grounding, it would have said so, particularly since its practice is to consider issues of its own motion under the principle *jura novit curia*: see for example *MM v United Kingdom* (supra) at para 150.

45. For these reasons the principle of legality is satisfied in relation to the Schedule 7 port questioning power. The suggested analogy with *Gillan* requires examination but fails. The need for safeguards is measured by the quality of intrusion into individual liberty and the risk of arbitrary misuse of the power. The intrusion into individual liberty is of a significantly lesser order at ports than in the streets generally. There are sufficient safeguards against arbitrary use of this power which either were not present or were not working in *Gillan.* There are effective controls via judicial review and the Independent Reviewer which prevent arbitrary use of the power or provide a correction if it should occur.

Proportionality

46. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, 770-771, para 20 Lord Sumption conveniently formulated the concept of proportionality into four questions. There has been no dispute in the present appeal about this formulation:

(i) is the objective sufficiently important to justify limitation upon a fundamental right?

(ii) is the measure rationally connected to the objective?

(iii) could a less intrusive measure have been adopted?

(iv) has a fair balance been struck between individual rights and the interests of the community?

47. So far as concerns the power of port questioning and search the live dispute is as to the combination of the last two questions, which are inevitably linked. As to the first, the objective of Schedule 7 is clearly not border control *per se* but rather the prevention and detection of terrorism. That is clearly sufficiently important to justify *some* intrusion upon article 8 rights. The power of questioning and search is rationally connected to that objective; it is designed to serve it and the unanimous findings of the Independent Reviewers demonstrate its utility in aid of it. The appellant contended that it was not rationally connected to ports and borders, but that is not the question. Rather that contention is another way of confronting questions (iii) and (iv); moreover there is a plain rational reason for connecting questioning and search aimed at the prevention and detection of terrorism with border control. Of course acts of terrorism may be entirely confined to these shores, but it is obvious that those concerned in acts of terrorism, at whatever level, are very likely to be travellers and, certainly given the sources of present terrorist threats, to have international connections leading to travel. The current concern for outgoing travellers, some very young, seeking to join terrorist organisations abroad is merely an example. The gravamen of the appellant's case is that all questioning and searching is plainly disproportionate unless it is based upon an objectively established reasonable ground for suspecting the person concerned of being within section 40(1)(b). Thus her case is that a less intrusive measure, namely a power based on such objective grounds for suspicion, could and should have been adopted, and that failure to do so does not strike a fair balance.

48. The answer to these two linked questions depends in the end on the balance between the level of intrusion for the individual and the value of the power in community purpose served. It is common ground that the State is entitled to a generous margin of judgment in striking this balance. The importance for the public of the prevention and detection of acts of terrorism can scarcely be overstated and the level of risk of such acts is at least as high now as it has been at any time in the 40 years since these powers were introduced, though of course the sources of the threats have changed from time to time.

49. Lord Lloyd's 1996 report referred in the passage quoted at para 39 above to the "unique opportunity to target checks where they are likely to be most effective, namely at the 'choke points' provided by our ports and airports". He went on to record that the port checks were designed "to deter terrorists from entering the UK … to catch those who try: and to collect intelligence on the movement of persons of interest". He concluded that the intelligence which they yielded "is a valuable by-product" of the work of the port examiners, and that he had heard that it "makes a real contribution to the counter-terrorism effort" (para 10.41). The unanimous view of all independent observers who have considered the matter has consistently been

that questioning and search powers which are not grounded on objectively demonstrable reasonable suspicion of involvement in terrorism are of undoubted value in the struggle against the threat of terrorism, and that to restrict the powers to those in respect of whom a reasonable suspicion can be demonstrated to the satisfaction of a court would not achieve anything like the same utility. The present Independent Reviewer gave specific consideration to this in his July 2013 report at paras 10.58ff. He gave examples of the detection and prevention of terrorist activity in cases where the threshold of objectively demonstrated grounds for reasonable suspicion would not have been passed. He adverted to the way in which, if such a threshold had to be passed, the use of "clean skins" (or previously innocent unknowns) could thwart investigation, travelling companions of known suspects could not be questioned and those actively involved in terrorism would be likely to be alerted (and, he might have added, likely to be given an insight into intelligence gathering). There is no reason to doubt these conclusions. In particular, it is clear that the vital intelligence gathering element of Schedule 7 would not be achieved if prior suspicion on reasonable grounds were a condition for questioning.

50. A distinct issue relating to proportionality arises in connection with any potential for discriminatory application of the powers. There is in this case no separate claim that the appellant suffered discrimination, nor could there be given her husband's apparent connection with some form of terrorism. But if there were a real potential for misuse of the power on a racially discriminatory basis, that would be a reason pointing towards a lack of proportionality, and thus of justification. For the reasons explained by the Independent Reviewer, however, (see para 25 above) this risk is not a substantial one. Moreover the Code of Practice (para 43) requires that the records kept of examinations should detail the self-declared ethnicity of the subject, which is a guard against discriminatory misuse. Nor is there any sign of compensatory selection of white subjects simply in order to balance the statistics, as there was found to be in relation to section 44 – see para 41(g) above. Some degree of profiling of potential subjects for questioning is inevitable given the sources, from time to time, of terrorist threat. The present Code of Practice (at para 4) does little more than rehearse the public sector duty under the Equality Act 2010. Its later provisions in paras 18 and 19 do confront the issue more directly and they make clear that selection for questioning must be informed by the known sources of terrorist threat. However the statement that 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" (para 19) is potentially confusing. The two propositions could usefully be drawn together. What needs to be made clear is that neither ethnic background nor religion can (separately or together) be the sole criterion for selection, unless present in association with known terrorist profiles or with other relevant characteristics, such as age, mode of travel, destination or origin.

51. Overall, the level of intrusion into the privacy of the individual is, for the reasons which have been explained above, comparatively light and not beyond the

reasonable expectations of those who travel across the UK's international borders. Given the safeguards set out above, it is not an unreasonable burden to expect citizens to bear in the interests of improving the prospects of preventing or detecting terrorist outrages. In those circumstances, the port questioning and associated search powers represent a fair balance between the rights of the individual and the interests of the community at large and are thus not an unlawful breach of article 8.

Detention: article 5

52. The power of detention here under consideration exists only as an ancillary to the Schedule 7 powers of port questioning and search, that is to say to reinforce them and to make them effective. Such detention falls within article 5(1)(b) in that it is made in order to secure the fulfilment of an obligation prescribed by law. It follows that what has already been said about the port questioning and search powers applies also to detention, and that the safeguards which exist in relation to them stand also in relation to detention. It does not, however, follow, although the Divisional Court [2014] QB 607 thought otherwise, that the power of detention is automatically justified. The level of intrusion occasioned by detention for up to six hours is of a different order to the intrusion occasioned by compulsory questioning and search, and it does not follow either that the safeguards which are adequate for the one are sufficient for the other, or that the fair balance between the rights of the individual and the interests of the public falls in the same place. Detention under Schedules 7 and 8 may involve the removal of the individual to a police station, and even if it is conducted entirely at the port it represents a substantial interference with the freedom to travel on either in or out of the country and to go about one's ordinary business.

53. The question of the compatibility of the power of detention with article 5 only barely arises in the present case. The appellant was prevented from moving on from the airport for about an hour and three quarters, some of which time she chose to use for prayer and thus to an extent delayed the questioning process. Whether that period was sufficient to constitute a deprivation of liberty for the purposes of article 5 is a question to which the answer is not clear. Deprivation of liberty, contrary to article 5, is to be contrasted with a simple restriction of freedom of movement, which is the subject of article 2 of Protocol 4, to which the UK is not a ratifying party: see *Austin v United Kingdom* (2012) 55 EHRR 359, where public order containment for several hours was held not to infringe article 5. We were referred also to the admissibility decision of the ECtHR in *Gahramanov v Azerbaijan* (Application No 26291/06) (unreported) given 15 October 2013, in which the applicant was prevented for (on his own case) some four hours from leaving, after being stopped at an airport. The court held the complaint inadmissible on the ground that it had not been shown that he had been obliged to remain any longer than was necessary to ascertain his status. In the present case the Secretary of State, as intervener, disputed that the appellant

had suffered a deprivation of liberty. However, in the court below the Crown conceded that she had.

54. It is helpful to address the question of detention more generally. To the extent that it is necessary to prevent a person being questioned from leaving whilst the process is underway, some degree of restriction of movement is a proper corollary of the port questioning and search power. It will usually not constitute a deprivation of liberty, as in *Gahramanov*. Even if it does, it will if it is for no more than is necessary to complete the process, be justified. The separate sanction of prosecution for the offence of failing to comply with the requirements of Schedule 7 may not be sufficient to ensure that questioning and search are effective and may not always bite on those who are leaving the country. What is not easy to see is why detention for as long as six hours can be necessary for this purpose. If a subject is bent on refusal, the additional period in a police station is unlikely to make a difference, and in any event the interference with personal liberty is sufficiently serious to call for greater justification than this.

55. To be proportionate detention for this length of time calls for objectively demonstrated grounds, such as a suspicion on reasonable grounds that the subject falls within section 40(1)(b) or, of course, other grounds for arrest. The Independent Reviewer also had doubts about the power of detention, although he contemplated a test of subjective, rather than objectively justified, suspicion. The better view is that if detention beyond what is necessary to complete the process is to be undertaken it ought to be justified by objectively demonstrated suspicion. A refusal to co-operate after explanation that the purpose of inquiry is to establish whether the subject is within that section might, depending on the circumstances, itself provide or contribute to grounds for such reasonable suspicion that he is, especially, for example, if he fails to identify himself. But it will not always do so; everything will depend on the facts. The Independent Reviewer doubted whether this would be so at the outset of questioning, and he is no doubt right that often it would not, but for the reasons given it is at that stage perfectly proportionate to prevent the subject moving on for a reasonable time whilst questions are asked, possessions inspected and any search undertaken.

56. To the extent that there was any deprivation of liberty in the present case, it seems clear that it was for no longer than was necessary for the completion of the process. There was no requirement to attend a police station. Accordingly, there was in this case no breach of article 5.

Inspection, copying and retention of electronic data

57. The use of this power does not arise in the present appeal and it was not separately argued. The inspection of electronic data is no doubt akin to the inspection of written documents, or for that matter the inspection of baggage or possessions, and it may, as in those analogous cases, yield valuable intelligence, especially of contacts between persons who have separately come to attention. The Independent Reviewer has emphasised the value of material extracted from such sources (see para 21 above). But the retention of such data is a considerable intrusion into the private life of the subject, particularly given the volume and content of personal material which is kept nowadays on mobile telephones or portable computers. Paragraph 11A(3) of Schedule 7 permits retention under three heads. Under para 11A(3)(b) it may be retained while the examining officer believes it may be needed as evidence in criminal proceedings. Under para 11A(3)(c) it may be retained while he believes it may be needed in connection with an immigration decision. There appears no arguable disproportion in these provisions. But under para 11A(3)(a) it may be retained "for so long as is necessary for the purpose of determining whether a person falls within section 40(1)(b)". To the extent that this justifies retention for the duration of the stop, and for a short period afterwards to compare records, this would appear not to be disproportionate. Retention for long enough to compare with other records necessarily goes with the power to inspect, which would otherwise be of very limited value. But if para 11A(3)(a) were to be used to justify retention indefinitely so as to provide a bank of data, that would seem to be a different matter.

58. Other objects seized cannot be retained beyond seven days in the absence of potential use as evidence on criminal or immigration issues (para 11(2)(a)). The Code (para 40) offers no further guidance on the retention of electronic data. In a case such as that postulated there appears to be a good deal of force in the Independent Reviewer's conclusion that greater safeguards are called for (see para 26(b) above). His proposal was for a requirement that subjective suspicion should be enough, that it should be required for both copying and retention, and that if it exists both copying and retention should follow. It may be that the better view is that copying and initial inspection for a reasonable period should be governed by the same criteria as port questioning and the other search and retention powers, but that if longer retention is to be justified *objectively* established grounds for suspicion should be required. Whether the right period for initial inspection is the seven days prescribed for other material obtained by search would need evidence which this court has not needed to be given. Moreover, there ought to be verifiable means of destruction if retention is not justified. A definitive ruling on such matters must, however, if suitable adjustments are not made to the legislation or Code, await a case in which they are directly raised. It may also be necessary then to give detailed consideration to the inter-relation between such data retention and other surveillance and data interception powers.

Self-incrimination and article 6

59. Two related questions arise at this stage:

(a) could the appellant avail herself of the common law privilege against self-incrimination when questioned under Schedule 7 or is that privilege inapplicable either because it is by necessary inference abrogated by the statute or because in the case of a person questioned under its powers no sufficient risk existed of the answers being used in criminal proceedings against either that person or her spouse?

and

(b) was the appellant in any event provided with a privilege against self-incrimination by article 6 of the ECHR?

In the Divisional Court the appellant's case seems to have been argued almost entirely upon the second of these questions, but the first was fully raised in this court and should be addressed first.

60. The privilege against self-incrimination is firmly established judge-made law dating from the sixteenth century abolition of the Star Chamber: see *Holdsworth's History of English Law* (3rd ed) (1944) and *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1, 17. It entitles any person to refuse to answer questions or to yield up documents or objects if to do so would carry a real or appreciable risk of its use in the prosecution of that person or his spouse: *In re Westinghouse Electric Corpn Uranium Contract Litigation MDL Docket No 235 (Nos 1 and 2)* [1978] AC 547 and *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380. If such level of risk exists, the individual should be allowed "great latitude" in judging for himself the effect of any particular question: *R v Boyes* (1861) 1 B & S 311, 330, cited with approval in *Westinghouse*.

61. A statute may, however, exclude this privilege in a particular situation, and may do so either expressly or by necessary implication: *Bishopsgate* (supra). Because the privilege is firmly embedded in the common law, such necessary implication must be established with clarity and is not to be assumed; the approach classically enunciated by Lord Hoffmann in relation to fundamental human rights in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131 is clearly appropriate:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

62. For the appellant Mr Matthew Ryder QC correctly submitted that such a parliamentary intention will often be gathered from an ancillary provision preventing the use in criminal prosecutions of answers or material disclosed, or sometimes limiting such use to specific kinds of prosecution, such as for giving false information on the occasion of the questioning. As he says, no such ancillary provision is present here.

63. That, however, is to overstate the position. There is no parliamentary consistency of practice. Sometimes, a statute which provides for an obligation to provide information or to answer questions will indeed say that no privilege against self-incrimination may be claimed. Sometimes there will be added a provision that any answer given may not be relied upon in a subsequent criminal prosecution, or only in prosecutions for making a false statement in answer. A familiar example of both provisions occurring is section 31 of the Theft Act 1968. But other provisions which are clearly intended to impose an unqualified obligation to answer do not contain one, or either, of such stipulations. An example is afforded by the provisions considered in *Bishopsgate*, sections 235 and 236 of the Insolvency Act 1986. In that case, the Court of Appeal concluded that the transparent purpose of those provisions to enable a liquidator or similar office holder to obtain information in the public interest, would be stultified if a person required to give that information could refuse to answer by claiming privilege. Another illustration is *R v Hertfordshire County Council, Ex p Green Environmental Industries Ltd* [2000] 2 AC 412 where the House of Lords, in a speech delivered by Lord Hoffmann, held that the same applied to section 71(2) of the Environmental Protection Act 1990.

64. The same applies to the present provisions. The Schedule 7 powers are patently not aimed at the obtaining of information for the purpose of prosecuting either the person questioned or his spouse. Whilst that does not by itself mean that there is no real risk that such information could be so used subsequently, it is an indicator that the process of information gathering is not to be limited by the

operation of privilege. The reality is that Schedule 7 powers would be rendered very largely nugatory if privilege applied. The necessary implication is that it does not.

65. Moreover, there is a powerful reason why the risk of prosecution based upon answers to Schedule 7 questioning is not a real and appreciable one. Whilst the mere fact that prosecution is not the purpose of such questioning does not sufficiently reduce the risk, the provisions of section 78 of the Police and Criminal Evidence Act 1984 in practice do. That section provides that evidence relied upon by the prosecution in a criminal trial may be excluded if it appears to the court that, having regard to all the circumstances, including those in which the evidence was obtained, its admission would have such an adverse effect upon the fairness of the proceedings that it should not be admitted. Before the Divisional Court, and likewise in this court, the Crown has been unable to postulate any scenario in which answers obtained under the compulsory powers afforded by Schedule 7 would not fall to be excluded under this section, and there is no known case in which such answers have been adduced in a prosecution, although on one occasion they were adduced at the request of the defendant.

66. It is to be accepted as a general proposition that reliance on a judicial discretion is not to be equated, for a prospective defendant, with the exercise of his privilege against self-incrimination: see observations to this effect in *Rank Films* (para 442) and *Bishopsgate* (para 19). But the section 78 controlling power, vested in the trial judge in criminal proceedings, is not sufficiently described as a matter of discretion. It is a matter of judgment. If in practice the outcome of the exercise of that judgment is inevitably that the evidence will be excluded, then the real and appreciable risk which the privilege against self-incrimination exists to guard against is not present. The circumstances in which the evidence was obtained are a central consideration in the exercise of the section 78 judgment. Evidence obtained from the defendant himself (or his spouse) by means of legal compulsion is a classic case of evidence which it will be unfair to admit. Even without the direct application of article 6 ECHR the outcome of the section 78 judgment is effectively inevitable. Once article 6, directly binding on a court under section 6(3) of the Human Rights Act 1998, is brought into the equation, there is simply no room for any contrary conclusion, for, as is shown by *Saunders v United Kingdom* (1997) 23 EHRR 313 (below), article 6 has the effect that any use in a criminal prosecution of answers obtained under compulsion of law will be a breach of the right to a fair trial. The presence or absence of other evidence implicating the defendant is irrelevant to this proposition. For this reason, it is simply nothing to the point that the Director of Public Prosecutions declined in the Divisional Court to volunteer an undertaking never to seek to adduce Schedule 7 material if later there were a criminal prosecution; she would never be allowed to do so. For the same reason, the suggested possibility of use does not contribute to the assessment of proportionality.

67. So clearly is this the inevitable outcome of the application of section 78 that it is difficult to understand why effect has not been given to the Independent Reviewer's recommendation that the position be put beyond argument (such as has been made here) by the enactment of a provision making answers or information obtained inadmissible except in proceedings under para 18 of Schedule 7 or for an offence of which the gist is deliberately giving false information when questioned. It may be that the view has been taken that the effect of section 78 was so clear that specific provision is not necessary. The present argument demonstrates that it is desirable. Moreover, it is necessary to make the position plain in relation to the (largely theoretical) possibility that if A was indeed prosecuted, his co-accused B, if hostile to him, might seek to adduce material deriving from Schedule 7 questioning; section 78 would have no application since it would not be the Crown which was adducing the evidence, and fairness might have to be achieved by the unsatisfactory method of severance. It is to be hoped that following the observations of the Divisional Court and (now) this court, such enactment will follow.

68. Article 6 ECHR does not contain an explicit privilege against self-incrimination, but it is well established that such is implicit in it. The trigger for the privilege is, however, that a person is "charged" with a criminal offence, in the special sense in which that word is used in the jurisprudence of the Strasbourg court, that is to say that his position has been substantially affected by an allegation against him and he has become, in effect, a suspect: see Lord Hope's summary of the rule in *Ambrose v Harris* [2011] UKSC 43; [2011] 1 WLR 2435, paras 62-63. If a person is charged in this sense, then the effect of article 6 will be to confer the privilege against self-incrimination and any abrogation by statute of the common law privilege will accordingly be ineffective; moreover the use in a subsequent criminal trial of answers obtained under compulsion before the defendant was charged will be an infringement of the right to a fair trial. See for example *Saunders v United Kingdom* where section 434(5) of the Companies Act 1985 had abrogated the privilege. In that case the answers given under compulsion to DTI inspectors were adduced in a criminal prosecution of the subject and it was that which constituted the breach of article 6. The court made it clear at para 67 that the asking of the questions, at a stage when the defendant (as he later became) had not been charged and the purpose of the questioning was an administrative investigation quite different from a criminal one, did not amount to a breach of article 6.

69. Port questioning and search under Schedule 7 TA 2000 is not part of a criminal investigation. Its purpose is not the accumulation of an evidential case against the subject. If that follows, it is a separate matter. The subject is not a person charged for the purposes of article 6, which has no application to him. The appellant was at no stage a defendant to a criminal charge and no question of a breach of a right to a fair trial arises.

70. For those reasons, there was in the present case neither a wrongful denial of the common law privilege against self-incrimination nor a breach of article 6 ECHR.

Conclusion

71. It follows that the appeal should be dismissed.

LORD NEUBERGER AND LORD DYSON:

72. The relevant factual and legal background is set out in the judgment of Lord Hughes at paras 1-27 above, and we agree with most of his subsequent reasoning. There is nothing we wish to add to what Lord Hughes says in paras 57-70 in relation to electronic data, self-incrimination and article 6 of the Convention. However, because we consider that there is force in the opposite view, we will briefly express our reasoning on the two main points which have caused Lord Kerr to reach the opposite conclusion in relation to article 8 (albeit in a different order from that on which they are discussed in his judgment), namely proportionality (his paras 119-128) and legality - ie in accordance with the law (his paras 93-111).

73. Exercise of the Schedule 7 powers, and in particular exercise of the initial powers of stopping and questioning under para 2, which are the focus of this appeal, is said to involve a potential interference with the rights of the person concerned under articles 5 and 8 of the Convention. We agree with Lord Hughes that article 5 is not engaged for the reasons which he gives at paras 52-56 above. However, as he says, it is common ground that article 8 is engaged.

74. Accordingly, the four requirements set out in *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2011] UKSC 45, [2012] 1 AC 621, para 45 (Lord Wilson) and *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, 770-771, 790-791, paras 20 and 74 (Lord Sumption and Lord Reed respectively) must be satisfied. We agree that the first two requirements, namely importance of objective and rationality of connection, are satisfied as Lord Hughes and Kerr say; however, unlike Lord Kerr, we also consider that the third and fourth requirements, namely necessity and fair balance (or proportionality), are satisfied.

75. The two most fundamental and well-established functions of any government are the defence of the realm from external attack and the maintenance of the rule of law internally. The powers granted to the executive by the legislature under Schedule 7 are for the purpose of ensuring national security, which includes aspects of both those vital functions – as well as having the important role of curbing

terrorism internationally. A court should be circumspect before upholding any challenge to such legislative powers, when that challenge is based on necessity or disproportionality. The executive is, or at any rate should be, particularly well informed and experienced in assessing any risks to national security and how to deal with them, whereas the courts are not. However, this does not mean that the court should simply wave through any such legislation: the rule of law crucially requires the court to be vigilant when assessing the necessity or proportionality of both the contents and the implementation of any statute which interferes with human rights. The importance of, and tension between, the need for circumspection and the need for vigilance is apparent from the discussion in the judgments in this court in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, paras 31-44, 67-74, 104-109, 112-117 and 147-174. Further, as Lord Reed also said in *Bank Mellat (No 2)*, para 71, "the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend on the context, and will in part reflect national traditions and institutional culture".

76. In our view, it is not correct to say that in every case where the issue of necessity or proportionality arises the executive must produce positive evidence to show that the means which it has adopted to meet the objective in question is no more than is required. In some cases, it would be tantamount to proving a negative, which is often hard and sometimes impossible. It is important to be realistic as well as principled when assessing the proportionality of any means adopted: the need for a degree of reality in relation to proportionality was acknowledged by Lord Reed in *Bank Mellat (No 2)* at para 75. In any case where an issue of necessity or proportionality arises, it is appropriate to consider the third and fourth questions raised by *Aquila and Bank Mellat (No 2)* by reference to the practical realities of the case in question, as well as general principles.

77. Turning to this case, it is of course not in dispute that properly trained police officers should have the power to exercise border controls to curb terrorism by stopping and questioning individuals entering or leaving the United Kingdom, ie at ports and borders. Once that is accepted, we find it hard to see how there could be any objection to giving officers the right to stop and question people at ports or borders on a random, or unpredictable, basis – ie on a basis which cannot be predicted by those passing through the ports and borders – provided that that right is properly regulated and supervised, and as predictable and controlled as reasonably possible.

78. The legislature does not consider it necessary that officers should stop and question everyone passing through ports and borders, a course which would be self-evidently generally much more intrusive on individual rights. In those circumstances, it is easy to understand why Schedule 7 does not limit the right to stop and question to those people who give rise to objectively explicable suspicion.

The fact that officers have the right to stop and question unpredictably is very likely to assist in both detecting and preventing terrorism, and in deterring some who might otherwise seek to travel to or from this country for reasons connected with terrorism. Further, many experienced officers may have a feeling of suspicion, which is justified but objectively inexplicable, of a particular individual passing through a port or border.

79. Of course, in many cases, it may be inappropriate to allow even the likelihood of an increase in the prospects of successfully achieving a legitimate aim to justify an interference with human rights. However, in this case, the interference is slight (see paras 51 and 54-56 above), the independent justification is convincing (see paras 39 and 49 above), the supervision is impressive (see paras 19-26 above), there are substantial safeguards (para 43 above), the benefits are potentially substantial (see paras 20-23 above), and no equally effective but less intrusive proposal has been forthcoming. In those circumstances, we conclude that the appeal, in so far as it is based on proportionality, should fail.

80. We turn to legality. The requirement that legislation is "in accordance with the law" means (i) that the legislation must have "some basis in domestic law" and (ii) that it must be "compatible with the rule of law", as the Grand Chamber of the Strasbourg court put it in *S & Marper v United Kingdom* (2008) 48 EHRR 1169, para 95. Unsurprisingly, it is not suggested that Schedule 7 fails to satisfy the first requirement, and the argument on legality therefore focusses on the second requirement.

81. The argument that the Schedule 7 powers are incompatible with Convention rights in this connection is that they are unlawful in the light of the unpredictability of, and lack of control over, their application. Thus, it is said, contrary to what the Fourth Section of the Strasbourg court held was required in *Gillan v United Kingdom* (2010) 50 EHRR 1105, paras 76-77, the powers in question are not sufficiently precise or constrained. In other words, it is said that the power under paragraph 2 of Schedule 7 has not been "formulated with sufficient precision to enable the individual … to regulate his conduct", and it involves "a legal discretion granted to the executive … expressed in terms of an unfettered power".

82. In *Gillan*, the court had to consider the lawfulness of the power conferred by section 44 of the 2000 Act on a senior police officer to designate an area anywhere in the United Kingdom as one in which the police could stop and search any person for articles in connection with terrorism. The designated areas were often substantial (eg the whole of the Greater London area) and the periods, although limited, were almost automatically renewed. Both the successful applicants and the court made the point that the power under consideration was to be distinguished from a power of search exercised at airports (paras 59 and 64). To use the words of the court, "[a]n

air traveller may be seen as consenting to such a search by choosing to travel" and "has a freedom of choice", whereas, under section 44, "[t]he individual [could] be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search".

83. Furthermore, the court in *Gillan* was also plainly influenced by a number of other factors which it mentioned in paras 83-85 of its judgment. Those factors were (i) the fact that the domestic court, the House of Lords, considered that the section 44 power "radically ... departs from our traditional understanding of the limits of police power", (ii) the very large and fast increasing number of stop and searches which were being conducted annually under section 44, (iii) the startling fact that every one of them had been fruitless, (iv) the fact that the independent reviewer had criticised the way in which stop and search under section 44 had been conducted in a number of highly significant respects, (v) the fact that "black and Asian persons [had been] disproportionately affected" by the section 44 stop and search system, and (vi) the fact that section 44 could be used against "demonstrators and protesters in breach of articles 10 and/or 11".

84. We do not read the decision in *Gillan* as ruling that any random stop and search system, let alone any system which permits officers randomly to stop and question preliminarily, cannot be "in accordance with the law". This view is supported by the Third Section's decision in *Colon v Netherlands* (2012) 55 EHRR SE45, which upheld a universal right of stop and search in a particular area, albeit for a limited, but not inconsiderable, period. While the court in *Colon* relied in paras 73 and 76-78 on certain factors which distinguished it from *Gillan*, its decision emphasises how the determination of lawfulness is very sensitive to the facts of the particular case. (However, it is only fair to acknowledge that the court in *Colon* relied on some features of the Dutch stop and search system which are not present here.)

85. The point that the lawfulness of any scheme is highly fact-sensitive was made by the court in *Gillan* at para 77, where it said that "[t]he 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" (a passage repeated in *Colon* in para 72). And, as the Grand Chamber observed in *Rekvényi v Hungary* (Application No 25390/94) (2000) 30 EHRR 519, para 34:

> "[w]hilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in

> terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

In the same case, the Grand Chamber said at para 59 that lawfulness "implies qualitative requirements in the domestic law such as foreseeability and, generally, an absence of arbitrariness".

86. When considering whether the legality principle is satisfied in relation to a particular system, it appears clear from the reasoning in the judgment in *Gillan* that one must look not only at the provisions of the statute or other relevant instrument which gives rise to the system in question but also at how that system actually works in practice.

87. There are, in our view, important differences between the statutory provisions and modus operandi of the system in this case and those of the system in *Gillan*, and those differences establish that the powers in this case are more foreseeable and less arbitrary than those in *Gillan* and, in our view, justify the lawfulness of the Schedule 7 powers.

88. First, the areas in which Schedule 7 powers can be exercised are targeted by statute to specific and relatively limited and confined places, namely ports and airports. As Lord Lloyd put it in his report, these locations constitute "the first line of defence against the entry of terrorists" – and, it may be added, the exit of terrorists. Secondly, the individuals against whom the powers in question can be exercised are limited by statute to a relatively limited, identifiable and specific group, namely, only against those passing across the UK's borders. Thirdly, the Schedule 7 powers may only be exercised for a limited purpose, namely to determine whether the person concerned "appears to be" a person who "is or has been concerned in the commission, preparation or instigation of acts of terrorism".

89. Furthermore, none of the more specific concerns which the court raised in paras 83-85 of *Gillan*, summarised in para 83 above, appear to us to arise here. (i) The Schedule 7 powers, particularly as they are only exercisable at a port or airport, cannot be said to be extraordinary. Questioning, even challenging, people who are seeking to enter or leave a country is relatively commonplace. Physical searches at security points in airports are not infrequently conducted on a random basis. (ii) As the evidence summarised in para 18 above establishes, a relatively limited number of people are interviewed under Schedule 7, and the number has decreased each year between 2009/2010 and 2013/2014, whereas the court in *Gillan* (see para 84) was "struck" by the dramatic increase in numbers of people stopped and searched, year on year. (iii) Quite unlike the powers in *Gillan*, the exercise of the powers under review in the present case has produced some successful outcomes - see paras 20-

23 above. (iv) The independent reviewer is very positive about the way in which the Schedule 7 system is working and is being operated, as is apparent from what is said in para 24 above; indeed, he describes the system as an essential ingredient in the fight against terrorism. Again, this is quite different from the independent reviewer's assessment in *Gillan*. By contrast with point (v) in para 83, there is no evidence that the Schedule 7 powers have been used in a racially discriminatory fashion. Indeed, discriminatory use is specifically prohibited by the code. In this connection, the independent reviewer's reports quoted in para 25 above are significant. Finally, (vi) unlike the powers in *Gillan*, the Schedule 7 powers could not be used against "demonstrators and protesters in breach of articles 10 and/or 11".

90. It is right to add that we are not convinced that there is much force in the respondents' arguments that (i) the code governing the Schedule 7 powers is more restrictive than that governing the powers considered in *Gillan*, or (ii) the nature of the powers exercised under Schedule 7 is less intrusive than those exercisable under the powers considered in *Gillan*. So far as point (i) is concerned, little if any argument was directed to it, and consideration of the two codes does not suggest a very significant difference between them. As to point (ii), we do not consider that it has much, if any, bearing on the issue of legality, although we accept that it could be of real relevance to the issue of proportionality. Nonetheless, these reservations do not in any way undermine the significance of the points made in paras 87 and 88 above.

91. The significant differences between the Schedule 7 powers and the powers considered in *Gillan*, which are set out in paras 88 and 89 above do not, of course, automatically mean that the powers granted by Schedule 7 to the 2000 Act satisfy the requirement of legality. 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. Further, the Schedule 7 powers are subject to the specific controls set out by Lord Hughes in paras 16, 17 and 43 of his judgment.

92. There are, of course, cases in which legality requires practical systems that are otherwise in the public interest to be abandoned. However, given the various factors summarised in paras 88-89 above, as more fully considered by Lord Hughes in his judgment, we have reached the conclusion the powers granted by paragraph 2

of Schedule 7 to the 2000 Act do not offend against the requirement of legality, and accordingly we conclude that this appeal should be dismissed.

LORD KERR: (dissenting)

Legality

93. The opportunity to exercise a coercive power in an arbitrary or discriminatory fashion is antithetical to its legality. The primary question in this case is whether the powers under Schedule 7 to the Terrorism Act 2000 can be used in this way or whether there are in place sufficient safeguards to prevent them from being exercised in such a manner. It is not enough that they have not in fact been used arbitrarily or in a discriminatory way. If they can be used in such a way, they will not be legal. Moreover, powers which can be used in an arbitrary or discriminatory way are not transformed to a condition of legality simply because they are of proven utility.

94. The most important authority in this area is the Strasbourg decision in *Gillan v United Kingdom* (2010) 50 EHRR 1105 and probably the most important passage from the judgment (in relation to the issues in the present case) is that contained in para 83, quoted by Lord Hughes in para 36 above. There are important earlier passages, however. In paras 76 and 77, the court said this:

> "76. … the words, 'in accordance with the law' require the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual - if need be with appropriate advice - to regulate his conduct.
>
> 77. For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. *In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power.* Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. 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" (emphasis supplied)

95. As ECtHR acknowledged, eleven constraints on the exercise of the powers at issue in the *Gillan* case had been identified by Lord Bingham when the case had been before the House of Lords (*R (on the application of Gillan) v Comr of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307). These were set out in para 14 of Lord Bingham's speech:

> "... First, an authorisation under section 44(1) or (2) may be given only if the person giving it considers (and, it goes without saying, reasonably considers) it expedient 'for the prevention of acts of terrorism'. The authorisation must be directed to that overriding objective. Secondly, the authorisation may be given only by a very senior police officer. Thirdly, the authorisation cannot extend beyond the boundary of a police force area, and need not extend so far. Fourthly, the authorisation is limited to a period of 28 days, and need not be for so long. Fifthly, the authorisation must be reported to the Secretary of State forthwith. Sixthly, the authorisation lapses after 48 hours if not confirmed by the Secretary of State. Seventhly, the Secretary of State may abbreviate the term of an authorisation, or cancel it with effect from a specified time. Eighthly, a renewed authorisation is subject to the same confirmation procedure. Ninthly, the powers conferred on a constable by an authorisation under sections 44(1) or (2) may only be exercised to search for articles of a kind which could be used in connection with terrorism. Tenthly, Parliament made provision in section 126 for reports on the working of the Act to be made to it at least once a year, which have in the event been made with commendable thoroughness, fairness and expertise by Lord Carlile of Berriew QC. Lastly, it is clear that any misuse of the power to authorise or confirm or search will expose the authorising officer, the Secretary of State or the constable, as the case may be, to corrective legal action."

96. Notwithstanding the existence of these constraints, ECtHR considered that the safeguards provided for in domestic law did not "constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference" para 79. The reasons for this conclusion were given in para 83 of the court's judgment (*op cit*) and in the following passages from paras 80-82:

> "80. The court notes at the outset that the senior police officer referred to in section 44(4) of the Act is empowered to authorise any constable in uniform to stop and search a pedestrian in any area specified by him within his jurisdiction if he, 'considers it expedient for the prevention of acts of terrorism'. However, 'expedient' means no more than 'advantageous' or 'helpful'. There is no requirement at the authorisation stage that the stop-and-search power be considered 'necessary' and therefore no requirement of any assessment of the proportionality of the measure. The authorisation is subject to confirmation by the Secretary of State within 48 hours. The Secretary of State may not alter the geographical coverage of an authorisation and although he or she can refuse confirmation or substitute an earlier time of expiry, it appears that in practice this has never been done. Although the exercise of the powers of authorisation and confirmation is subject to judicial review, the width of the statutory powers is such that applicants face formidable obstacles in showing that any authorisation and confirmation are ultra vires or an abuse of power.
>
> 81. The authorisation must be limited in time to 28 days, but it is renewable. It cannot extend beyond the boundary of the police force area and may be limited geographically within that boundary. However, many police force areas in the United Kingdom cover extensive regions with concentrated populations. The Metropolitan Police Force Area, where the applicants were stopped and searched, extends to all of Greater London. The failure of the temporal and geographical restrictions provided by Parliament to act as any real check on the issuing of authorisations by the executive are demonstrated by the fact that an authorisation for the Metropolitan Police District has been continuously renewed in a "rolling programme" since the powers were first granted.
>
> 82. An additional safeguard is provided by the independent reviewer. However, his powers are confined to reporting on the general operation of the statutory provisions and he has no right to cancel or alter authorisations, despite the fact that in every report from May 2006 onwards he has expressed the clear view that, 'section 44 could be used less and I expect it to be used less'."

97. Drawing on the description of the section 44 powers in this passage, it is possible to contrast them with the powers contained in Schedule 7 in a variety of different ways. These illustrate the greater ambit of the Schedule 7 powers. No authorisation, whether from a senior police officer or otherwise, is required for the examining officer to have resort to the Schedule 7 powers. The exercise of those powers is not dependent on the examining officer (or anyone else) considering that

it is expedient to do so for the prevention of acts of terrorism. Since no authorisation is required, there is no question of it being subject to review by the Secretary of State. There is no geographical or temporal limitation on the exercise of the powers (other than, of course, that they are to be used at a port of entry into or exit from the United Kingdom). There is no provision for automatic lapse of the powers nor is there any question of their renewed authorisation being subject to confirmation.

98. Certain features are common to both sets of powers. The width of the powers is similar in both instances and challenges to their use on conventional judicial review grounds both face the same difficulty as was identified by ECtHR in *Gillan.* Both are subject to review by the independent reviewer but, as in *Gillan*, so in this case, this is a post-hoc review. The independent reviewer cannot restrict the exercise of the powers. He may merely make recommendations as to their future use and, as we have seen in this case, his recommendations are not always followed.

99. Resort to the powers may be based on no more than a "hunch" or the "professional intuition" of the officer concerned. Indeed, the absence of any requirement of either reasonable or even subjective suspicion in both instances clearly contemplates that this is the basis on which the powers will in fact be exercised. The "*sole proviso*" as in *Gillan* is that the Schedule 7 powers should be exercised for the purpose of determining whether the person who is subject to them appears to be or have been concerned in the commission, preparation or instigation of acts of terrorism.

100. The same considerations affect the viability of a judicial review challenge and this in turn brings sharply into question the claim that judicial superintendence of the exercise of the powers is an effective safeguard against their being resorted to in an arbitrary, discriminatory or disproportionate fashion. If an examining officer does not have to form a suspicion, how is his exercise of the powers to be reviewed? At present, the only averment required of an officer whose use of the powers is challenged is that they were exercised for the statutory purpose. On the current state of the law that unvarnished statement will be sufficient to insulate the exercise of the powers from further investigation or challenge.

101. It is said that a distinguishing feature of the Schedule 7 powers is that, whereas the section 44 power was exercisable in relation to any person in the designated geographical area, the Schedule 7 powers may only be used in relation to those passing through ports of entry or exit. It is suggested that, while people in this country expect to be allowed to pass through the streets freely, they have traditionally accepted that they will be subject to border controls such as the requirement to identify themselves. Two points should be made about this. Firstly, being subject to border controls such as the requirement to provide proof of identity and entitlement to enter is an entirely different matter from being required to answer

questions about one's movements and activities. As this case shows, these questions can be quite detailed and, more importantly, if they are not answered, the person of whom they are asked faces criminal sanction. Secondly, and more importantly, whether people in this country are accustomed to intrusion when they move through ports of entry or exit does not bear on the question of whether the circumstances in which the Schedule 7 powers may be exercised are too widely drawn to satisfy the test of "in accordance with law". Put shortly, an unfettered power which may be arbitrarily or capriciously used does not become legal just because people generally do not take exception to its use.

102. The significance of the restriction on the use of Schedule 7 powers to ports of entry should not be misunderstood. As the respondent has acknowledged, there are 245m passenger movements through United Kingdom ports every year. All are potentially subject to this power. The fact that it is exercised sparingly has no direct 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 is the potential reach of the power rather than its actual use by which its legality must be judged. Moreover, although the percentage of travellers who are subjected to the use of the power is small, in absolute terms the number is not inconsequential. On average 5 to 7 people each day are examined for more than an hour.

103. That there is the potential for arbitrary or discriminatory exercise of the power is apparent from, among other things, the provisions of the Code of Practice. It stipulates that selection should not be based solely upon the ethnic background or religion of the individual. This provision is objectionable for two reasons. In the first place there is no clearly obvious means of policing the requirement that persons should not be stopped and questioned just because of their ethnic background or religion. As ECtHR held in *Gillan* at para 86 "in the absence of any obligation on the part of the officer [exercising powers of stop and search under TA section 44] to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised." Keeping records of the self-declared ethnicity of those subject to the Schedule 7 powers does not, of itself, provide a guarantee that the powers are not being exercised in a discriminatory way.

104. Secondly, the provision in the Code of Practice contemplates that ethnic origin or religious adherence can be at least one of the reasons for exercising the power. In so far as the perceived religious belief or ethnic origin of an individual (as opposed to his or her capacity to provide information about their possible involvement in terrorism) is the basis on which he or she is made subject to Schedule 7 powers, this constitutes direct discrimination. As Lord Nicholls of Birkenhead held in *Nagarajan v London Regional Transport* [2000] 1 AC 501, 512H: "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." Provided

that race exerted a "more than trivial" influence on the decision to treat a person less favourably, the decision will constitute race discrimination (*Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931, paras 36-37). As Mr Squires, for the intervener, the Equality and Human Rights Commission, submitted, if examining officers exercise Schedule 7 powers not because they have any particular suspicion or intelligence about an individual but on the basis of an "intuition" that a person "looks like" a terrorist, it is predictable that those of Asian or Muslim appearance will be disproportionately targeted. The startling reality that this legislation authorises the use of a coercive power, at least partly, on the grounds of race and religion should be starkly confronted. That not only permits direct discrimination, it is entirely at odds with the notion of an enlightened, pluralistic society all of whose members are treated equally.

105. The legality of a measure which interferes with a Convention right must also be vouched against its demonstrable proportionality. Limits to police powers must be prescribed in order to enable the necessary examination of whether the specific exercise of those powers is proportionate to take place and in order to demonstrate that a proper balance between individual rights and wider public interests has been struck. The majority in *R (T) v Chief Constable of Greater Manchester Police (Liberty intervening)* [2015] AC 49, held that ensuring that a particular provision was proportionate was an aspect of the "prescribed by law" requirement. This is, of course, distinct from the question whether an interference in a particular case was necessary (see per Lord Reed paras 114-115). In order to be "prescribed by law", the legal regime governing the exercise of police powers must include limitations capable of securing the proportionate exercise of those powers and of ensuring that the proportionality of any interference can be "adequately examined" (*ibid* para 114).

106. Where the stop, question and search powers can be exercised without any suspicion whatever, there is simply no material on which a judgment as to whether they are being used proportionately can be made. The examining officer does not have to explain why he or she chose a particular individual for the exercise of the Schedule 7 powers. Indeed, he or she does not have to have a reason (in the sense of a rationalised conclusion) for the exercise of the power, since it is unnecessary to have any form of suspicion. A purely instinctive impulse based on nothing more than a feeling that something relating to terrorism might be disclosed by the exercise of the powers is enough to permit recourse to them. In those circumstances, an examination of whether the powers have been used proportionately is simply unfeasible. This crucial dimension of the prescribed by law requirement is missing from the Schedule 7 regime. On that account use of the Schedule 7 powers cannot be said to be "in accordance with law".

Utility

107. The utility of a provision - in this case, its effectiveness as a counter-terrorism measure - is, at least potentially, relevant to a claimed justification of interference with a qualified Convention right. So, for instance, if it could be shown that the exercise of Schedule 7 powers provided a tangible result in terms of reducing the risk of terrorist attack, this would sound on the question of pursuit of a legitimate aim for the interference and whether a proper balance had been struck between the rights of the individual and the interests of the community. But it is misconceived to assume that, because the possible utility of Schedule 7 powers is relevant to justification of an interference with a Convention right, it meets the requirement that the measure be "in accordance with law".

108. The distinction between the manner in which a power is exercised and the result that its exercise may achieve should be clearly recognised. It does not follow that, because a measure is an effective counter-terrorist tool, the way in which that tool is deployed is automatically proportionate and in accordance with law.

109. In *Colon v The Netherlands* (2012) 55 EHRR SE45 a power of search in aid of public order, on foot of a designation by the Burgomaster, in the old centre of Amsterdam was held to meet the requirement of legality, although not grounded on any basis of suspicion. It is to be noted, however, that the applicant's complaint that the interference with his right to respect for his private life was not "in accordance with the law" was confined to what he claimed was the ineffectiveness of the judicial remedies available. In particular, he argued that an essential guarantee in the form of prior judicial control was missing. The European Court dealt with that claim in paras 75-78 as follows:

> "75. The court has accepted in past cases that prior judicial control, although desirable in principle where there is to be interference with a right guaranteed by article 8, may not always be feasible in practice; in such cases, it may be dispensed with provided that sufficient other safeguards are in place (see, mutatis mutandis, *Klass v Germany* (1979-80) 2 EHRR 214, para 56; and *Rotaru v Romania*, (2000) 8 BHRC 449 para 59). In certain cases, an aggregate of non-judicial remedies may replace judicial control (see, mutatis mutandis, *Leander v Sweden* (1987) 9 EHRR 433, paras 64-65).
>
> 76. In the Netherlands, all pertinent legal texts are in the public domain (compare and contrast para 30 of *Gillan*). Before the public prosecutor can order police to carry out a search operation, a prior order designating the area concerned must be given by an

> administrative authority of the municipality, the Burgomaster. That order must in turn be based on a byelaw adopted by an elected representative body, the local council, which has powers to investigate the use made by the Burgomaster of his or her authority (see paras 34-36 above).
>
> 77. Review of a designation order, once it has been given, is available in the form of an objection to the Burgomaster, followed if necessary by an appeal to the Regional Court and a further appeal to the Administrative Jurisdiction Division of the Council of State (see para 40 above).
>
> 78. The criminal courts have a responsibility of their own to examine the lawfulness of the order and the scope of the authority of the official who gave it. It is a defence for anyone charged with failing to comply with a search order issued by or on behalf of the public prosecutor to state that the order was not lawfully given; the criminal court must answer it in its judgment (see para 41 above)."

110. The emphasis of the legality debate was on the reviewability of the authorising agent's (the Burgomaster's) decision, rather than on any opportunity to examine the proportionality of the individual decision of officers as to who should be stopped and searched. The use which the Burgomaster made of his or her powers remained subject to review and control by the local council, an elected representative body. It is important to understand, therefore, that the court's reference to the effectiveness of the measure (in paras 94 and 95 of its judgment) was made in the context of the justification of the interference with the article 8 right, rather than as an assessment of the "accordance with law" requirement.

111. The fact that a measure may be effective in pursuit of the aim of counteracting terrorism does not mean that its use in accordance with law is to be assumed. If the measure is not effective to achieve its avowed aim, this is, of course, a reason to find it disproportionate. But the converse does not hold true. The proportionality of a measure is not to be determined by its efficacy in fulfilling its objective.

The privilege against self-incrimination and article 6

112. The venerable history of the privilege against self-incrimination and its place at the centre of our system of criminal justice have been described by Lord Hughes in para 60 of his judgment. The importance attached to this right is such that it is not to be lightly set aside. As Lord Griffiths said in *AT & T Istel Ltd v Tully* [1993] AC

45, 57 the privilege is "deeply embedded in English law and can only be removed or moderated by Parliament" and in *Gray v News Group Newspapers Ltd* [2013] 1 AC 1, para 18 Lord Neuberger of Abbotsbury MR said that it was for the legislature and not the judiciary to remove or cut down the privilege against self-incrimination.

113. Two particular features of the right should be noted. It is engaged when compliance with a legal obligation to answer questions would create a "real and appreciable risk" of criminal proceedings being brought – *In re Westinghouse Electric Corpn Uranium Contract Litigation MDL Docket No 235 (Nos 1 and 2)* [1978] AC 547, 574 per Lord Denning MR. Secondly, the relevant risk is of prosecution, not conviction: *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310; *JSC BTA Bank v Ablyazov (No 13)* [2014] EWHC 2788. So, if answering the questions put to her by examining officers would expose Mrs Beghal (or, for that matter, her husband) to an appreciable risk of prosecution, the privilege against self-incrimination is in play. It is not necessary to show that criminal proceedings are likely. The privilege arises unless the risk is "so far beyond the bounds of reason as to be no more than a fanciful possibility": – *Westinghouse* [1978] AC 547, 579 per Roskill LJ.

114. It is suggested that the powers under Schedule 7 would be ineffective if the privilege against self-incrimination was held to apply to them. The premise on which this is based appears to be that those stopped and questioned under Schedule 7 would be unlikely to answer without there being in place the prospect of prosecution if they refused to respond. It must therefore be assumed that Parliament intended that the privilege should be abrogated in relation to the use of these powers. For my part, I would be reluctant to make the assumption that those who were questioned under Schedule 7 would indeed refuse to answer unless faced with the possibility that they would be prosecuted in consequence. But I have a more fundamental reason for disagreeing with the conclusion that the privilege against self-incrimination does not arise in relation to the exercise of Schedule 7 powers. I am therefore prepared to proceed on the hypothetical basis that Parliament did indeed intend that the privilege should be abrogated.

115. It is suggested that Schedule 7 powers are not aimed at obtaining information for the purpose of prosecuting the person questioned or her spouse. I do not understand why this should be so. The purpose of questioning under the schedule is to determine whether the person questioned appears to be a terrorist within the wide definition contained in section 40(1)(b) of the 2000 Act. If answers to the questions posed suggest that the person questioned is indeed someone who has committed an offence under one of the sections specified in section 40 or who is or has been concerned in the commission, preparation or instigation of acts of terrorism, why should those answers not form the basis of a prosecution? It seems to me inescapable that there is a real and appreciable risk of prosecution if the answers to the questions posed prove to be self-incriminating. The fact that, in this case, it was not suspected

that the appellant was a terrorist is nothing to the point. If, as she should have been, 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, is indisputable.

116. In the Divisional Court [2014] QB 607 there was some discussion as to whether the Director of Public Prosecutions might be prepared to give an undertaking that answers to questions asked in the exercise of Schedule 7 powers would never form part of a subsequent prosecution case. Unsurprisingly, to me at least, the Director declined to give that undertaking. It would be a startling policy decision to give an assurance that evidence of terrorism elicited by Schedule 7 questioning would not be used to prosecute someone implicated by such evidence. The independent reviewer and, incidentally, the Divisional Court and Lord Hughes in his judgment in this case, have recommended that Parliament should enact a provision making answers or information obtained inadmissible in proceedings, except where there has been a breach of paragraph 18 of the Schedule (wilful failure to comply with a duty under Schedule 7) or for an offence of deliberately giving false information when questioned. The plain fact is, however, that self-incriminating answers given in response to questions posed under Schedule 7 can form the basis of a prosecution.

117. It is suggested, however, that such a prosecution would not be viable by reason of section 78 of the Police and Criminal Evidence Act 1984. True it is that the exercise of the power to exclude evidence under this provision must be exercised in accordance with article 6 of ECHR and that this has the effect that any use in a criminal prosecution of answers obtained under compulsion of law will generally be a breach of the right to a fair trial. But two caveats to that must be entered. In the first place, answers to questions posed under Schedule 7 can prompt inquiry which might lead to the obtaining of evidence independent of the material which the responses have supplied. Secondly, it is by no means clear that evidence of those answers will automatically be excluded if there is other evidence which directly implicates the person responding. So, for instance, if there is significant other evidence which, alone, might be sufficient to establish the guilt of the accused, is it inevitable that evidence of responses given during a Schedule 7 investigation which corroborates or reinforces that evidence, would be excluded? I do not believe that it is.

118. Of greater importance, however, is the consideration that the protection afforded by the privilege against self-incrimination is against the risk of prosecution rather than conviction. In this context the significance of the DPP's understandable refusal to confirm that there will never be any circumstances in which responses to a Schedule 7 questioning will not be used in a prosecution comes fully into play. There is, currently, no guarantee that someone who gives a self-incriminating answer in the course of a Schedule 7 inquiry will not be confronted by those answers

in a subsequent criminal trial. He may succeed in having evidence of those answers excluded but he cannot ensure that he will not be prosecuted on foot of them. I consider therefore that the requirement in Schedule 7 that a person questioned under its provisions must answer on pain of prosecution for failing to do so is in breach of that person's common law privilege against self-incrimination. On that account it is incompatible with article 6 of ECHR.

Articles 5 and 8

119. It is accepted that the exercise of Schedule 7 powers constitutes an interference with article 5 and article 8 rights. This throws the focus of the discussion about those rights on the question of justification. To establish justification, it is necessary to satisfy a trilogy of tests: the interference must pursue a legitimate aim; it must be in accordance with law; and it must be necessary in a democratic society. An aspect of the last of these is proportionality.

120. As Lord Wilson in *R (Aguilar Quila) v The Secretary of State for the Home Department (AIRE Centre intervening)* [2012] 1 AC 621, para 45 and Lord Sumption and Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 770-771, 789, paras 20 and 70ff explained, this normally requires that four questions be addressed:

(a) is the legislative objective sufficiently important to justify limiting a fundamental right?;

(b) are the measures which have been designed to meet it rationally connected to it?;

(c) are they no more than are necessary to accomplish it?; and

(d) do they strike a fair balance between the rights of the individual and the interests of the community?

121. The objective of the Schedule 7 powers (counteracting terrorism) can be readily acknowledged as a legitimate aim. And obtaining information about whether a person appears to be a terrorist is rationally connected to that aim. As is usually the case, the real debate centres on the third and fourth issues: is the breadth of the powers no more than is necessary to achieve the aim; and has a fair balance been struck between the rights of the individual and the interests of the community.

122. The fact that a power has been successful in promoting the aim of the interference with a Convention right does not supply the complete answer to the question whether it is no more than is necessary to achieve the aim. Nor does the endorsement of the usefulness of the power by the independent reviewer. Valuable though the independent reviewer's opinions are, the question whether this undoubted interference with an individual's Convention rights is no more than is necessary is one for the courts. And the courts should be mindful that the proven success of the use of the power does not establish that no lesser form of interference would be just as efficacious. Nor does it, indeed, address the question whether, even if somewhat less effective, a more unobtrusive interference would be sufficient to fulfil the aim of the measure.

123. While the state enjoys an area of discretionary judgment as to what measures are needed to pursue a particular aim, this does not relieve it of the obligation to produce some evidence that the specific means chosen to bring that about are no more than is required. There is no evidence that a suspicion-less power to stop, detain, search and question is the only way to achieve the goal of combatting terrorism. The fact that the measure has been successful does not establish that proposition. Indeed, to take the example of detention, it is clear that the measure goes beyond what is necessary. As Lord Hughes has pointed out in paras 54 and 55, detention beyond what is necessary to complete the process should be justified by objectively demonstrated suspicion. The fact that the appellant was not detained for more than was necessary does not establish that the breadth of the power available to examining officers is proportionate. Plainly, it is not.

124. Likewise, the failure or refusal of Parliament to enact a provision making answers or information obtained by use of Schedule 7 powers inadmissible in proceedings disposes of any possible argument that this measure goes no further than is required to meet its aim. The opinion of the independent reviewer and the Divisional Court that this enactment should be made has not been challenged. While the provision remains in force, that aspect of the Schedule 7 powers is not only not in accordance with law (for the reasons earlier given) but also, ipso facto, more than is necessary to fulfil the objective of the interference.

125. Of course it is true that the threat of terrorism is substantial and should not be downplayed. But that undoubted truth should not mask or distort the obligation to dispassionately examine the aptness of measures taken to deal with it. If they are to be seen as no more than necessary, the powers under Schedule 7 must be capable of withstanding scrutiny of their rationale. In my view, no reasoned justification has been proffered for investing examining officers with a power to stop, search, question and detain anyone passing through a port and for making those who refuse to answer questions amenable to the criminal law.

126. On the issue of whether a proper balance has been struck between the rights of the individual and the interests of the community, the degree of interference with rights is self-evidently relevant. And it is unquestionably true that in many cases, the interference with the Convention rights may be relatively unobtrusive. It is also undoubtedly relevant that members of the public expect to be questioned at ports of entry to and exit from the United Kingdom and that many raise no objection to the use of Schedule 7 powers. Again, the scourge of terrorism and the need to take effective measures against it loom large in this context. But the potential reach of the Schedule 7 powers must also be clearly recognised.

127. A person stopped under this provision is required to answer questions even though they may not have had the benefit of legal advice. Individuals may have many reasons why they do not want to answer questions as to their movements and activities. These reasons are not necessarily or invariably discreditable. Some may be apprehensive about answering questions without a lawyer being present or may lack a full understanding of the significance of refusing to answer. The fact that they are open to criminal sanction, which could include imprisonment, for failing to answer questions, renders the exercise of these powers a significant interference with article 8 rights, in my opinion.

128. Again, the absence of any articulated reason for the need for a suspicion-less power to stop, detain, etc makes its justification on the basis that it strikes the right balance problematic. The safeguards outlined by Lord Hughes in para 43 of his judgment do not bear on this anterior question, and, in fairness, he does not suggest that they do. Whatever may be said about the efficacy of those safeguards (and there is, at least, ample scope for debate about, for instance, the effectiveness of judicial review) they do not supply the necessary justification for allowing examining officers to exercise the powers under Schedule 7 without any suspicion whatever. For that fundamental reason, I cannot accept that the particular form of interference which Schedule 7 represents has been shown to be justified.

Conclusion

129. I would allow the appeal and declare that Schedule 7 of the Terrorism Act 2000 is incompatible with articles 5, 6 and 8 of ECHR.