By
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A Necessary Evil?

Ali Naseem Bajwa QC and **Terry McGuinness** examine port stops carried out under Schedule 7 of the Terrorism Act 2000

In June this year, journalist Glenn Greenwald published in *The Guardian* newspaper the first of a series of reports detailing US and British mass surveillance programmes, based on documents obtained by the National Security Agency whistleblower, Edward Snowden. On 18 August, Mr. Greenwald's partner and occasional assistant, David Miranda, flying via London from Berlin to Rio de Janeiro was stopped at Heathrow Airport under schedule 7 of the *Terrorism Act* 2000. Mr. Miranda was detained for nine hours, questioned and had various items of electronic equipment seized from him. The link between Mr. Greenwald's publications and Mr. Miranda's detention is undisputed.

As the facts concerning the Miranda case continue to emerge, the hitherto little-known schedule 7 powers have fallen into the spotlight and provoked a fierce public debate. But what precisely is schedule 7 and why is it controversial?

The Powers

Schedule 7 gives a constable, immigration officer or customs officer the power to stop, question, detain for up to nine hours and search a person at a port/border area whom the officer believes is entering or leaving the UK for the purpose of determining whether that person appears to be a terrorist.

The Act expressly states that an officer may exercise his schedule 7 powers "whether or not he has grounds for suspecting" that a person is a terrorist.

A person questioned under schedule 7 must give the officer "any information in his possession which the officer requests" and "any document which he has with him and which is of a kind specified by the officer." Any property given to or found by the officer may be retained for up to seven days or for as long as the officer believes it may be needed as evidence in criminal/deportation proceedings.

A person detained under schedule 7 may be photographed, strip searched and have his fingerprints and a non-intimate DNA sample taken. There is no right to have a named person informed or to consult a solicitor unless the detained person is transferred to a police station.

Importantly, it is a criminal offence, punishable by up to 3 months' imprisonment and/or a £2,500 fine, if a detained person wilfully (a) fails to comply with a duty, (b) contravenes a prohibition, (c) obstructs or seeks to frustrate a search or examination under schedule 7.

The exercise of schedule 7 powers is assisted by the statutory Home Office Code of Practice, *Examining Officers under the Terrorism Act 2000*. The Code of Practice cautions that, "The powers must be used proportionately, reasonably, with respect and without unlawful discrimination" whilst, at the same time, advising that, "[T]he powers should not be used arbitrarily" (Notes for Guidance on Paras. 9 & 10).

Schedule 7-type powers are far from new; they were first introduced in the UK by the *Prevention of Terrorism (Temporary Provisions) Act* 1974, against the background of the Troubles in Northern Ireland, and then renewed by successive Prevention of Terrorism Acts in 1976, 1984 and 1989 until the relevant provisions of the *Terrorism Act* 2000 came into force in February 2001.

Anti-Social Behaviour, Crime and Policing Bill

After a public consultation process commenced in September last year, the government included in the *Anti-Social Behaviour, Crime and Policing Bill* (introduced in May) provisions to amend schedule 7 so as to (a) limit the power to question without detention to one hour, (b) reduce the maximum detention period to six hours, (c) curtail the power to conduct an intimate search or a strip search and (d) enlarge the right to have someone informed and to consult a solicitor to detention at any place.

Reviews of Schedule 7 Powers

Schedule 7 and its predecessor statutes have to date survived all legal challenges and government reviews.

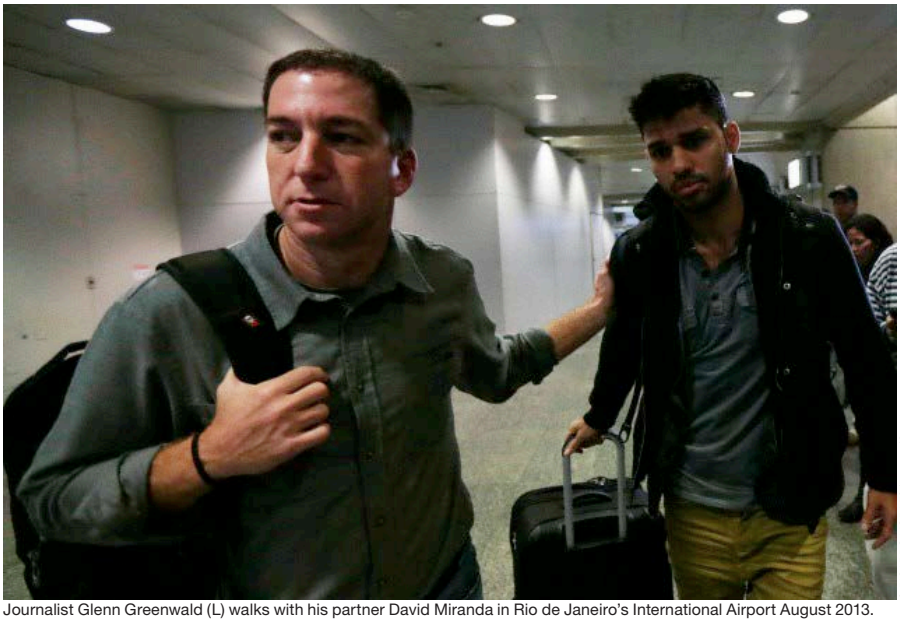
In *McVeigh v UK* (1983) 5 EHRR 71, the European Commission for Human Rights found there to be no breach of article 5 (right to liberty) or article 8 (right to privacy) of the European Convention on Human Rights (ECHR) following the detention of three men for 45 hours as they arrived in Liverpool from Ireland. The Commission concluded that any interference with these rights may be justified, "[A]s being in accordance with the law and necessary in a democratic society for the prevention of crime where those means were adopted merely to identify the persons concerned and to ascertain whether or not they were concerned in terrorist activities…"

Lord Lloyd of Berwick's 1996 report, *Inquiry into Legislation Against Terrorism*, said that "[S]pecial branch controls at ports are primarily designed to deter terrorists from entering the UK and to catch those who try; and to collect intelligence on the movements of persons of interest to the police and the Security Service…". Lord Lloyd concluded that, "There are sound strategic reasons for an island nation to carry out checks of this kind at ports. They provide the first line of defence against the entry of terrorists, and serve a useful function against crime as a by-product."

Successive independent reviewers of terrorism legislation have, in general, been supportive of port stops. In his 2001 review, John Rowe QC described port stops as "intuitive stops." He said, "It is impossible to overstate the value of these stops... I do not think such a stop by a trained Special Branch officer is

'cold' or 'random'. The officer has experience and training in the features and circumstances of terrorism and terrorist groups, and he or she may therefore notice things, which the layman would not, or he or she may simply have a police officer's intuition. Often the reason for such a stop cannot be explained to the layman."

In his 2012 report, the current reviewer, David Anderson QC, described the proportionality of the powers in their current form as "a legitimate subject for public debate." More recently, Mr. Anderson expressed a hope that parliament would address the fundamental question of whether or not it should be possible for officers to detain and question someone for any length of time without the requirement of reasonable suspicion.



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Journalist Glenn Greenwald (L) walks with his partner David Miranda in Rio de Janeiro's International Airport August 2013.

The most recent domestic authority on schedule 7 is an unsuccessful appeal by way of case stated of *Beghal v DPP* [2013] EWHC 2573 (Admin). The court found that schedule 7 powers (a) are not arbitrary because they apply to a limited category of people, namely those at a port/border entering or leaving the UK and are adequately constrained by the Code of Conduct and accompanying Notes for Guidance, which afford the necessary measure of legal protection against arbitrary interference by the executive (b) strike a fair balance between the rights of the individual and the interests of the community in combating terrorism, therefore are not disproportionate and (c) do not engage and/or violate article 6 ECHR (right to a fair hearing). Nevertheless, because of the degree of compulsion to answer questions, the court urged consideration of a legislative amendment introducing a statutory bar to the introduction of Schedule 7 admissions in a subsequent criminal trial.

> *"The numbers of persons travelling through UK ports and borders today are so great that finding something useful by an "intuitive stop" is the stuff of needles and haystacks"*

The case to watch is *Malik v UK* (application no. 32968/11). On 28 May this year, the European Court of Human Rights (ECtHR) declared admissible a challenge to schedule 7 brought by Liberty on behalf of a British national detained in 2010 at Heathrow airport upon his return from a pilgrimage to Saudi Arabia.

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It is remarkable that it has taken very nearly 40 years for the draconian port stop powers to attract the current level of critical attention.

The fundamental unfairness of schedule 7 is the fact that, absent a reasonable suspicion test, its use is almost always going to be either arbitrary or discriminatory. As the Miranda case demonstrates, the absence of a reasonable suspicion test makes it all too easy to abuse these powers. Lord Falconer, who oversaw the introduction of the schedule 7 statute, has expressed the view that Mr. Miranda's detention was unlawful because "there is no suggestion that [he] is a terrorist." With respect, this rather misses the point. *Anyone* at a port entering or leaving the UK may lawfully be subjected to the full rigour of the schedule 7 powers. The truth is that people like Mr. Miranda are rarely detained – and that's one reason that this case, unlike many thousands of similar ones involving innocent persons, made the headlines and caused such waves.

In our view, the utility of schedule 7 is overstated. A committed terrorist is hardly going to be deterred or significantly hindered by schedule 7. The numbers of persons travelling through UK ports and borders today are so great that finding something useful by an "intuitive stop" is the stuff of needles and haystacks. In many instances where schedule 7 searches have uncovered useful material, the person in question was already a target and could have been the subject of a reasonable suspicion arrest and search. The harm done to individuals and communities – severe inconvenience, anxiety and distress and feelings of alienation and victimisation – is not to be underestimated.

We would not be surprised if the ECtHR in the Liberty case of *Malik v UK* were to find schedule 7 wanting for similar reasons to the finding of an article 8 ECHR violation in *Gillan v UK* (2010) 50 EHRR 45, a case which concerned public area stop and search powers without a reasonable suspicion requirement under section 44 of the *Terrorism Act* 2000.

We take the view that schedule 7 is an unnecessary and disproportionate power which should be abolished. If port stop powers are to remain, the changes in the *Anti-Social Behaviour, Crime and Policing Bill* do not go far enough. Reasonable suspicion should be the minimum threshold for its use, the person being questioned should have the right to silence and the maximum period of detention should be limited to two hours. Only then could it be said that something like a fair balance is struck between individual liberty and collective security. ●

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