

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

R (DAVID MIRANDA)

Claimant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
COMMISSIONER OF POLICE OF THE METROPOLIS

Defendants

APPLICATION FOR LEAVE TO APPEAL

1. The Claimant seeks permission to appeal against the Divisional Court's judgment dismissing his application for judicial review. The First Defendant and Second Defendant have both indicated that they adopt a neutral position to this application.

2. The Divisional Court granted the Claimant permission to seek judicial review on the basis that: "*The issues which the claim raises are of substantial importance.*"¹ In a number of areas the case and the judgment raise novel issues and give rise to a number of points of law of general public importance which warrant consideration by the Court of Appeal. These include:
 - (a) **The applicability of the *O'Hara* principle to the exercise of police powers under Schedule 7.** It is a well established principle at common law and under the ECHR that the assessment of the legality of police powers of arrest must be undertaken exclusively by reference to the state of mind of the arresting officer (see *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286; *O'Hara v United Kingdom* (2002) 34 EHRR 32). In the present case, the Divisional Court appears to have adopted a different approach in

¹ Judgment, paragraph 15

relation to determining the purpose for which powers were used by examining officers pursuant to Schedule 7. This court has held that it was not confined to a consideration of the examining officers' subjective state of mind, or personal knowledge, but was entitled to aggregate the knowledge and intentions of a number of different individuals. Unusually, this also included material that was deliberately withheld from the very officers who exercised the Schedule 7 power by detaining the Claimant. If this analysis is right, it is an approach not clear in existing authorities. It has significant consequences for the lawful use of executive powers where more than one officer is involved in the decision to exercise those powers. It also would represent a new interpretation of the approach to determining the purpose of executive action, beyond that which is set out in the case of *R v Southwark Crown Court, ex parte Bowles* [1998] AC 641. Accordingly, this is an important point that merits further consideration by the Court of Appeal.

(b) **The definition of terrorism and the requirement for cogent reasons to justify the exercise of Schedule 7 powers.** The Divisional Court considered that an analysis of DS Stokley's reasoning supported its conclusion that Schedule 7 powers were exercised lawfully against the Claimant. This raises two important legal issues:

- (i) First, whether DS Stokley adopted the correct understanding of the definition of 'terrorism' under s 1 TACT, insofar as he considered that the risk of publication of articles similar to those that had already been published could constitute terrorism. It is axiomatic that if DS Stokely had acted on the risk posed by the publication of articles that could not, in law, constitute terrorism, his approach would have been flawed. This is an important question regarding the scope of the definition of 'terrorism' and its potential application to journalistic activities.
- (ii) Second, the reliance on DS Stokley's reasoning gives rise to an important issue regarding the cogency of reasoning necessary to justify the use of Schedule 7 powers. There appears to have been no evidential basis for DS Stokley's view that the risk of a 'Russian threat' justified the use of Schedule 7 powers against the Claimant. Whether, and if so in what circumstances, Schedule 7 powers may be exercised on the basis of unreasoned or speculative assessments of the facts is a matter of significant importance. It is a point that has significance under all three of the principal issues: purpose, proportionality, compatibility.

- (c) **The compatibility of Schedule 7 of TACT with Articles 5 and 8 of the ECHR.** In *Beghal v DPP* [2014] 2 WLR 150 the Divisional Court held that Schedule 7 was compatible with Articles 5 and 8 ECHR and certified these issues as points of law of general public importance. In the present case, Laws LJ rejected identical arguments concerning these Convention rights on the basis that *Beghal* was correctly decided and that “[n]o complaint relating to Article 5 or 8 can survive my agreement with [that judgment]”. On 6 February 2014, the Supreme Court granted the appellant permission to appeal on the certified questions in *Beghal*. The compatibility of Schedule 7 with Articles 5 and 8 is therefore a matter of general public importance that will shortly receive detailed consideration by the highest appellate court.
- (d) **The compatibility of Schedule 7 of TACT with Article 10 of the ECHR.** The Divisional Court in *Beghal* did not consider the compatibility of Schedule 7 with Article 10. It was the Claimant’s submission, supported by the interveners, that Article 10 brings an important further dimension to any analysis of the compatibility of Schedule 7 with the Convention. The compatibility of Schedule 7 with Article 10 has not been considered by any appellate court and is not an explicit issue in the *Beghal* appeal. It is an issue of general public importance with significant implications for all individuals involved in journalism who travel through UK ports and airports. In the same way that the Supreme Court has granted permission to appeal in the *Beghal* case in relation to Articles 5 and 8, it would be desirable for an appellate court to consider how such submissions relate to Article 10.
- (e) **The interpretation of Schedule 5 of TACT.** The Divisional Court held that the material seized from the Claimant could not have been obtained under Schedule 5 TACT. This conclusion appears to be based on the suggestion that the material included ‘stolen’ raw data which fell outside the broad language of s 13(1) of PACE (Judgment, paragraph 64). However Laws LJ added that, ‘the point is not straightforward, given the proposition (which I have accepted) that there are cases where the law should protect stolen material’. This is a novel point of law in relation to the interpretation of Schedule 5 and the definition of ‘journalistic material’ under PACE. This also appears to be an important point raised in this case for the first time and which this Court had to determine without the benefit of clear authority. It has potentially far-reaching implications regarding the circumstances in which material may be obtained under Schedule 5. The Claimant respectfully submits that these issues would benefit from further clarification by the Court of Appeal.

(f) **The seizure of journalistic material without prior judicial authorisation.**

To the extent that Schedule 5 was incapable of being used by the Defendants to obtain the material seized from the Claimant, the case raises an important question as to whether the requirement for prior judicial authorisation for the seizure of material from individuals involved in journalistic activities may be avoided by Schedule 7. The Claimant submits that this court appears to have taken a different approach to that adopted by the European Court of Human Rights in relation to 'prior judicial authorisation' (see, for example, the judgment of the Grand Chamber in *Sanoma Uitgevers BV v The Netherlands* Application No. 38224/03(2010) 51 EHRR 31). This is a novel point of law that warrants consideration by an appellate court.

(g) **The correct approach to the four-stage proportionality analysis expounded by the Supreme Court.**

In *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39 Lord Sumption identified four separate steps that courts must consider when assessing the proportionality of particular state action. The fourth requirement is 'whether...a fair balance has been struck between the rights of the individual and the interests of the community'. This principle is of some importance in this case. The Court, in particular the judgment of Laws LJ at paragraph 46 appears to have questioned the suitability of this criterion, warning that, 'there is a real difficulty in distinguishing this from a political question to be decided by the elected arm of the government'. Insofar as this Court appears to have taken a different approach to proportionality than that of the Supreme Court, this case raises an important issue as to how Court's should assess the balance between the rights of the individual and the interests of the community. This is potentially relevant to a wide class of litigation and affects all cases involving qualified Convention rights.

3. The Claimant submits that the unusual public importance of the points raised in this judgment, as well as the exceptional nature of the case, have been recognised by this Court. In that context the judgment raises a number of important and novel issues. The interventions and submissions of Liberty, English Pen, Article 19, Media Law Defence Initiative and the Coalition of Media & Free Speech Organisations also reflect the general public importance of the issues raised in this case. The exercise of Schedule 7 powers against the Claimant was discussed in Parliament and will be the subject of a review by the Independent Reviewer of Terrorism Legislation. The President of the Supreme Court and the former Lord Chief Justice have expressed 'concern' about the 'substantial intrusive powers' conferred under Schedule 7, in particular 'the fact that the powers are so

unrestricted' and 'not subject to any controls' (*R v Gul* [2013] UKSC 64). In these circumstances, this case falls into the exceptional category where this Court should grant permission to appeal to the Court of Appeal so that the issues may be clarified further.

4. For these reasons, the Claimant asks the Court to grant permission to appeal to the Court of Appeal.

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18 February 2014