

IN THE COURT OF APPEAL
B E T W E E N

R (David MIRANDA)

Appellant

-v-

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(2) COMMISSIONER OF POLICE OF THE METROPOLIS

Respondents

GROUNDS OF APPEAL

OVERVIEW

1. The Appellant appeals the judgment of the Divisional Court (Laws LJ, Ouseley and Openshaw JJ) of 19 February 2014. The Divisional Court granted the Appellant permission to seek judicial review on the basis that *'the issues which the claim raises are of substantial importance'* (Laws LJ at [15]), but ultimately dismissed his application for judicial review.
2. The case relates to the use of counter-terrorism powers under Schedule 7 of the Terrorism Act 2000, to obtain material that the Appellant was carrying at Heathrow airport. The material was encrypted data that had been provided to journalists by Edward Snowden. Mr Snowden is a former US National Security Agency analyst. The data he provided was the basis of journalists' articles about mass surveillance, which have resulted in a global public debate. The debate has involved those at the highest levels of government, domestically and internationally. Similarly, the Respondents' use of Schedule 7 counter-terrorism powers on the Appellant to obtain that sensitive data on which the articles were based, has itself provoked international criticism and debate.
3. The Appellant challenged the use of Schedule 7 powers under three broad headings: improper purpose; proportionality; compatibility. Those three broad challenges raise important and novel issues of law and are renewed on this appeal.
4. **The Appellant is filing these grounds as a matter of urgency, in order to apply for interim relief from the Court of Appeal. That interim relief relates to the Respondents' inspection and use of the seized material. An order granting interim relief has been in place, by consent, since 30 August 2013. But it will expire by 4pm on Wednesday 26 February 2014, unless it is renewed by the Court of Appeal.**

THE GROUNDS

Improper purpose: Flaws in the legal approach to determining the purpose of the 'examining officers'

5. This case raises the novel issue as to how the purpose of the exercise of powers under Schedule 7 of the Terrorism Act 2000 (TACT) should be determined on an application for judicial review. The Divisional Court's approach has significant wider implications for determining the purpose of exercising executive powers more generally.
6. Schedule 7 powers are exercised by the 'examining officers' (Schedule 7, paragraph 2). In this case the 'examining officers' were two police officers who did not provide witness statements in the case and had very little information about the context in which the Appellant was stopped.
7. There is considerable authority, both at common law and under the European Convention on Human Rights (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).
8. However, the Divisional Court declined to adopt that well-established approach when considering the exercise of Schedule 7 powers. Instead it sought to glean the 'purpose' of the exercise of Schedule 7 powers from a range of officers who were involved in assessing information about the material the Appellant may have been carrying, even though very little of that information was communicated to the 'examining officers' themselves. This included placing significant reliance on the assessment made by an officer, (D/Supt Stokley), who had received briefings from the Security Service, even though the substance of those briefings was not communicated to the examining officers.
9. The Divisional Court has determined the purpose of the two examining officers by aggregating the knowledge and assessments of a number of different individuals who did not share all the details of their knowledge or assessments with each other. This approach, which does not appear to rely on existing authorities, 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 appears to represent a new way of determining the purpose of executive action, beyond the 'dominant purpose' test set out in the case of *R v Southwark Crown Court ex parte Bowles* [1988] AC 641.

10. The Appellant submits that the Divisional Court erred in this approach to assessing purpose.
11. Further or alternatively, the Appellant submits that insofar as the Divisional Court was entitled to look beyond the knowledge and assessment of the examining officers themselves, the dominant purpose of the D/Supt Stokley was to assist the Security Service in obtaining sensitive data. The dominant purpose was not for that permitted by TACT, namely to determine whether or not the Appellant was a person who appeared to be involved in the commission, preparation or instigation of acts of terrorism. The Appellant relies on the following:
 - (1) D/Supt Stokley's approach indicated support and reliance on the reasoning and requests of the Security Service which were for purposes other than those permitted by Schedule 7.
 - (2) D/Supt Stokley's approach to what may constitute terrorist activity appeared to wrongly conflate lawful journalistic reporting on surveillance by the government with the unlawful disclosure of information that would assist terrorists.
 - (3) D/Supt Stokley appeared to base a significant part of his assessment on the risk of a threat of disclosure of sensitive information to Russian authorities when there was no evidence to support such risk, nor even a suggestion of such a risk in the briefing he receive from the Security Services. It was, at best, highly speculative and unsupported by reasonable evidence or assessment of the available information.

Proportionality: Assessment and 'fair balance'

12. At [40] of the Divisional Court's ruling, Laws LJ raised concerns over the fourth limb of Lord Sumption's approach to determining proportionality, as set out in *Bank Mellat v HM Treasury (No. 2)* 3 WLR 170, [2013] UKSC 39, at [20]: *'whether, having regard to these measures and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community'*. He suggested that *'there is a real difficulty in distinguishing this from a political question to be decided by the elected arm of government.'*

13. The Appellant submits that in taking that approach, Laws LJ reduced the importance of that aspect of the assessment of proportionality. He then erred in his overall approach to the proportionality assessment in this case. In particular:

(1) The Divisional Court gave too much weight to the assertions made on behalf of the Respondents as to threats to national security in relation to potential disclosure of information; and insufficient weight to the evidence of the careful manner in which disclosures of information had been made by the journalist in possession of that material.

(2) The Divisional Court gave too much weight to the assessments by D/Supt Stokley that there was a risk to national security and public safety by the disclosure of information by journalists; and insufficient weight to the lack of evidence - or anything other than speculation - that the risks to which he averted were likely to materialise.

Proportionality: Less intrusive means through Schedule 5 of TACT

14. The Appellant relied on the existence of Schedule 5 of TACT (orders pursuant to terrorist investigations), as a less intrusive means by which the Respondents could have sought access to the material being held by the Appellant.

15. At the very least the use of Schedule 5 would have ensured prior judicial authorisation for the seizure of journalistic material. Accordingly, in rejecting the need for prior judicial authorisation before the seizure of journalist material, the Divisional Court appears to have departed from the principle set out by the European Court of Human Rights (see, for example, the judgment of the Grand Chamber in *Sanoma Uitgevers BV v The Netherlands* Application No. 38224/03(2010) 51 EHRR 31).

16. In rejecting the use of Schedule 5 of TACT as impractical (see [60] – [62] of the Divisional Court’s ruling), Laws LJ erred in the following ways:

(1) Laws LJ erred in concluding that because the material possessed by the Appellant included ‘stolen’ raw data, it fell outside the broad language of s 13(1) of PACE (see [64]).

(2) Laws LJ erred in concluding that a Schedule 5 application would necessarily have failed because the material possessed by the Appellant could not be identified with sufficient particularity or certainty. The high level of particularity or

certainty suggested by Laws LJ is not necessary in order to obtain a warrant or order under Schedule 5 of TACT.

- (3) Laws LJ erred in suggesting that an order under Schedule 5 could not have been accompanied by the same coercive measures to answer questions that could be deployed under Schedule 7 of TACT. The range of Schedule 5 powers that could be deployed would have achieved a necessary, effective and proportionate balance for the obtaining of journalistic material subject to prior judicial authorisation, as determined by Parliament.

Compatibility: Articles 5, 8 and 10 of ECHR

17. The Appellant submits that the Divisional Court erred in finding that Schedule 7 is compatible with Articles 5, 8 and 10 of ECHR:

- (1) Insofar as Articles 5 and 8 are concerned, the Divisional Court erred in endorsing the reasoning of another Divisional Court in the case of *Beghal v DPP* [2014] 2 WLR 150. *Beghal v DPP* was granted permission to appeal to the UK Supreme Court on 6 February 2014.
- (2) Insofar as Article 10 is concerned, the Divisional Court erred in failing to give sufficient weight to the importance of freedom of expression, and journalistic work, in the context of the broad powers pursuant to Schedule 7. The Article 10 dimension of Schedule 7's compatibility with fundamental rights did not feature in *Beghal* and is, of itself, a matter of substantial public interest and importance.

INTERIM RELIEF

18. Interim relief was first granted to the Appellant on 23 August 2013. Interim relief was originally granted to ensure that any ultimate success of the Claimant was not a 'pyrrhic victory'.¹
19. Following the order of 23 August 2013, interim relief was continued by a consent order on 30 August 2013. The terms of the order are attached at **Annex A**.
20. After judgment on 19 February 2014, interim relief has continued with the agreement of the Respondents, subject to the Appellant making this application to appeal to the Court of Appeal. Interim relief will expire at 4pm on 26 February 2014, unless continued by a new order by the Court of Appeal.
21. The interim relief sought has been in place by consent for more than 5 months.
22. The Respondents have previously made it clear that they were neutral on whether permission should be granted and, if the High Court had granted permission to appeal, they were 'neutral' as to whether it should the order that interim relief continue pending appeal. There is no indication that their position is any different if the Court of Appeal was to grant permission to appeal.
23. Interim relief is necessary to ensure that if permission to appeal is granted and the appeal is successful, the granting of judicial review would not be rendered nugatory by the Respondents inspecting and using material they obtained unlawfully. Insofar as the Respondents may need to view material pursuant to the urgent needs of national security or limited and specific Official Secrets Acts investigations, the terms of the current interim relief allow them to do so. The Appellant seeks no more than continuation of the status quo, pending appeal.

Matthew Ryder QC
Eddie Craven,
Raj Desai

24 February 2014

Matrix Chambers

¹ See paragraph 37 of interim relief judgment of 23 August 2013.

Annex A

Terms of the order of 30 August 2013:

That until the determination of these proceedings or further order the Defendants shall not copy, disclose, transfer, distribute (whether domestically or to any foreign government or agency) or interfere with the data held by the claimant and detained pursuant to Schedule 7 to the Terrorism Act 2000 save:

- (i) for the purpose of investigating whether the Claimant is a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism or has committed an offence contrary to ss. 58 or 58A of the Terrorism Act 2000 or the Official Secrets Acts 1911 and 1989; or
- (ii) for the purpose of protecting national security, including by preventing or avoiding the endangering of the life of any person or the diminution of the counter-terrorism capability of Her Majesty's Government.