

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15/05/2018

Before :

**LORD JUSTICE IRWIN**  
**MR JUSTICE FOSKETT**

Between :

	<b>MUHAMMAD RABBANI</b>	<b><u>Appellant</u></b>
	<b>- and -</b>	
	<b>DIRECTOR OF PUBLIC PROSECUTIONS</b>	<b><u>Respondent</u></b>

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**Henry Blaxland QC and Nikolaus Grubeck** (instructed by **Birnberg Peirce Ltd**) for the  
**Appellant**  
**Tom Little QC** (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing dates: 3 May 2018  
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**Judgment Approved** Lord Justice Irwin:

**Introduction**

1. This is an appeal by way of case stated by the Appellant from his conviction before the Chief Magistrate, sitting in the Westminster Magistrates' Court on 25 September 2017, for an offence of wilfully obstructing or seeking to frustrate a search or examination contrary to paragraph 18(1)(c) of Schedule 7 to the Terrorism Act 2000.
2. On 20 November 2016, at around 6:30am the Appellant was made the subject of a Schedule 7 Terrorism Act 2000 stop and search at Terminal 4 at Heathrow Airport. The Appellant is and was the international director and managing director of the organisation CAGE, which organisation specialises in supporting and advising individuals in respect of the terrorism laws. After answering some questions, the Appellant refused to provide the PIN and password for his mobile phone and laptop computer. That refusal was the basis of his conviction.

## The Facts

3. The Chief Magistrate gave a written judgment at the close of the prosecution case addressing three submissions on behalf of the Appellant, and then gave a further judgment at the conclusion of the hearing, on convicting the Appellant. She incorporated each into her case stated. This court is bound by the facts set out in the case stated.
4. The judgment on conviction makes it clear that the Appellant was stopped by first one and then by a second officer. Both gave evidence to the Chief Magistrate. At the start of the process the Appellant was given a written notice which explained the examining officers' powers. As part of the stop he was asked for the PIN number and password of his mobile phone and his Apple computer. He refused to provide them, and said it was against his Article 8 rights. It was not in issue but that the Appellant, because of his occupation, was knowledgeable about the provisions of the Terrorism Act 2000 and as to his own rights under the European Convention on Human Rights.
5. The Chief Magistrate found that the first officer who stopped the Appellant had "only the vaguest idea of what CAGE did". In her case stated, she "accepted that the stop was not random, but targeted in some way".
6. There was a formal interview conducted by the officers who stopped the Appellant at the airport, after the Appellant had spoken to his solicitor. It may be helpful at this point to quote verbatim from the facts as set down in the judgment by the Chief Magistrate:

"5. ... He told the officers he had been out for three days to attend the wedding of a friend in Doha. He said the officers knew where he worked. He did not wish to give the PIN numbers as he did not think the requirement "extends to matters of personal privacy so by giving my mobile number or a password or similar, all I'm doing is violating my own privacy which I think this doesn't cover". He repeats again in the interview that it is about his own privacy. It is like handing over "my own home keys" which you would rather not do. Indeed, the importance of passwords and PIN numbers in the 21<sup>st</sup> Century cannot be overstated.

6. The Defendant went on to say that he had been stopped before when he had not given the PIN numbers and he had not been prosecuted for failing to do so.

...

7. The Defendant confirmed to the officers he would not give them the numbers. His main qualm he said was that there was a lot of information that had already been collected. Therefore, he thought it was a bit of a pointless exercise and unnecessary. It was disproportionate in the circumstances...."

7. The Chief Magistrate went on to point out in her ruling what the Appellant had not said:

“7. ... What he did not say to them was that there was information on his devices that was excluded material. He was repeatedly told of the powers of the examining officers under the Schedule.

8. He was then arrested under Section 18(1) of Schedule 7 of the Terrorism Act 2000.”

8. The judgment recites how the Appellant was later interviewed at the police station by other officers. At that stage he gave a prepared statement in which he said that he was content to comply with the request, but that the contents of the devices affected the privacy and confidentiality of others, including the fact that his work –

“...is in large part to do with vulnerable people who have placed their trust in him and in his colleagues. He had given the codes to his solicitor and they could be released once he had informed his family and colleagues.”

9. There followed correspondence between the Appellant’s solicitors and police as to whether independent counsel could be appointed who could be given access to the devices, but in the event that did not take place. The Appellant was charged in May 2017.

10. The Chief Magistrate then noted the Appellant’s evidence to her. He confirmed his occupation. He was of good character and has a family with two young children. She made it explicit that she bore his good character in mind, both as diminishing the likelihood that he would commit the offence and as supporting his credibility. The Chief Magistrate went on to record his evidence as follows:

“12. He explained that his reluctance to give his PIN number for the two devices comes down to the fact that he had received confidential information from a client he had seen at the wedding in Doha who was alleging he had been tortured in the United States and the information was to form the basis for the making of a complaint in that country and this one. Bearing in mind his good character I accepted this account.”

11. The Appellant confirmed in cross-examination that he had deliberately not provided the PIN numbers and password to the examining officers when, as the Chief Magistrate found, they had lawfully required him to do so.

12. The Chief Magistrate concluded that there was “no doubt that the Defendant obstructed the police in not giving them the requested PIN and password”. She rejected the submission on behalf of the Appellant that, since the Appellant had been asked on at least two previous occasions for his PIN and password and had declined, and had not been prosecuted, “it could not be said it was a wilful obstruction on this occasion”. This argument was not repeated to us. The Chief Magistrate concluded that the Appellant –

“...took a risk and thought that as on earlier occasions the police would not take any further action. I accept he was trying to protect confidential material on his devices. The Defendant took

a calculated risk by refusing to give the information”.

13. In my view, therefore, the factual position here is very clear. Although the Chief Magistrate accepted that the Appellant had acted as he did so as to protect the information of others, he did not say so at the time. Indeed, he never said so until after the offence (if it was an offence) was complete and he was arrested. On the contrary, at the time he told the examining officers that he was seeking to protect his own privacy. At no stage during the relevant period did the Appellant mention the confidentiality of others, or material relevant to journalism, or material protected under other legislation. The submissions of both parties must be examined against that factual backdrop.

### **The Statute**

14. The relevant provisions of Schedule 7 to the Terrorism Act 2000 are as follows:

*“Power to stop, question and detain*

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.

(3) This paragraph also applies to a person on a ship or aircraft which has arrived in 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).

...

5. A person who is questioned under paragraph 2 or 3 must—

(a) give the examining officer any information in his possession which the officer requests;

(b) give the examining officer on request either a valid passport which includes a photograph or another document which establishes his identity;

(c) declare whether he has with him documents of a kind specified by the examining officer;

(d) give the examining officer on request any document which he has with him and which is of a kind specified

by the officer.

6. (1) For the purposes of exercising a power under paragraph 2 or 3 an examining officer may –

(a) stop a person or vehicle;

(b) detain a person

...

7. For the purpose of satisfying himself whether there are any persons whom he may wish to question under paragraph 2 an examining officer may—

(a) search a ship or aircraft;

(b) search anything on a ship or aircraft;

(c) search anything which he reasonably believes has been, or is about to be, on a ship or aircraft.

8. (1) An examining officer who questions a person under paragraph 2 may, for the purpose of determining whether he falls within section 40(1)(b)—

(a) search the person;

(b) search anything which he has with him, or which belongs to him, and which is on a ship or aircraft;

(c) search anything which he has with him, or which belongs to him, and which the examining officer reasonably believes has been, or is about to be, on a ship or aircraft;

...

11A. (1) This paragraph applies where the examining officer is a constable.

(2) The examining officer may copy anything which –

(a) is given to the examining officer in accordance with paragraph 5,

(b) is searched or found on a search under paragraph 8, or

(c) is examined under paragraph 9.

(3) The copy may be retained—

(a) for so long as is necessary for the purpose of determining whether a person falls within section 40(1)

(b),

(b) while the examining officer believes that it may be needed for use as evidence in criminal proceedings, or

(c) while the examining officer believes that it may be needed in connection with a decision by the Secretary of State whether to make a deportation order under the Immigration Act 1971.

...

18(1) A person commits an offence if he—

(a) wilfully fails to comply with a duty imposed under or by virtue of this Schedule,

(b) wilfully contravenes a prohibition imposed under or by virtue of this Schedule, or

(c) wilfully obstructs, or seeks to frustrate, a search or examination under or by virtue of this Schedule.”

## **The Grounds**

15. Three questions were asked of the High Court by the Appellant. They are:

- i) Whether, in considering whether the offence under paragraph 18(2) Schedule 7 Terrorism Act 2000 has been proved, the prosecution is required to adduce evidence relevant to the legality of the decision to stop and examine a person under Schedule 7.
- ii) Whether the Code of Practice for Examining Officers and Review Officers under Schedule 7 Terrorism Act 2000 contains sufficient safeguards to preserve the right to confidentiality of material held by a person who has been stopped in the exercise of the powers under Schedule 7.
- iii) Whether the offence could be committed where the defendant failed to permit access to confidential material and no procedure was yet in place to allow independent inspection of the material.

16. In addressing the first ground, which was in substance the first of the three submissions made to the Chief Magistrate at the close of the Crown case, she concluded that the Crown had indicated there was no further disclosure which it was obliged to make in the light of the defence case. There was nothing known which would either support the defence case, or undermine the prosecution case:

“in other words there is no information it [the Crown] has which suggests the stop is unlawful. On the face of it, without further information from the Crown, I have no evidence to suggest that the stop was unlawful. The first submission fails”.

17. In response to the second submission concerning the code of practice, the Chief Magistrate once again made a relevant ruling at the close of the prosecution case. She said:

“I find that it is not for this court to determine the correctness of the code of practice. It allows an examining officer to examine the information but cease to review information and not copy it when they have reasonable grounds for believing it is privileged, excluded or special procedure material.”

It is clear that the Chief Magistrate found no basis for undermining the conviction in this point.

18. The third ground reads as follows:

“Whether the offence could be committed where the defendant failed to permit access to confidential material and no procedure was yet in place to allow independent inspection of the material.”

19. It is clear from the passages already quoted from her final ruling that, although the Chief Magistrate accepted the Appellant was protecting confidential material, he never said so before his offence was complete and his arrest had taken place. It is clear that she considered any question of independent inspection of the material to be an afterthought and irrelevant to the conviction.

20. I turn to consider the grounds advanced in turn.

### **Ground 1: Evidence of Legality of the Stop**

21. Mr Blaxland began by stressing that the Schedule 7 powers are summary, and intrusive. As the Supreme Court made clear in *Beghal v DPP* [2016] AC 88, the powers represent an interference with private life, and must be exercised both lawfully and proportionately: see the judgment of Lord Hughes, at paragraphs 7, 30 to 33 and 43. There must be sufficient safeguards in place to ensure that the power is not exercised arbitrarily. For those reasons, and on general principles, the legality of the stop must be established by the Crown in any prosecution. Mr Blaxland laid particular emphasis on two of the safeguards enumerated by Lord Hughes in paragraph 43:

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

...

(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.”

22. Mr Blaxland submitted that there was a burden on the Crown in any such case to call evidence to establish the legality of the stop. He submitted that had not been done here. If the search was random, then the legality might be established simply by evidence that the individual conducting the stop was authorised under the Act to exercise the power, and that he or she was doing so within the general purposes of the statute. However where the search was not random, as here, Mr Blaxland submitted that more was required, to demonstrate that the search was not “arbitrary”. If there was information or intelligence which could not be communicated to the defendant, then the Court should convene a closed or *ex parte* hearing, and the interests of the defendant could be safeguarded by the instruction of a special advocate to protect his interests.
23. In support of this proposition, Mr Blaxland cited the case of *R v H* [2004] 2 AC 134, [2004] UKHL 3, where the House of Lords contemplated “in an exceptional case” the appointment of a special advocate to consider an application for public interest immunity from the disclosure of relevant information.
24. Mr Tom Little QC for the Crown responded to these submissions in a number of ways. There was no special need to call evidence to establish the legality of the stop. The officers were acting in the execution of duty. There had been no submission of abuse of process before the Chief Magistrate. There was no evidence from the defence which raised a question of illegality of the stop, or even raised a concern which might have called for an answer. There had of course been evidence of the lawful use of the power, in the sense that the powers were exercised by police officers authorised to do so, and exercised for the statutory purpose. There was no call for more evidence. It was illogical for a random search to be regarded as lawful (as Mr Blaxland accepted such a search would be) if a search which was not random called for an explanation in evidence before it could be lawful. The extent of the powers, their lawful basis and the proportionality of the powers were all made clear by the Supreme Court in *Beghal*.
25. Moreover, it could not be the intention of Parliament that intelligence should have to be communicated, even in summary form, before the powers of stop and search could be exercised. That was clearly not practical and would frustrate the powers.
26. Further, the suggestion of a closed hearing with special counsel to resolve this issue was quite untenable. In *R v H* the House of Lords had contemplated the appointment of special counsel in public interest immunity hearings only as an exceptional measure. The context there was the sensitivity of material sought to be withheld from the proceedings. That was entirely different from a closed hearing in criminal proceedings within which the Crown would establish a necessary ingredient of proving the case.
27. In my judgment, this Ground fails and fails clearly. There was no basis on which the legality of the stop or the request for the PIN and password was called into question. There was the basic evidence from the officers as I have indicated. I see no basis for a requirement for more.

28. Further, in the absence of some specific factors being advanced, I can see no logic to the proposition that a random exercise of the powers of stop and search would be lawful, but an exercise of the powers based on intelligence or knowledge of the individual would be unlawful without some evidence of the material which prompted the stop.
29. As to the suggestion of a closed hearing, in my judgment that is clearly misconceived. The House of Lords in *R v H* contemplated representation by special counsel only as an exceptional measure in PII hearings and in the rare case even then. And the context of *R v H* is entirely different from this case, for the reasons given by Mr Little. Moreover, the Supreme Court made clear in *Al Rawi and Others v The Security Service and Others* [2011] UKSC 34 [2012] 1 AC 5313, it is Parliament alone which could introduce a closed material procedure: that cannot be done by the Court as an exercise of the inherent jurisdiction. That decision led to the Justice and Security Act 2013, which did introduce such procedures, but only in civil proceedings and under very strict pre-conditions and conditions.

### **Grounds 2 and 3: The Adequacy of the Safeguards**

30. Before I move to consider the submissions advanced, it is helpful to remind myself that we are considering a conviction, not dealing with a judicial review or an application for a declaration of incompatibility with the European Convention of Human Rights. There can be no challenge here to the provisions of the Schedule. This Court cannot opine on the adequacy of policy or drafting of the Code of Practice. This is a criminal appeal.
31. It is also worth pointing out two further things. The Appellant could have sought to appeal his conviction to the Crown Court. Such an appeal would have proceeded by way of re-hearing, and the Appellant, if he had chosen to do so, could have given fuller evidence of all the relevant events. Secondly, the Appellant did issue, and then withdrew, judicial review proceedings arising out of these events. He has had the opportunity to deploy one of the key safeguards expressly mentioned by Lord Hughes in *Beghal* but, no doubt after careful consideration, has chosen not to carry on with that course.
32. On these two linked questions, or Grounds, Mr Blaxland began by citing the well-known case of *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6, [2016] 1 WLR 1505. That case concerned the exercise of Schedule 7 powers in relation to the husband of a journalist Mr Glenn Greenwald, who was carrying journalistic materials belonging to Mr Greenwald when he, Mr Miranda, was stopped at Heathrow Airport. The case turned on the suggested incompatibility of the Schedule 7 powers with Article 10 of the ECHR. The matter is dealt with in the judgment of Lord Dyson MR (with whom Richards and Floyd LJ agreed), the relevant paragraphs being 94 to 118.
33. It is not necessary for me to traverse that judgment in any detail. The reasoning is clearly focussed on journalistic material and on Article 10. Lord Dyson's conclusion is that the constraints on the exercise of the powers "do not afford effective protection of journalistic rights" (paragraph 113). Lord Dyson observed that such material has better protection under "other legal regimes", citing sections 11 to 14 of the Police and Criminal Evidence Act 1984 (PACE), where "journalistic material" falls within the categories of "special procedure material" or "excluded material", and similar

protections arise in Schedule 5 to the Terrorism Act 2000 (judgment, paragraphs 116 and 117).

34. Mr Blaxland took us to the relevant provisions of PACE affecting search and seizure:

**“Police and Criminal Evidence Act 1984 c.60**

**Part II POWERS OF ENTRY, SEARCH AND SEIZURE**

**Search warrants**

**11. Meaning of “excluded material”.**

(1) Subject to the following provisions of this section, in this Act “excluded material” means—

(a) personal records which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he holds in confidence;

...

(c) journalistic material which a person holds in confidence and which consists—

(i) of documents; or

(ii) of records other than documents.

(2) A person holds material other than journalistic material in confidence for the purposes of this section if he holds it subject—

(a) to an express or implied undertaking to hold it in confidence; or

(b) to a restriction on disclosure or an obligation of secrecy contained in any enactment, including an enactment contained in an Act passed after this Act.

(3) A person holds journalistic material in confidence for the purposes of this section if—

(a) he holds it subject to such an undertaking, restriction or obligation; and

(b) it has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism.”

35. Some months before the Supreme Court judgment in *Miranda*, the Home Office Code of Practice governing Schedule 7 was amended. The relevant amended passage reads:

“40. The examining officer may copy any information obtained under paragraph 5; searched or found on a search under paragraph 8; or anything examined under paragraph 9 including electronic data (although examining officers should cease reviewing, and not copy, information which they have reasonable grounds for believing is subject to legal privilege, is excluded material or special procedure material, as defined in sections 10, 11 and 14 of the Police and Criminal Evidence Act 1984). The copies may be retained for so long as is necessary for the purpose of determining whether a person is concerned in the commission, preparation or instigation of acts of terrorism; or while the officer believes that they may be needed for use as evidence in criminal proceedings or in connection with a decision by the Secretary of State whether to make a deportation order under the Immigration Act 1971. Copies of information obtained during an examination must be managed in compliance with the requirements of Management of Police Information guidance.”

36. After the judgment in *Miranda*, the National Police Chief’s Council issued “*New Guidance on Schedule 7 Code of Practice*”. This addressed the same concerns in slightly different language, explicitly responding to *Miranda*:

**“Background**

On 19 January 2016, the Court of Appeal issued a judgment in David Miranda’s appeal against the Secretary of State for the Home Department. The Court dismissed Mr Miranda’s appeal on the facts. Mr Miranda’s examination under Schedule 7 to the Terrorism Act 2000 was found to be lawful and proportionate on the facts of the case.

The Court of Appeal did find, however, that Schedule 7 as it was at the time of Mr Miranda’s examination – in August 2013 – was not compliant with Article 10 of the European Convention on Human Rights (right to freedom of expression) in respect of journalistic material. In its judgment, the Court recommended that if there were an operational need to seize and examine journalistic material under Schedule 7, then a mechanism for judicial authority to do so should be introduced.

**Code of Practice Amendment 2015**

In 2015 – several months prior to the *Miranda* judgment – the Home Office amended the Code of Practice for Examining and Review Officers under Schedule 7. One of the amendments made was to include a line at paragraph 40 of the Code which states:

“examining officers should cease reviewing, and not copy, information which they have reasonable grounds for believing is subject to legal privilege, is excluded material or special procedure material, as defined in sections 10, 11 and 14 of the Police and Criminal

Evidence Act 1984 (PACE)”.

Section 11(1)(c) PACE includes journalistic material within the meaning of “excluded material”. The line at paragraph 40 of the Code therefore directs that examining officers must not examine or copy any material they reasonably believe is journalistic material; and in cases where they have commenced examining material where they had no initial grounds for believing it was journalistic, should cease examining such material if and when they come to have such a belief. The passage in the Code was not considered by the Court in *Miranda*, as it was introduced after *Miranda*’s examination took place.

As a result of this addition to the Code, anything an examining officer reasonably believes is journalistic material cannot be examined using Schedule 7.”

There then follows a passage of guidance as to what is “journalistic material”.

37. It is finally relevant to record that the explanatory leaflet which was given to the Appellant makes no mention of journalistic material, confidential material garnered in the course of any trade, business or profession, “excluded” material or “special procedure material”. A copy of the leaflet was before us.
38. All of that forms the background to Mr Blaxland’s submissions. He says that, if by means of the leaflet or otherwise, the categories of material which would not be examined or copied had been explained to the Appellant, then he might very well have agreed to provide the PIN and password to the devices. He submits that without such explanation the relevant safeguards are insufficient. He equates journalistic material with the other forms of excluded material and special procedure material: there is “no meaningful distinction” between them. The logic of *Miranda* should extend to the other categories of document, and without similar safeguards as those applied to journalistic material, the Schedule 7 powers “are not compatible with Article 8 ECHR”. For that reason, the conviction should be quashed.
39. In my view there are a number of insuperable problems about this sequence of points. Firstly, the *Miranda* decision was centred expressly and narrowly on Article 10 and freedom of expression for journalists. It is by no means self-evident that identical (or even similar) considerations arise in respect of other categories of excluded or special procedure material.
40. Secondly, there is no question of a declaration of incompatibility here: there has been no such application.
41. Thirdly, any discrepancy of detail between the language of the pre-*Miranda* and post-*Miranda* guidance was not for the Chief Magistrate (as she observed) and is not for this Court. Such an issue might possibly have been raised in a judicial review, if that had been pursued. However, unless such a discrepancy can be shown to have affected the conviction here, it is not relevant to this appeal.

42. Critically, the Appellant did not raise any question of material containing confidential information gathered in the course of a business or profession until after the obstruction was complete. There has never been any question of this being journalistic material. The assertion of confidentiality by the Appellant was never more than that. The officers never had any sight of this material to verify the assertion. Nor did the Chief Magistrate. She simply accepted the Appellant's evidence on the point, bearing in mind his good character. There was no evidence before her as to how much of the content of the devices was the confidential material of others, or whether it was in a separate file or folder, severable from the rest of the relevant memory.
43. The evidence here is clear, as I have said. The Appellant at the relevant time was not merely silent about excluded or special procedure material. He made the positive assertion that he was refusing access to protect his own privacy: "my own home keys", "all I'm doing is violating my own privacy which I think this doesn't cover".
44. In my view there is no reason in either Question 2 or 3, or in the submissions advanced, however eloquently, by Mr Blaxland, to affect the validity of this conviction. The Chief Magistrate made no error of law. I would dismiss this appeal.

**Mr Justice Foskett:**

45. I agree.