Neutral Citation Number: [2013] EWHC 2573 (Admin)

Case No: CO/3047/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/08/2013

Before :

LORD JUSTICE GROSS
MRS JUSTICE SWIFT
MR JUSTICE FOSKETT

- -

Between :

SYLVIE BEGHAL	**Appellant**
- and -	
DIRECTOR OF PUBLIC PROSECUTIONS	**Respondent**

- -
- -

Matthew Ryder QC (instructed by **Abrahams Law**) for the **Claimant**
Louis Mably (instructed by **Crown Prosecution Service**) for the **Defendant**
Paul Nicholls QC (instructed by the **Treasury Solicitor)** for the **Secretary of State for the Home Department**

Hearing dates: 19th and 20th March 2013

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Approved Judgment

LORD JUSTICE GROSS :

INTRODUCTION

1. This is the judgment of the Court to which we have all contributed.

2. The central (though not sole) issue on this appeal concerns the compatibility of the powers to "stop, question and detain" contained in Schedule 7 to the Terrorism Act 2000 ("TACT 2000" and "Schedule 7" respectively) with, in particular, Arts. 6 and 8 of the European Convention on Human Rights ("ECHR"). The appeal thus gives rise to the question of where the balance is to be struck between the rights of the individual and the public interest in safeguarding the country from terrorism. This is a challenging area for the law, requiring vigilance as to individual liberties while retaining a firm grasp of the practical needs of national security.

3. On the 12th December, 2011, at Leicester Magistrates' Court, before District Judge Temperley, the Appellant pleaded guilty to one charge of wilfully failing to comply with a duty imposed under or by virtue of Schedule 7, contrary to para. 18(1)(a) of that Schedule. That plea followed (1) a ruling by the District Judge that he had no power to stay the proceedings as an abuse of process of the Court on the grounds advanced by the Appellant and that only a higher Court could do so; (2) an indication from the District Judge that, in those circumstances, it was highly likely he would find the Appellant guilty of the charge in question.

4. Before the District Judge, the Appellant had submitted, *inter alia*, that the powers given to the police under Schedule 7 infringed her rights under Arts. 5, 6 and 8 of the ECHR and her rights to freedom of movement ("FOM") between Member States under Arts. 20 and 21 of the Treaty on the Functioning of the European Union ("TFEU").

5. The Appellant now appeals to this Court by way of Case Stated.

THE FACTS

6. The facts are not in dispute and may be taken from the Case Stated by the District Judge ("the Case"), augmented by some few matters of detail which we were told without objection.

7. The Appellant is a French national, ordinarily resident in the United Kingdom. Her husband is currently in custody in France in relation to terrorist offences. On the 4th January, 2011, following a visit to her husband, she returned to this country with her three children, arriving at East Midlands Airport, at around 20.05, on a flight from Paris. At the UK Borders Agency desk she was asked to remain; officers from Leicestershire Constabulary subsequently conducted an examination under Schedule 7.

8. As the Case records:

> " 5. It was common ground that:
>
> i) The Appellant was stopped with her three children at the airport but was not formally detained or arrested.

> ii) She was told she was not under arrest and the police did not suspect her of being a terrorist. She was told the police needed to speak to her to establish if she may be a person concerned in the commission, preparation or instigation of acts of terrorism.
>
> iii) The Appellant was taken to an examination room with her infant child, the other two children being allowed to proceed to Arrivals. Her luggage was taken to another room to be searched.
>
> iv) The Appellant requested to consult with a lawyer and later asked to have an opportunity to pray. While she was praying one of the officers spoke to her lawyer by telephone and indicated she would be free to speak to him in 15 minutes.
>
> v) After the Appellant finished praying she was advised she could telephone her lawyer after she had been searched. The officers then proceeded with the search, which is not the subject of this Appeal.
>
> vi) The Appellant was then allowed to speak to her lawyer by telephone. The officers made it clear to both the Appellant and her lawyer that they would not delay the examination questioning pending the arrival of the lawyer.
>
> vii) The Appellant was then questioned in the absence of her lawyer having been served with form TACT 1, the contents of which were read out to her. She indicated she would only answer questions after her lawyer arrived.
>
> viii) During the interview the Appellant was asked a number of questions regarding her family, her financial circumstances and her recent visit to France. She did not provide answers to most of those questions.
>
> ix) When the examination was over the Appellant was cautioned and reported for the offence of failing to comply with her duties under Schedule 7 by refusing to answer any questions.
>
> x) The Appellant's lawyer arrived after the examination had finished. The officers did not seek to question the Appellant again in the presence of her lawyer."

9. As to timings, the Appellant was given time to pray at about 21.00. The telephone consultation with her lawyer took place at around 21.23. The Appellant was taken to a room for the Schedule 7 examination and was served with the TACT 1 notice at about 21.30. The Appellant was cautioned at about 22.00 and told she was "free to go". The Appellant's legal representative arrived at about 22.40.

10. In a little more detail, the questions asked of the Appellant, included the following:

i) The reasons for her travel;

ii) Where she had stayed in France;

iii) Whether she had remained in France or travelled on from there;

iv) The identity of the (adult) person waiting for her at East Midlands airport and to whom her two children (who had been allowed to proceed, see above) were handed over;

v) Whether she had been arrested by the police either in the United Kingdom or any other country;

vi) Her relationship with her husband, given his imprisonment for acts of terrorism;

vii) Whether she was in employment or on benefits;

viii) How she had paid for her flight and whether anyone else had paid for it;

ix) Whether she had a motor vehicle;

x) Names and dates of birth of her father, mother and brothers and sisters (and the addresses of her siblings);

xi) Whether she was French/Algerian and whether she had dual nationality;

xii) How long she had lived in England;

xiii) Whether she had a mobile phone with her.

11. The Appellant was subsequently charged with three offences, namely: (1) wilfully obstructing a search under Schedule 7; (2) assaulting a police officer contrary to s.89, Police Act 1996; (3) wilfully failing to comply with a duty under Schedule 7.

12. Charges (1) and (2) were eventually dismissed; the Respondent offered no evidence on those charges following the Appellant's pleas of guilty (as already recorded) to charge (3).

13. The Case stated two Questions ("the Questions") for the consideration of this Court:

> " 1. Did I err in law in refusing to stay the proceedings against the Appellant on the basis that her prosecution for failure to comply with a duty under Schedule 7 of the Terrorism Act amounted to a breach of her rights under Articles 5, 6 and 8 of the ECHR (including her rights of access to a lawyer, the privilege against self-incrimination and right to privacy and family life)?
>
> 2. Did I err in law in refusing to stay the proceedings against the Appellant on the basis that her prosecution for failure to comply with a duty under Schedule 7 of the Terrorism Act

> 2000 amounted to an unjustifiable interference with her rights to free movement within the territory of the European Union as an EU national? ”

14. It may at once be noted that Mr. Ryder QC, for the Appellant, rightly in our view, disclaimed in terms any criticism of the District Judge's ruling that the relief sought by the Appellant could only be granted by the High Court. Accordingly, the Questions will be re-formulated (see below), reflecting the focus of the appeal on the substance of the Appellant's complaints rather than the District Judge's conclusions or assumptions as to the limits of his jurisdiction.

THE RELEVANT PROVISIONS

15. It is next convenient to introduce the central statutory and ECHR provisions.

16. Starting with *TACT 2000*, a "terrorist" is defined by s.40(1)(b) as follows:

> " … 'terrorist' means a person who –
>
> is or has been concerned in the commission, preparation or instigation of acts of terrorism."

"Terrorism" itself is widely defined in s.1 of TACT 2000; it is unnecessary to set out the definition here.

17. Schedule 7 is headed "Port and Border Controls". Paragraph 1 defines an "examining officer" as any of a constable, an immigration officer and a suitably designated customs officer. Insofar as material, the Schedule continues 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 [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).

5

A person who is questioned under paragraph 2…. must –

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

…..

6

(1) For the purposes of exercising a power under paragraph 2…an examining officer may –

(a) stop a person….

(b) detain a person.

…..

(4) A person detained under this paragraph shall….. be released not later than the end of the period of nine hours beginning with the time when his examination begins.

Offences

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.

….

(2) A person guilty of an offence under this paragraph shall be liable on summary conviction to –

(a) imprisonment for a term not exceeding three months,

(b) a fine not exceeding level 4 on the standard scale, or

(c) both. ”

18. TACT 2000 does not stand alone. The exercise by examining officers of their powers under Schedule 7 is assisted by the statutory *Home Office (2009) Examining Officers under the Terrorism Act 2000 Code of Practice* (“the Code”), issued pursuant to para. 6(1) of Schedule 14 to TACT 2000. The Code is itself complemented by the *2009*

NPIA Practice Advice ("the Practice Advice"). These documents were (newly) promulgated in 2009 after, as we understand it, extensive consultation.

19. The *Code* contains detailed provisions as to the exercise by examining officers of their functions under TACT 2000, supplemented by "Notes for guidance".

20. For present purposes, paragraphs 9 and 10 of the Code are of significance:

> " 9. The purpose of questioning and associated powers to determine whether a person appears to be someone who is or has been concerned in the commission, preparation or instigation of acts of terrorism. The powers, which are additional to the powers of arrest under the Act, should not be used for any other purpose.
>
> 10. An examining officer may question a person whether or not he suspects that the person is or has been concerned in the commission, preparation or instigation of an act of terrorism and may stop that person for the purposes of determining whether this appears to be the case. Examining officers should therefore make every reasonable effort to exercise the powers in such a way as to minimise causing embarrassment or offence to a person who is being questioned. "

21. The accompanying Notes for guidance underline that the powers must be used "proportionately, reasonably, with respect and without unlawful discrimination". They go on to say that "Examining officers must take particular care to ensure that the selection of persons for examination is not solely based on their perceived ethnic background or religion." The powers are not to be exercised so as to "unfairly discriminate" against anyone on the grounds, *inter alia*, of race, colour, religion or creed. Importantly, the Notes for guidance then provide as follows:

> " Although the exercise of Schedule 7 powers is not based on an examining officer having any suspicion against any individual, the powers should not be used arbitrarily. An examining officer's decision to exercise their Schedule 7 powers at ports must be based on the threat posed by the various terrorist groups active in and outside the United Kingdom. When deciding whether to exercise their Schedule 7 powers, examining officers should base their decisions on a number of considerations, including factors such as:
>
> - known and suspected sources of terrorism;
>
> - Individuals or groups whose current or past involvement in acts or threats of terrorism is known or suspected and supporters or sponsors of such activity who are known or suspected;
>
> …..

> Selections for examination should be based on informed considerations such as those outlined above and must be in connection with the threat posed by the various terrorist groups active in and outside the United Kingdom. A person's perceived 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.
>
> ….."

22. The *Practice Advice* speaks to essentially the same effect as the Code with regard to the factors influencing the decision to exercise the Schedule 7 powers of examination. The Foreword merits mention:

> " Special Branch ports officers carry a significant responsibility as part of the police contribution to ensuring National Security. It is vital that they are equipped with powers that enable them to carry out their role effectively and efficiently.
>
> Schedule 7….. provides these officers with unique powers to examine people who pass through the United Kingdom's borders. It is essential that they are applied professionally so that the police maintain the confidence of all sections of the public. Any misuse of these powers could have a far-reaching negative impact on police community relations and hinder progress made in support of the Government's counter-terrorism strategy (CONTEST). "

23. Turning to the ECHR, so far as material, it provides as follows:

> "Article 5
>
> Right to liberty and security
>
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (b) The lawful arrest or detention of a person … in order to secure the fulfilment of any obligation prescribed by law….
>
> Article 6
>
> Right to a fair trial
>
> 1. In the determination ….. of any criminal charge against him, everyone is entitled to a fair and public hearing….
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ….
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require….
>
> Article 8
>
> Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

24. Turning to the right to FOM, Arts. 20 and 21 of the TFEU provide, insofar as material, as follows:

> "Article 20
>
> 1. Citizenship of the Union is hereby established…..
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> (a) the right to move and reside freely within the territory of the Member States;
>
> …..
>
> These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and the measures adopted thereunder.
>
> Article 21
>
> Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

THE RIVAL CASES

25. For the *Appellant*, Mr. Matthew Ryder QC put at the forefront of his submissions on Art. 8, ECHR what he termed a debate between the Courts in this country and the European Court of Human Rights ("the Strasbourg Court") as to the use of "intuitive stops". He highlighted the decision of *Gillan v UK* (2010) 50 EHRR 45 (*"Gillan (Strasbourg)"*), where the Strasbourg Court ruled that powers to stop and search persons under s.44 TACT 2000 were in breach of Art. 8 (and potentially Art. 5): those powers were neither sufficiently circumscribed nor subject to adequate safeguards against abuse; accordingly they were not in accordance with the law. That decision of the Strasbourg Court stood in obvious conflict with the decision of the House of Lords in the same case, which held that there had been no such violation: *R (Gillan) v Comr of Police of Metropolis* [2006] UKHL 12; [2006] 2 AC 307 (*"Gillan (HL)"*). Mr. Ryder's submission was that the reasoning of *Gillan (Strasbourg)* applied to the present case in that there was no distinction to be drawn between s.44 and the provisions of Schedule 7. It was not good enough to say that the Schedule 7 powers were confined to ports and airports; these powers too were not in accordance with the law. Moreover, the Schedule 7 powers were not proportionate; if directed to border control they were too broad; but if border control was simply the "trigger" for the exercise of the power, then it was not rationally connected to the aim of the legislation and the threat it sought to combat. If there was a genuine threat, the powers were arbitrary, in that they should not have been limited to ports and airports. Mr. Ryder did not shrink from the consequences of his submission, admitting and indeed averring that insofar as the present case was indistinguishable from *Gillan*, he must fail on this point before this Court, as we were bound by *Gillan (HL)*. But, he said, we should give leave for him to pursue the matter to the Supreme Court. As it seemed to us, while not abandoning Art. 5, Mr. Ryder's submissions under this heading – other than asserting that there had been a "deprivation of liberty" – added nothing of substance to his argument under Art. 8.

26. As to FOM, Mr. Ryder emphasised that this was an independent and important right. It served to counter the argument that the Schedule 7 powers bit only on individuals who chose to travel. The Schedule 7 powers had a "chilling effect", frightening people off travel.

27. Art. 6, ECHR raised questions which were completely separate from Arts. 8 and 5 and rights to FOM. Looking at the substance of the matter, Art. 6 was engaged from, at latest, the time when the TACT 1 form was served. On pain of a criminal penalty, the Appellant was obliged to answer questions exposing her to the risk of self-incrimination without the assistance of her lawyer in attendance. If Art. 6 was once engaged, then there was no sufficient basis for the Respondent's submission that the Appellant's rights were not violated. In the absence of any statutory exclusion, it was not an answer to the breach of the Appellant's privilege against self-incrimination that a criminal Court may have excluded any evidence thus obtained pursuant to s.78 of the Police and Criminal Evidence Act 1984 ("PACE").

28. For the *Respondent*, Mr. Louis Mably submitted that not every exercise of the Schedule 7 powers resulted in the engagement of either Art. 8 or Art. 5, ECHR. On the facts, however, he accepted that the stopping and questioning of the Appellant did engage those Articles. That said, any interference with the Appellant's Art. 8 rights was justified; such interference was in accordance with the law and proportionate.

There were a number of important and material differences between Schedule 7 and s.44; the border control context was crucial. *Gillan (supra)* was distinguishable and this Court was not bound by decisions in that case; the Appellant's argument ought thus to fail both before the Strasbourg Court and, *a fortiori*, in the domestic Courts of this country. The Schedule 7 powers were an aspect of border control not criminal investigation; it was therefore unsurprising that there was no requirement of reasonable suspicion. The Schedule 7 powers were an essential tool in the fight against terrorism. So far as concerned Art. 5, the structure of the argument was similar; Mr. Mably accepted that there had been a deprivation of liberty under Art. 5.1 but it was justified within the terms of Art. 5.1(b). The Appellant's right to FOM added nothing to the argument.

29. What remained was Art. 6, ECHR. In a nutshell, Schedule 7 did not engage Art. 6 but, if it did, there was no violation of the privilege against self-incrimination – a privilege which was in any event not absolute. The examination powers under Schedule 7 were not exercised for the purpose of obtaining evidence for use in criminal proceedings. This was not an inquiry preparatory to criminal proceedings but a public interest inquiry related to border control. The Schedule 7 powers of examination thus did not give rise to the need or rationale for Art. 6 protection. If that was wrong, then the CPS was bound to have regard to Art. 6 and the discretion under s.78 PACE was to be applied compatibly with Art. 6. Accordingly, any evidence obtained pursuant to the exercise of Schedule 7 powers could only be admitted in criminal proceedings <u>if</u> Art. 6 was not violated. Although there was no statutory prohibition on such use of material obtained under Schedule 7 and the CPS could not and did not wish to give a blanket undertaking, neither Mr. Mably nor (he told us, on instructions) the CPS could postulate a hypothetical example where such evidence could be used compatibly with Art. 6. Almost inevitably, any material obtained pursuant to a Schedule 7 examination would be excluded from a subsequent criminal trial. The only known instance where Schedule 7 material had been adduced in evidence in a criminal trial had arisen at the defendant's request. Realistically, therefore, s.78 PACE stood as a potent safeguard, so that even if Art. 6 was engaged, there was no violation of the Appellant's rights thereunder.

30. We were grateful to both Mr. Ryder and Mr. Mably for the quality of their written and oral submissions.

31. As appears from this summary, the principal Issues from the Case can be reformulated and conveniently considered under the following headings:

i) Issue (I): Arts. 8 and 5 ECHR and rights to FOM;

ii) Issue (II): Art. 6 ECHR.

Before turning to these Issues, it is necessary to say something of the remedies for which the Appellant contends and helpful to outline both the legislative history of Schedule 7 as well as the position of the *Independent Reviewer of Terrorism Legislation*.

REMEDIES

32. At the outset of the hearing and subsequently we raised with the parties the question of the remedies sought by Mr. Ryder on behalf of the Appellant. We wished to clarify whether the Appellant advanced a general challenge to the compatibility of the Schedule 7 powers with the various ECHR provisions already highlighted or merely a complaint as to their exercise in this individual case. Insofar as the Appellant's case involved or might lead the Court to consider granting a Declaration of Incompatibility pursuant to s.4 of the Human Rights Act 1998 ("the HRA 1998"), we were mindful of the requirements to give notice to the Crown in accordance with CPR Part 19.4A and CPR 19APD.6.

33. In the event, it became clear to us that Mr. Ryder's argument was not confined to the facts of this case. His submissions entailed, first, an allegation of abuse of process based on the violation of the Appellant's ECHR and FOM rights; secondly, a Declaration of Incompatibility; thirdly, the contention that the Appellant's rights had been infringed, even if no Declaration of Incompatibility was granted. Mr. Mably's position was that no Declaration of Incompatibility should be granted; the Appellant's rights had not been infringed and even if they had (whether considering her individual position or the compatibility of the Schedule 7 provisions with the ECHR more generally), there had been no abuse of process.

34. In the circumstances, we were grateful for the attendance at the hearing of Mr. Paul Nicholls QC, on behalf of the Secretary of State for the Home Department ("the SSHD"). Notice to the Crown had only, however, been given late in the day, so that Mr. Nicholls was (understandably) not in a position to take an active part in the hearing. An adjournment would have been obviously inconvenient but, with the constructive assistance of all counsel, a practical solution was devised. We would proceed with the hearing on the understanding that if, in the course of preparing our judgment, we found ourselves provisionally inclining to a Declaration of Incompatibility (of course, a remedy of last resort), then we would re-list the matter for further argument so that Mr. Nicholls could be heard.

THE LEGISLATIVE HISTORY

35. In dealing with this topic, we have derived considerable assistance from the agreed note furnished by counsel at the Court's request.

36. Against the background of the terrorist threat emanating from Northern Ireland, the Prevention of Terrorism (Temporary Provisions) Act was enacted in 1974 ("the PTA 1974"). Pursuant to s.8 of the PTA 1974, the Secretary of State was empowered, by order, to provide for the examination of persons arriving in, or leaving, Great Britain or Northern Ireland, with a view to determining whether the person appeared to be a terrorist, was subject to an exclusion order or there were grounds for suspecting that the person had committed an offence in relation to an exclusion order.

37. The PTA 1974 was repealed and replaced by the PTA 1976, in which (by s.13 thereof) the same scheme for the making of an order in relation to port and border examinations was enacted. The Prevention of Terrorism (Supplemental Temporary Provisions) Order 1976 ("the 1976 order") was made under the PTA 1976. This was the provision unsuccessfully challenged before the European Commission of Human

Rights ("the Commission") in *McVeigh v United Kingdom* (1981) 5 EHRR 71. We shall return to that decision in more detail later but it is worth pausing at this stage to underline that the Commission (at [21] – [24]) had particular regard to the nature of the terrorist threat and the Common Travel Area ("CTA") covering the United Kingdom and the Republic of Ireland – thus meaning that there was no general system of immigration control applying to travel between Great Britain, Northern Ireland and the Republic of Ireland.

38. The PTA 1976 remained in force as enacted (albeit renewed each year) until 1984, when it was repealed and replaced by the PTA 1984, which conferred the same power on the Secretary of State to make an order in relation to port and border examinations.

39. The PTA 1984 was repealed and replaced by the PTA 1989. The powers relating to port and border examinations were incorporated into Schedule 5 to that Act. These provisions remained in force (on the basis of annual renewal subject to Parliamentary approval) until February 2001, when the provisions of Schedule 7 (to TACT 2000) came into force.

40. In 1995 Lord Lloyd of Berwick was asked by the then government to review the laws dealing with terrorism. This was at a time when there were prospects of a resolution to the problems associated with Northern Ireland (a ceasefire having come into effect that year); ultimately, those prospects came to fruition with the signing of the Good Friday Agreement in April 1998.

41. Lord Lloyd's Report, entitled "*Inquiry into Legislation Against Terrorism"* (Command Paper No. 3420 of 1996) was published in October 1996 and comprised, with respect, a comprehensive review of the laws concerning terrorism. For present purposes, its relevance lies in the treatment of "Port Powers" (as they were termed), dealt with at paras. 10.26 – 10.57. Those paragraphs repay careful study.

42. At para. 10.26, Lord Lloyd dealt with the frequency with which the powers were used: some 720,000 passengers were stopped in 1995 for questioning, amounting to less than half a percent of the 170 million travellers passing through the UK's ports and airports that year.

43. At para. 10.27, Lord Lloyd placed these powers into geographical context:

> " 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 that the police have any power to stop and question people passing through ports. Immigration checks on EU nationals having in most cases 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. "

44. Later, at para. 10.36, Lord Lloyd posed the question of whether the "Port Powers" would still be necessary "once a lasting peace has been established in Northern Ireland".

45. In the course of answering that question (in the event, affirmatively), Lord Lloyd made a number of significant observations. At para. 10.41, he said this:

> " …special 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…"

At para. 10.45, he adverted to the fact that the Port Powers gave rise to few formal complaints. It was relatively rare for an examination under these powers to lead to a detention and "only a handful of examinations lead to charges for offences under the prevention of terrorism legislation or other legislation" (para. 10.46). He went on to put the matter this way (at para. 10.47):

> " The port powers are among the less controversial of the provisions in the PTA. Previous reviewers have testified unambiguously to their worth and very few of the people who submitted evidence to the Inquiry took exception to the existing powers. Many felt that the Schedule 5 powers represented an effective defence against international terrorism which it would be folly to abandon. Others had no strong feelings, but understood the case for continuing port checks. "

46. In due course, Lord Lloyd (at para. 10.56) answered his own question:

> " **I have concluded that the powers to examine people at ports should remain in force, substantially as they already exist in Schedule 5 of the PTA and should be exercisable at designated and non-designated ports.…**…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. They will continue to serve an important purpose in checking traffic arriving from the CTA, which would otherwise be left open. The special branch officers have expertise, and access to information, which could not effectively be duplicated by immigration officers. The intelligence which they provide is valued by the Police Service and the Security Service. "

47. Lord Lloyd did, however, proceed to recommend a number of modifications to the details of the powers (at para. 10.57). Those included the introduction of a Code of Practice and a reduction in the maximum period of detention – both since enacted, if not in precisely the same terms as recommended by Lord Lloyd.

48. For completeness, it may be noted that at paras. 10.1- 10.25 of his Report, Lord Lloyd set out why he recommended the re-enactment of powers that later became s.44 of TACT 2000, considered in *Gillan (supra)* and to which we shall return.

49. Subsequently, the then government published a consultation paper in December, 1998, entitled "*Legislation Against Terrorism*" (Command 4178). This paper post-dated the Good Friday Agreement. Chapter 11 dealt with port and border controls for counter-terrorist purposes. This consultation paper underlined that under the pre-cursor/s to Schedule 7, "reasonable suspicion" was not required before a stop could be made (para. 11.3). The paper furnished some statistics on the exercise of these powers in 1997 (at para. 11.6):

> " The vast majority of examinations last only a few minutes. In 1997 for example, out of nearly 1 million passengers who were stopped, only 803 were examined for more than one hour. Of these only 10 were detained beyond the 24 hour point. Of the 10, 7 were suspected of involvement in Irish terrorism and 3 of international terrorism, and one of the latter was held for more than 48 hours. "

50. The consultation paper went on to pose the same question that Lord Lloyd had raised: was there a continuing need for these powers? It furnished this answer (at para. 11.10):

> " Lord Lloyd considered whether these powers would be required in the event of a lasting peace in Northern Ireland in some detail in his report. He came to the conclusion that they would. They provided, in his view, an essential first line of defence against the terrorist trying to enter the United Kingdom or operate within it. The Government agrees that the powers are effective both as a deterrent, and in practice. There is ample evidence to suggest that the ability of examining officers to stop and search at random and, without the need for reasonable suspicion, has disrupted both Irish and international terrorist operations; and explosives, guns and ammunition and other terrorist equipment have been recovered through the use of these powers. The Government has therefore concluded that similar powers should be included in any new permanent counter-terrorist legislation."

51. After the consultation process had been completed, TACT 2000 was passed. The Explanatory Notes make express reference to the consultation paper.

52. It should be noted that TACT 2000 was enacted after the HRA 1998 and that Parliament did so in the knowledge of the provisions and requirements of the HRA 1998. TACT 2000 of course pre-dates the various terrorist atrocities in the years which followed, in particular those of 9/11 in New York (and elsewhere in the United States) and 7/7 in London.

THE INDEPENDENT REVIEWER OF TERRORISM LEGISLATION

53. The office of *Independent Reviewer of Terrorism Legislation* ("the Independent Reviewer") came into being in 1984. Legislative provision is made for an Annual Report to Parliament by the Independent Reviewer, currently pursuant to s.36 of the Terrorism Act 2006 ("TACT 2006"). These Reports cannot of course be decisive as to the outcome of litigation; but they are of very considerable significance. The Independent Reviewer is, as indicated by the title of his office, an independent figure and, if we may say so, one of standing. He has access to all relevant material. His Reports evidence the information conveyed to Parliament about the functioning of the Terrorism Legislation.

54. From September 2001 until February 2011, Lord Carlile of Berriew QC was the Independent Reviewer. Thereafter, Lord Carlile was succeeded by Mr. David Anderson QC.

55. As we understand it, Lord Carlile's Reports at no stage questioned the necessity for the existence of the Schedule 7 powers, while consistently expressing the view that the number of stops at ports could be reduced without risk to national security.

56. In his 2012 Report ("the 2012 Report"), Mr. Anderson gave these figures as to the frequency of the exercise of Schedule 7 powers:

> "9.14 In the year to 31 March 2011, over the UK as a whole:
>
> (a) There was a total of 85,423 Schedule 7 examinations, 20% down on 2009/10.
>
> (b) 73,909 of those examinations were on people, and 11,514 on unaccompanied freight.
>
> (c) 2,291 people (3% of those examined – a similar percentage to 2009/10) were kept for over an hour.
>
> (d) 915 people were detained after examination (1% of those examined, up from 486 in 2009/10).
>
> ……
>
> (f) There were 31 counter-terrorism or national security-related arrests. However 25 of those were in a single force area…
>
> ……
>
> These figures have to be set against the numbers of passengers travelling through UK airports (213 million), UK seaports (22 million) and UK international rail ports (9.5 million) during the year. In total, only 0.03% of passengers were examined under Schedule 7 in 2010/11."

The 2012 Report noted (at para. 9.16) that these figures did not reflect "the substantial number" of people who were asked "screening questions" only (lasting between a few seconds and a few minutes and not constituting the beginning of an examination).

57. The 2012 Report carefully addressed the question of ethnic origins of those examined under Schedule 7 (at paras. 9.20 *et seq*). As noted, self-defined members of ethnic minority communities constituted a majority of those examined and 92% of those detained under Schedule 7 (as set out above, those detained amounting to 1% of the total of those examined). In, with respect, very balanced terms, the Independent Reviewer went on to say this:

> "9.23 …..Detentions (plainly) and examinations (almost certainly) are thus imposed on members of minority ethnic communities – particularly those of Asian and 'other' (including North African) ethnicity – to a greater extent than their presence in the travelling population would seem to warrant.
>
> 9.24 That fact alone does not mean that examinations and detentions are misdirected. ……Schedule 7 should not be used (as section 44 stop and search was from time to time used) in order to produce a racial balance in the statistics: that would be the antithesis of intelligence-led policing. The proportionate application of Schedule 7 is achieved by matching its application to the terrorist threat, rather than to the population as a whole.
>
> 9.25 There is however no room for complacency…..
>
> 9.26 The ethnicity figures provide, in themselves, no basis for criticism of the police. They however underline the need for vigilance, particularly when some minority communities are understandably sensitive about the application of Schedule 7.. "

58. Mr. Anderson observed (at para. 9.28) that Schedule 7 was a "long-established power which has not traditionally been the subject of campaigning or press interest" – unlike s.44.

59. Turning to the utility of the Schedule 7 powers, the Independent Reviewer expressed himself forcefully under these headings (at paras. 9.43 *et seq*):

    i) Securing evidence which assists in the conviction of terrorists;

    ii) Intelligence about the terrorist threat;

    iii) Disruption or deterrence;

    iv) Recruitment as informants.

60. As to i), the Independent Reviewer accepted (at para. 9.44) that the focus was not on answers given in interview – which "because of the compulsion to answer" would "almost certainly" be inadmissible in criminal proceedings (see further below).

Instead, the product here would be expected to consist of physical possessions or the contents of mobile phones, laptops and the like. Mr. Anderson went on to say (at para. 9.46) that "…the majority of examinations which have led to convictions were intelligence-led rather than based simply on risk factors, intuition or the '*copper's nose*'…."

61. As to ii), the Independent Reviewer underlined the importance of the contribution made by such examinations to the "rich picture" of the terrorist threat to the United Kingdom.

62. Heading iii) essentially speaks for itself and Schedule 7 stops have the advantage of possibly dissuading "nervous or peripheral members of terrorist networks" from pursuing their plans. Moreover, such stops "may help inhibit the use by terrorist groups of '*clean skins*' not previously known to police or to the security and intelligence services".

63. As to iv), Schedule 7 examinations, once completed, could serve as an opportunity for the identification of those who might be recruited as informants. In our judgment, the utility is obvious. That said and as Mr. Anderson emphasised (at para. 9.51), this objective could only be a "by-product" of the exercise of Schedule 7 powers:

> "… Schedule 7 does not permit a person to be stopped or examined for the purpose of recruitment as an informant. If such a power is thought necessary, it should be legislated for."

64. The Independent Reviewer's conclusion (at para. 9.52) was that the "utility of the Schedule 7 power" was "scarcely in doubt". It stood in "stark contrast" to s.44. It was important, however, that the "considerable attractions" of Schedule 7 "….should not distract ports officers from the fact that the power may only be used with the genuine intention of determining whether someone appears to be or to have been concerned in the commission, preparation or instigation of acts of terrorism" (at para. 9.53).

65. The Independent Reviewer was struck (at para. 9.58) by the "light touch" and "professionalism" of nearly all the ports officers he observed doing their job, an approach aimed at ensuring that interviewees left "with a smile on their face" – though Mr. Ryder drew our attention to other materials perhaps suggesting a somewhat less rosy picture.

66. In the 2012 Report, Mr. Anderson repeated his suggestion – first advanced in his 2011 Report – that there should be a review of the operation of Schedule 7 powers, including a public consultation. (That consultation has since taken place and we touch upon it below.)

67. For completeness, the 2012 Report alluded to *Gillan (supra)* but it is unnecessary to include those observations here.

ISSUE (I): Arts. 8 and 5 ECHR and RIGHTS to FOM

(I) Art. 8

68. *(1) Introduction:* As foreshadowed, Mr. Mably accepted that, on the facts of this case, Art. 8.1 was engaged but contended that any interference with the Appellant's Art. 8 rights was justified. Accordingly, Art. 8.2 formed the battleground between the parties. Mr. Ryder developed a two-pronged attack under this heading, both general and specific to the facts of this case. First, the Schedule 7 powers were not "in accordance with the law". Secondly, they were not proportionate. While there is a degree of overlap between these arguments, they call for separate analysis. We take them in turn, dealing, first with the general attack before turning to the specific facts of the Appellant's case. It seems appropriate to approach this Issue in that order, because if Mr. Ryder's broader-based argument succeeds then, inevitably, the Appellant's individual case must succeed; if not, then the question of whether the Appellant's Art. 8 rights were breached by her treatment at East Midlands Airport will remain to be considered.

69. *(2) Not in accordance with the law: (A) The relevant test:* We shall come, presently, to the conflict, or inconsistency, between *Gillan (HL)* and *Gillan (Strasbourg)*. As it seems to us, however, in terms of stating the relevant test, the House of Lords and the Strasbourg Court spoke with one voice; in essence, individuals are not to be subjected to the arbitrary exercise of power by public officials. Thus, in *Gillan (HL)*, Lord Bingham expressed the matter as follows (at [34]):

> " The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided."

70. For its part, the Strasbourg Court said this:

> " 76. The Court recalls its well-established case law that 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 art. 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 … 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. "

71. *(B) Precedent:* Given the obvious conflict or inconsistency between *Gillan (Strasbourg)* and *Gillan (HL)*, the question arises as to which we must follow, should we come to the conclusion that the present case is indistinguishable from (i.e., falls within the *ratio decidendi* of) *Gillan*. The context in which this question arises comprises both our domestic rules of precedent and the Court's duty under s.2(1) of the HRA 1998 to "take into account" (i.e., ordinarily follow) any judgment of the Strasbourg Court. The answer to the question – should it arise – is fortunately clear from *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465 and subsequent authorities. Our duty is to follow the decision of the House of Lords, if need be granting the unsuccessful party leave to appeal to the Supreme Court to resolve the inconsistency: see, esp., Lord Bingham, in *Kay*, at [43] – [44].

72. We turn to *Gillan*, conscious that <u>if</u> the present case is indistinguishable, then the Appellant must fail before us, whatever other orders we may make.

73. *(C) Gillan (HL):* This litigation concerned an authorisation made under ss. 44 and 45 of TACT 2000 by an Assistant Commissioner of the Metropolitan Police, allowing police officers to stop and search members of the public at random for articles that could be used in connection with terrorism. That authorisation was made in relation to the whole of the Metropolitan Police District and lasted for 28 days (and was confirmed under s.46 of TACT 2000). Within the period of the authorisation and its geographical limits, the Appellants in *Gillan (HL)* were stopped and searched by police officers, pursuant to the authorisation, while on their way to, or present at, a demonstration against an arms fair. Nothing incriminating was found and the Appellants brought proceedings against the Commissioner of Police of the Metropolis and the SSHD seeking judicial review of their treatment, the authorisation and confirmation. So far as principally relevant, ss. 44 and 45 of TACT 2000 provided as follows:

> " *Power to stop and search*
>
> 44. …..
>
> (2) An authorisation under this subsection authorises any constable in uniform to stop a pedestrian in an area or at a place specified in the authorisation and to search -
>
> (a) the pedestrian;
>
> (b) anything carried by him.

> (3) An authorisation under subsection (1) or (2) may be given only if the person giving it considers it expedient for the prevention of acts of terrorism.
>
> 45. (1) The power conferred by an authorisation under section 44(1) or (2) –
>
> (a) may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and
>
> (b) may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind. ”

74. At the very outset of his speech in *Gillan (HL)*, Lord Bingham said this:

> “ 1. It is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence. So jealously has this tradition been guarded that it has almost become a constitutional principle. But it is not an absolute rule. There are, and have for some years been, statutory exceptions to it. These appeals concern an exception now found in sections 44 to 47 of the Terrorism Act 2000.”

In the event, the House of Lords dismissed the challenge to the use of those provisions of TACT 2000 and the sections themselves. The Appellants in *Gillan (HL)* had relied on Arts. 5, 8, 10 and 11 of the ECHR.

75. Lord Bingham’s reasoning on this issue was, with respect, crisply stated. The stop and search powers satisfied the relevant test of lawfulness. TACT 2000 informed the public that those powers were available, if authorised and confirmed. The Act, together with the accompanying statutory Code defined and limited the powers with “considerable precision” (at [35]) and described the procedure in detail. Lord Bingham went on (*ibid*) to say this:

> “ ……it would stultify a potentially valuable source of public protection to require notice of an authorisation or confirmation to be publicised prospectively. The efficacy of a measure such as this will be gravely weakened if potential offenders are alerted in advance. ….In exercising the power the constable is not free to act arbitrarily, and will be open to civil suit if he does. It is true that he need have no suspicion before stopping and searching a member of the public. This cannot, realistically, be interpreted as a warrant to stop and search people who are obviously not terrorist suspects, which would be futile and time-wasting. It is to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion. ”

There had been no suggestion that the constables in the individual cases had exercised their powers in a discriminatory manner, so that Lord Bingham preferred not to say anything on that topic (*ibid*).

76. Although, strictly speaking out of order, it is convenient to note here Lord Bingham's indication, earlier in his speech, that if the lawfulness of the search was once assumed, then:

i) The detention was lawful under Art. 5(1)(b), ECHR, "to secure the fulfilment of an obligation prescribed by law" (at [26]);

ii) The search was proportionate under Art. 8.2; it would be "…impossible to regard a proper exercise of the power….as other than proportionate when seeking to counter the great danger of terrorism" (at [29]).

77. For completeness, it may be noted that Lord Bingham referred in terms to the Schedule 7 powers. He observed (at [9]) that, like s.45, Schedule 7 dispensed with the requirement of reasonable suspicion; it made "….detailed provision for the stopping and questioning of those embarking and disembarking at ports and airports, without reasonable suspicion, supplemented by a power to detain for a period of up to nine hours." Furthermore, Lord Bingham inclined to the view (at [28]) that "an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports…" could "scarcely be said" to reach the requisite level of seriousness for Art. 8 to be engaged.

78. For present purposes, it is unnecessary to make any detailed reference to the other speeches in their Lordships' House, so far as they concurred, powerfully, with Lord Bingham on the question of lawfulness. It is, however, of some interest to note that three of their Lordships addressed the risk that the s.44 power would be exercised in a discriminatory fashion: Lord Hope, at [41] – [47]; Lord Scott, at [68]; Lord Brown, at [81] and following. The particular concern related to the exercise of the power more frequently with regard to persons of Asian appearance than to others. To an extent, this concern overlapped with the argument as to random searches. It suffices to record here certain passages in the speech of Lord Hope and the concluding paragraph in the speech of Lord Brown.

79. Lord Hope introduced the matter this way:

> " 41. One has only to observe the huge numbers of people moving every day through this country's transport network to appreciate the fact that it would be wholly counter-productive for the police to be compelled to exercise the section 44 power in these circumstances on a basis that was a purely random one. Those they might wish to stop for very good reasons would slip through the net as the process of random selection was being conducted. A brief study of the selection process would be enough to guide the terrorist as to how to organise his movements so that he could remain undetected. A system that is to be effective has to be flexible. Precise rules cannot be laid down in advance. Much has to be left to the discretion of the individual police officer.

> 42. Common sense tells us that the nature of the terrorist threat will play a large part in the selection process. Typically terrorist acts are planned, organised and perpetrated by people acting together to promote a common cause rather than by individuals. They will have a common agenda. They are likely to be linked to sectors of the community that, because of their racial, ethnic or geographical origins, are readily identifiable. That was true of sectarian violence during the troubles in Northern Ireland….. It is certainly true today, as the current wave of international terrorism is linked to groups that have an Islamic fundamentalist background. "

80. The key, in Lord Hope's view, was to ensure that "…..each person is treated as an individual and not assumed to be like other members of the group" (at [45]). The mere fact that a person appeared to be of Asian origin was not a legitimate reason for the exercise of the power (*ibid*). The selection process (for the exercise of the s.44 power) had thus to be based on more than the mere fact of a person's racial or ethnic origin (at [46]); that further selection process "makes the difference between what is inherently discriminatory and what is not" (*ibid*). Lord Hope expressed his conclusion in these terms:

> "47. On balance, therefore, …it is not inevitable that stopping persons who are of Asian origin in the exercise of the section 44 power will be found to be discriminatory. But the risk that it will be employed in a discriminatory fashion cannot be discounted entirely…."

81. Lord Brown stated his conclusion as follows:

> " 92. Of course it is important, indeed imperative, not to imperil good community relations, not to exacerbate a minority's feelings of alienation and victimisation, so that the use of these supposed preventative powers could tend actually to promote rather than counter the present terrorist threat. I repeat….that these stop and search powers ought to be used only sparingly. But I cannot accept that, thus used, they can be impugned either as arbitrary or as 'inherently and systematically discriminatory'….simply because they are used selectively to target those regarded by the police as most likely to be carrying terrorist connected articles, even if this leads, as usually it will, to the deployment of this power against a higher proportion of people from one ethnic group than another. I conclude rather that not merely is such selective use of the power legitimate; it is its *only* legitimate use. To stop and search those regarded as presenting no conceivable threat whatever (particularly when that leaves officers unable to stop those about whom they feel an instinctive unease) would itself constitute an abuse of the power. Then indeed would the power be being exercised arbitrarily. "

82. *(D) Gillan (Strasbourg):* Differing from the House of Lords, essentially as to the application of the relevant test, the Strasbourg Court held that there had been a violation of Art. 8, ECHR; the Appellants in *Gillan* thus succeeded before that Court and there was no need to examine their contentions under Arts. 5, 10 and 11.

83. The Strasbourg Court took the view that the safeguards provided by domestic law had not been demonstrated to "constitute a real curb" on the wide powers afforded to the executive "so as to offer the individual adequate protection against arbitrary interference" (at [79]). The Court was troubled by the "breadth of the discretion" conferred on the individual police officer (at 83]); the relevant Code governed "…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…" (*ibid*). The Court was further struck (unfavourably) by the extent to which the police had recourse to the stop and search powers and the lack of evidence that arrests for terrorism offences had resulted from their exercise (at [84]).

84. The Strasbourg Court's conclusion emerges from the following passage in its judgment:

> "85. In the Court's view, there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration, as the judgments of Lord Hope, Lord Scott and Lord Brown recognised. The available statistics show that black and Asian persons are disproportionately affected by the powers, although the independent reviewer has also noted, in his most recent report, that there has also been a practice of stopping and searching white people purely to produce greater racial balance in the statistics. There is, furthermore, a risk that such a widely framed power could be misused against demonstrators and protestors in breach of art. 10 and/or 11 of the Convention.
>
> 86. The Government argues that safeguards against abuse are provided by the right of an individual to challenge a stop and search by way of judicial review or an action in damages. But the limitations of both actions are clearly demonstrated by the present case. In particular, in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised.
>
> 87. In conclusion, the Court considers that the powers of authorisation and confirmation as well as those of stop and search under ss. 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore, 'in accordance with the law' and it follows that there has been a violation of art. 8 of the Convention."

85. The Strasbourg Court made no reference to Schedule 7 but addressed the position at airports in the following terms:

> "64. The Court is also unpersuaded by the analogy drawn with the search to which passengers uncomplainingly submit at airports or at the entrance of a public building. It does not need to decide whether the search of the person and of his bags in such circumstances amounts to an interference with an individual's art. 8 rights, albeit one which is clearly justified on security grounds, since for the reasons given by the applicants the situations cannot be compared. An air traveller may be seen as consenting to such a search by choosing to travel. He knows that he and his bags are liable to be searched before boarding the aeroplane and has a freedom of choice, since he can leave personal items behind and walk away without being subjected to a search. The search powers under s.44 are qualitatively different. The individual can be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search. "

86. It is convenient to defer (briefly) discussion as to whether this case, involving Schedule 7 powers, is distinguishable from *Gillan*, concerning s.44 powers.

87. *(E) McVeigh:* We have already introduced the decision in *McVeigh (supra)*, when dealing with the legislative history. It will be recollected that the 1976 order was unsuccessfully challenged before the Commission in *McVeigh*. The complaint concerned two men who were arrested on arrival in Liverpool from Ireland and then detained for 45 hours for "examination" under the 1976 order. They were searched, questioned and photographed and also had their fingerprints taken. Ultimately, no charges were preferred against the applicants. The Commission approached the case on the basis that the applicants were innocent holidaymakers. The applicants complained, *inter alia*, that their Art. 8 rights had been breached. The complaint was rejected by the Commission. Its reasoning appears from the headnote (at pp. 71-2):

> " Where in the course of examination under the prevention of terrorism legislation, persons are searched, questioned about their private lives, photographed and have their fingerprints taken, any interference by these means with their right to respect for their private life may be justified under Article 8(2) as 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….."

88. It is fair to say that the reasoning on this issue was, with respect, somewhat brief. It is also fair to say that the Commission had regard (at [39]) to the selective use of the powers of arrest and detention for purposes of examination under the 1976 order. That said, the trenchant nature of the Commission's conclusion is noteworthy. So too are the Commission's observations (at [192]) as to the importance of "controlling the international movement of terrorists" and that the "necessary checks must obviously

be carried out as the person concerned enters or leaves the territory in question….". Further still, it is striking that despite the long history of this legislation (as set out above), we were not informed of any challenge to Schedule 7 (or its predecessors) reaching the Strasbourg Court between *McVeigh* and the hearing of the present case.

89. *(F) Discussion: (i) Gillan:* In our judgment, *Gillan* is distinguishable. It follows that Mr. Ryder is not doomed to fail here – by virtue of the doctrine of precedent – but equally he is not in a position to contend that he must or should be granted leave to appeal to the Supreme Court on the basis of conflict or inconsistency between *Gillan (HL)* and *Gillan (Strasbourg)*. Our reasons follow.

90. First, the Code (here) post-dates the statutory Code relating to the exercise of s.44 powers considered in *Gillan (Strasbourg)*. In our judgment, the substantive provisions of the Code applicable to Schedule 7 powers, augmented by the Practice Advice cannot fairly be described as going essentially to the "mode" in which the Schedule 7 powers are exercised rather than restricting or circumscribing their exercise. In this regard, we draw attention to paras. 9 and 10 of the Code and the accompanying Notes for guidance, set out above. In our view, those provisions elucidate the *basis* on which the Schedule 7 powers are to be exercised not simply how they are to be exercised. They underline that the powers in question are not to be used arbitrarily and can only be used "professionally". As such, even in the terms used by the Strasbourg Court in *Gillan* (at [77]), it can be said that the Code and the Practice Advice "afford a measure of legal protection against arbitrary interferences" by the Executive. That said and, not least, as we did not hear any detailed comparison between the Code and the Code considered in *Gillan*, we would not wish to rest our decision on this point.

91. Secondly and, in our view crucially, the distinction between this case and *Gillan* is one of substance, turning on the starkly different context of the powers in issue. In our judgment port and border control is very different from a power to stop and search, potentially exercisable anywhere in the jurisdiction. Conclusions as to the arbitrariness of the latter do not readily, still less necessarily, translate into conclusions as to the former. As Schedule 7, para. 2 (*supra*) makes clear, the relevant powers apply only to a limited category of people - namely those "at a port or in the border area", where "the examining officer believes that the person's presence…..is connected with his entering or leaving.." the country and also to a person on a ship or aircraft which has arrived at any place in Great Britain or Northern Ireland. That the category of persons to whom Schedule 7 powers are applicable may itself be numerically large is neither here nor there; port and border controls cannot be simplistically assimilated with generalised powers of stop and search exercisable anywhere in any circumstances. Although it could not be said that the references in *Gillan (HL)* (at [9] and [28]) to the Schedule 7 powers and searches at airports, or the like reference to airports in *Gillan (Strasbourg)* (at [64]), of themselves make good the distinction, they certainly point to a significant contextual difference. As has been shown by reference to both Lord Lloyd's Report and the views of the Independent Reviewer, the Schedule 7 powers have a long history. At least in significant part, they plainly reflect that this country, as "an island nation" concentrates controls at its national frontiers. We venture the view that the Strasbourg Court would accord a wide margin of appreciation for individual states in respect of port and border controls. The one decision from that Court in this particular area, *McVeigh (supra)*,

spoke (at [192], as already noted) of the importance of controlling the international movement of terrorists and of the necessary checks being carried out as the person enters or leaves the territory in question. All this seems very far removed from the considerations applicable to the s.44 powers considered in *Gillan*.

92. *(ii) Decision:* Free of the authority of *Gillan*, it remains to consider whether this ground of the Appellant's general challenge under Art. 8 to the Schedule 7 powers is made good. We do not think it is.

93. First, the scale of the task faced by the Appellant should not be under-estimated.

    i) As submitted by Mr. Mably, there are difficulties in suggesting that Schedule 7 powers are incompatible with Art. 8 when many exercises of these powers are unlikely even to engage Art. 8 - in that such intrusions as there are (for example, screening powers) fall below the threshold of a minimum level of seriousness.

    ii) As already noted, TACT 2000 was enacted with the HRA 1998 in mind and there has been no challenge to the compatibility of the Schedule 7 powers with the ECHR since then.

94. Secondly, the arguments which serve to distinguish *Gillan* (*supra*) serve likewise to emphasise the important and particular position of port and border controls. In the language of Lord Lloyd (at para. 10.56) and the 1998 government consultation paper (at para. 11.10), they constitute for an island nation "the first line of defence against the entry of terrorists"; there was a continuing need for such powers. In the 2012 Report, the Independent Reviewer's conclusion (at para. 9.52) was that the utility of the Schedule 7 powers in combating terrorism was "scarcely in doubt".

95. Thirdly, the Schedule 7 powers are applicable only to a limited category of people, as explained earlier: namely, travellers in confined geographical areas. Moreover, as the Independent Reviewer observed, while there can be no room for complacency, the statistics collated in the 2012 Report do not suggest arbitrary over-use or misuse in respect of members of minority ethnic communities. To repeat, only 0.03% of all passengers were examined under Schedule 7 in 2010/2011; of those examined, only 3% were kept for over an hour – thus 2,291 people out of a total of some 244 million passengers travelling through United Kingdom airports, seaports and international rail ports. Given the understandable sensitivities involved, the numbers of those examined from minority ethnic communities merit continuing scrutiny - but, at least on the 2010/2011 figures, do not of themselves and in the light of the contemporary terrorism threat, furnish a basis for criticism of the exercise of these powers. We readily understand why the Independent Reviewer has reached that conclusion. With respect and *a fortiori*, the observations of Lord Hope and Lord Brown in *Gillan (HL)* (at [41] – [47] and [92]) set out above, strike us as pertinent in this context.

96. Fourthly, as the Independent Reviewer firmly underlined in the 2012 Report, the Schedule 7 powers may only be exercised in respect of that limited category of people for the specified purpose "of determining" whether the person questioned "appears to be a person" who "is or has been concerned in the commission, preparation or instigation of acts of terrorism": Schedule 7, para. 2(1), read with s.40(1)(b) of TACT 2000. These cumulative limitations on the Schedule 7 powers tell, in our judgment,

against their being arbitrary. (See too, in an admittedly different context, the reasoning of Moses LJ in *R (Roberts) v Commissioner of Police for the Metropolis* [2012] EWHC 1977 (Admin), at [32] – [33].) Further, these limitations are strongly indicative of the Schedule 7 powers performing (in Mr. Mably's words) a classic function of port and border control.

97. Fifthly, properly considered (and as further discussed below), the Schedule 7 powers, though principally exercised by police officers, are an aspect of port and border control rather than of a criminal investigation. Viewed in this context, it is perhaps unsurprising that there is no requirement of reasonable suspicion for the powers to be exercised (as made clear by Schedule 7, para. 2(4)). At all events, having regard to the context, the absence of a requirement of reasonable suspicion does not lend any or significant support to the Appellant's case that these powers are exercised arbitrarily. Realistically, in the present context, the requirement of reasonable suspicion would deter the proper exercise of Schedule 7 powers and render them all too easy to evade, so increasing the risk to the public: see, *per* Lord Bingham, *Gillan (HL)*, at [35] and Moses LJ, in *Roberts (supra)*, at [40].

98. Sixthly and pulling the threads together, the underlying purpose of the Schedule 7 powers is to protect the public from terrorism, having regard to its international character. The manifest importance of that purpose and the utility of the powers do not, of course and of themselves, entail the conclusion that these powers are not arbitrary and thus compatible with Art. 8. However, the exercise of Schedule 7 powers is subject to cumulative statutory limitations. Their exercise is governed by the Code. Over and above the possibility of legal challenge if misused in an individual case, they are subject to continuing review by the Independent Reviewer. The absence of a requirement of reasonable suspicion is both explicable and justifiable. For the reasons already given, we are not at all persuaded that these powers render the public vulnerable "…to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than for which the power was conferred" – Lord Bingham's test for arbitrariness, in *Gillan (HL)*, at [34], set out above. Equally, we are not persuaded that these are unfettered powers, falling foul of the test applied in *Gillan (Strasbourg)*, at [76] – [77], also set out above; for our part, the "level of precision" of these powers (*ibid*) falls and falls comfortably on the right side of the line.

99. *(3) Not proportionate:* We turn to the Appellant's second general ground of challenge under Art. 8: namely, that the Schedule 7 powers are not proportionate.

100. *(A) The test:* Proportionality, as, with respect, succinctly observed by Sir Andrew Morritt V-C (as he then was) in *Aston Cantlow PCC v Wallbank* [2001] EWCA Civ 713; [2002] Ch 51, at [51]:

> "….calls for consideration of the appropriateness of the measure to the need which it is designed to meet."

The principle, as most recently formulated by Lord Sumption JSC, giving the lead majority judgment in *Bank Mellat v Her Majesty's Treasury (No.2)* [2013] UKSC 39 (at [20]), is as follows:

> " ….the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community."

The principle does not entitle the Court to substitute its own assessment for that of the decision-maker and, albeit varying with the nature of the issue and the context, contemplates a margin of appreciation or a degree of deference for the decision-maker: Lord Sumption, at [21], Lord Reed JSC, at [71]. As expressed by Lord Reed, at [93]:

> " The making of government and legislative policy cannot be turned into a judicial process."

101. Pausing here, we should make it plain that the decision in *Bank Mellat* post-dates the hearing in this case and that we have not called for argument from the parties in respect of it. We have not done so for a number of reasons. First, *Bank Mellat* refers to and draws upon a number of authorities cited to us, including *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, at 80 and *Huang v Home Secretary* [2007] UKHL 11; [2007] 2 AC 167, at [19]. Secondly, for present purposes, it is unnecessary to delve into the matters which resulted in a 5-4 division of opinion in the Supreme Court on this issue in *Bank Mellat*. Thirdly, that division of opinion related largely, though not entirely, to the application of the test rather than the test itself. Thus the passages from Lord Reed's dissenting judgment to which reference has already been made, were concurred in by the majority. Fourthly, insofar as the judgments in *Bank Mellat* do reveal a difference of principle in connection with the *ratio* of *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, then, if and insofar as this division concerns the present case (which we doubt), the majority view (by which we are bound) is no less favourable to the Appellant than the minority view.

102. *(B) The battleground:* As will already be apparent from the summary of the argument before us, the battleground (or certainly principal battleground) related to limb (ii) of the *Bank Mellat* test. In that regard, Mr. Ryder placed considerable emphasis on the decision in *A (supra)*. There, the House of Lords considered s.23 of the Anti-terrorism, Crime and Security Act 2001, which provided for the detention of non-nationals if the Home Secretary believed that their presence in the United Kingdom was a risk to national security and he/she suspected that they were terrorists who, for the time being, could not be deported because of fears for their safety or other practical considerations. The House allowed the Appellants' appeal and, *inter alia,* declared that s.23 was incompatible with Arts. 5 and 14, ECHR. S.23 applied to non-nationals suspected of international terrorism but not to United Kingdom nationals who were considered to present qualitatively the same threat; furthermore, the legislation permitted such non-nationals to leave the country at any time, provided they could safely do so. The House held that s.23 did not rationally address the threat to security and was a disproportionate response.

103. Lord Sumption expressed the majority analysis of *A* in *Bank Mellat*, at [25]:

> " A measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of its being discriminatory in some respect that is incapable of objective justification. The classic illustration is *A*…another case in which the executive was entitled to a wide margin of judgment….The House of Lords was concerned with a derogation from the Convention permitting the detention of non-nationals whose presence in the United Kingdom was considered by the Home Secretary to be a risk to national security and who could not be deported. The House held that this was not a proportionate response to the terrorist threat which provoked it……No one disputed that the executive had been entitled to regard the applicants as a threat to national security. Plainly, therefore, the legislation in question contributed something to the statutory purpose of protecting the United Kingdom against terrorism, if only by keeping some potential terrorists in prison. It was nevertheless disproportionate, principally because it applied only to foreign nationals. That was relevant for two reasons. One was that the distinction was arbitrary, because the threat posed by comparable UK nationals, to whom the legislation did not apply, was qualitatively similar, although quantitatively smaller. The other was that it substantially reduced the contribution which the legislation could make to the control of terrorism, and made it difficult to suggest that the measure was necessary. This was because if (as the Committee assumed) the threat from UK nationals could be adequately addressed without depriving them of their liberty, no reason was shown why the same should not be true of foreign nationals. "

104. As it seems to us, the support to be derived by the Appellant from *A (supra)* and its analysis in *Bank Mellat (supra)* depends on the objective justification and hence rationality both as to the breadth of the Schedule 7 powers and their limited applicability to (what may be termed) ports, airports and borders only.

105. *(C) Discussion and decision:* As will be recollected, the first limb of Mr. Ryder's argument under this heading focused on the breadth of the Schedule 7 powers. Those powers were not calibrated; they were not restricted to travel for the purposes of terrorism; the questioning they permitted had nothing to do with travel; they were thus altogether too broad to be categorised as an aspect of border control.

106. We respectfully disagree. First, this argument fails to grapple with the limits on the exercise of the Schedule 7 powers – as to the categories of those to whom they apply, the localities to which they are confined and the purpose for which the powers have been exercised. It is to be underlined that these are powers which can be exercised only for the purpose of determining whether a traveller at a port, airport or border area (using shorthand) appears to be or have been concerned with acts of terrorism. Secondly, there can be no attraction in confining these powers to travel for the purposes of terrorism. That the particular journey may or may not have been for the

purposes of terrorism is neither here nor there. Inhibiting or deterring the travel of someone otherwise engaged in the commission of acts of terrorism serves, in our view, a manifestly rational purpose related to port and border control. Thirdly and realistically, the ability to question widely is necessary to build up a picture of the travel in question and its connection (if such there be) to acts of terrorism. It is important to reiterate the statutory purpose of the examination; it concerns travel but not travel in a vacuum. Fourthly having regard to the context and statutory purpose, that these powers are principally to be exercised by police officers cannot be objectionable and does not at all suggest that they go beyond border control. The correct position is simply that port and border control is conducted by police, customs and immigration officers using a range of powers of which the Schedule 7 powers form part; by their nature, they are appropriately vested in the police (or at least principally so) – as explained in Lord Lloyd's Report, *supra*, at para. 10.27.

107. The second limb of Mr. Ryder's argument posited that if port and border control was simply a "trigger" for the exercise of these powers, then the powers were disproportionate; if the powers were addressing a genuine threat of terrorism, then there was no logical or rational reason to confine them to ports, airports and border areas. Here in particular, Mr. Ryder placed reliance on the decision in *A (supra)*.

108. With respect, we again disagree. First, there is an objective justification for the focus on ports, airports and border areas. It is of course true that most travellers have nothing whatever to do with terrorism. Equally, it is true that some terrorism is domestic not international in character. But it is also true and long recognised that much terrorism is international in character. Secondly and especially for this country, there are undeniably sound and eminently proportionate reasons for concentrating on ports, airports and border areas. To revert to the language of Lord Lloyd (at para. 10.27 of his Report), these are the "choke points". It is thus rational to target the Schedule 7 powers at the limited category of persons and in the particular localities already described. For the United Kingdom, ports, airports and border areas provide a particularly appropriate venue for detecting, deterring and disrupting potential terrorist activity. Thirdly, not every measure which is designed to address the threat of terrorism can or does cover the entire gamut of that threat. To suggest, however, that the Schedule 7 powers are disproportionate because they do not extend beyond ports, airports and border areas fails to take into account the compelling reasons already outlined for the focus on those localities. The powers in question in *A (supra)* and *Bank Mellat (supra)* were successfully challenged not because they addressed part only of the problem in question but because their ambit was not objectively justifiable. That is not this case.

109. Realistically, looking at the matter in the round and having regard to the indisputable utility of the Schedule 7 powers, the Appellant's proportionality arguments faced demanding hurdles. In our judgment, those hurdles were not surmounted – a conclusion reinforced when, as is appropriate given the degree of overlap, our reasons for rejecting the Appellant's "arbitrariness" argument are brought cumulatively into account.

110. *(4) The facts of the individual case:* Merely because the general attack on the compatibility of the Schedule 7 powers with Art. 8 ECHR has failed, *non constat* that the Appellant must fail in her arguments based on the particular facts of this case. However, in our judgment, such interference as there was with the Appellant's Art. 8

rights - occasioned by the exercise of the Schedule 7 powers in this case - was justified under Art. 8.2.

111. We have, much earlier, recounted the facts set out in the Case, together with the questions asked of the Appellant. Given that the Appellant was returning to the United Kingdom following a visit to her husband, imprisoned in France for terrorism offences, the obvious inference is that she was not stopped and examined on a random basis. While the questions asked of her were wide-ranging, they are eminently understandable once regard is had to the factual context. They were, moreover, rationally connected to the statutory purpose and in no way disproportionate. We reject the suggestion that questions as to the financing of the travel, the Appellant's means of communication, her background and the relationships inquired into had nothing to do with that statutory purpose.

112. *(5) Conclusion:* It follows that the Appellant's appeal based on Art. 8 ECHR fails. As a general matter, the Schedule 7 powers are neither arbitrary nor disproportionate. As expressed in *Bank Mellat (supra)* a fair balance has been struck between the rights of the individual and the interests of the community. Further, the challenge to the exercise of those powers based on the facts of this individual case likewise fails.

(II) Art. 5

113. In our judgment, the argument under Art. 5 can be dealt with summarily. On the facts of this case, the Respondent accepts that there was interference with the Appellant's Art. 5 rights. The issue is whether such interference was justified. In the light of *McVeigh (supra),* at [194], [196] and [197] and the observations of Lord Bingham, in *Gillan (HL),* at [26], the Appellant accepts that she cannot contend that the interference was other than "in order to secure the fulfilment of any obligation prescribed by law". Thus, provided that the interference was "lawful" the interference was justified. Our conclusion under Art. 8 that the Schedule 7 powers of examination are lawful, accordingly determines the Art. 5 debate as well.

(III) Rights to FOM

114. We have already set out the relevant provisions of the TFEU. We agree with Mr. Ryder thus far, namely, that the Appellant's FOM rights are important and serve to counter any argument (if and insofar deployed) that the Schedule 7 powers bit only on individuals who chose to travel. That said, it seems clear to us that the argument as to FOM rights is subsumed into the debate under Arts. 5, 8 and, to an extent (see below), 6 - and serves to shape the context of that debate. The Appellant's FOM rights do not require further and independent consideration and no more need be said of them.

ISSUE (II): Art. 6 ECHR

115. *(1) Introduction:* As already foreshadowed, two principal issues were canvassed under this heading. First, whether the Appellant's Art. 6 rights were engaged by the exercise of the Schedule 7 powers of examination. Secondly, if Art. 6 was engaged, whether the Appellant's Art. 6 rights were violated. As it struck us here, the essential focus of Mr. Ryder's submissions concerned the application of the Schedule 7 powers to the facts of this case – although arguably including a more general contention that

in such circumstances Schedule 7 powers would be incompatible with Art. 6. We propose to deal with the argument/s as addressed to us.

116. *(2) The legal framework:* We were referred to a large number of authorities in connection with Art. 6. It suffices, however, to summarise the principles derived from these authorities and relevant for present purposes.

117. First, although not expressed in the ECHR, there is an implied privilege against self-incrimination under Art. 6. This privilege, well-known to the common law, was explained by the Strasbourg Court in the matter of *Saunders v United Kingdom* (1996) 23 EHRR 313, arising out of the Guinness saga (at [68]):

> " …..although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention. "

See too, *Shannon v United Kingdom* (2006) 42 EHRR 31, at [32]; *Brown v Stott* [2003] 1 AC 681 (PC), at p.709.

118. Secondly, the rationale for the privilege extending to the pre-trial stage of proceedings lies in the possible impact of a prior failure to comply with the provisions of Art. 6 on the fairness of a subsequent criminal trial: *Salduz v Turkey* [2009] EHRR 19, at [50]. In the context of the related right to access to legal advice, the Strasbourg Court in *Salduz* went on to say this:

> " 52. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, art. 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation…..
>
> 54. In this respect, the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial……"

See too, *Shannon (supra)*, at [38].

119. It is important, however, to underline that "…the European jurisprudence under article 6(1) is firmly anchored to the fairness of the trial and is not concerned with extrajudicial inquiries…": *Reg. v Herts CC, Ex p Green Industries Ltd.* [2000] 2 WLR 373, at p.381, per Lord Hoffmann. As Lord Hoffmann went on to observe (*Green*, at p.383), the *Saunders* decision drew a "clear distinction" between "extrajudicial inquiries and the use of the material thereby obtained in a subsequent criminal prosecution". As the Strasbourg Court held in declaring the application inadmissible in *Allen v United Kingdom* (Application no. 76574/01), at p.5, the privilege against self- incrimination does not "…*per se* prohibit the use of compulsory powers to require persons to provide information about their financial or company affairs…". *Allen* was a tax case, where, it may be noted, the applicant had been sentenced to a total term of 7 years imprisonment. As appears from *Allen* (*loc cit*) and other authorities, there is a difference between "forced self-incrimination about an offence…previously committed" and the offence itself arising from a failure to comply with such compulsory provisions.

120. Instructively, in the present context, the Strasbourg Court in *McVeigh (supra)* considered (at [187]) whether the measures in question "were not in reality a preparatory stage of criminal proceedings". The Court answered that question in the negative, holding (*loc cit*) that it had not been established "that there was any sufficiently firm suspicion or intention to institute criminal proceedings for it to be said that the arrests fell within the criminal sphere".

121. Thirdly, where a person's ECHR rights are potentially engaged, the correct temporal starting point for considering whether those rights have been breached is the moment as from which he was charged for the purposes of Art. 6.1: *Ambrose v Harris* [2011] UKSC 43; [2011] 1 WLR 2435. In this regard, Lord Hope (at [62]) held that a "substantive" rather than a "formal" approach should be adopted in answering the question whether the position of the individual had been "substantially affected". As Lord Hope went on to say (at [63]):

> " The moment at which the individual is no longer a potential witness but has become a suspect provides as good a guide as any as to when he should be taken to have been charged for the purposes of article. 6.1…."

122. Fourthly, the privilege against self-incrimination, where applicable, is not an absolute privilege; there are numerous examples of legislation interfering with it: *R (Bright) v Central Criminal Court* [2001] 1 WLR 662, at p.693, *per* Maurice Kay J (as he then was).

123. Fifthly, if Art. 6 is engaged, while the gravity of the security context cannot, certainly by itself, justify extinguishing the very essence of the privilege against self-incrimination (*Shannon, supra,* at [38]), plainly not every statutory interference with the privilege will violate an individual's Art. 6 rights. Whether it does so or not will depend on a broad inquiry as to all the circumstances, encompassing the legislation, the interference with the privilege and the facts in question. That inquiry has been articulated in different terms in the authorities though, with respect, as it seems to us, there is little of substance as between the various formulations.

124. Thus, in *Brown v Stott (supra)*, a decision concerned with the statutory requirement on a defendant to identify the driver of a car, Lord Steyn (at p.709) put the matter in terms of proportionality:

> "….the right in question is plainly not absolute. From this premise it follows that an interference with the right may be justified if the particular legislative provision was enacted in pursuance of a legitimate aim and if the scope of the legislative provision is necessary and proportionate to the achievement of the aim. "

In *O'Halloran and Francis v United Kingdom* (2008) 46 EHRR 21, another decision concerning a failure to identify the driver of a car, the Strasbourg Court expressed the principle as follows (at [55]):

> "In the light of the principles contained in its *Jalloh* judgment, and in order to determine whether the essence of the applicants' right to remain silent and privilege against self-incrimination was infringed, the Court will focus on {1} the nature and degree of compulsion used to obtain the evidence, {2} the existence of any relevant safeguards in the procedure, and {3} the use to which any material so obtained was put. "
>
> (Numbering added.)

R v S(F) [2008] EWCA Crim 2177; [2009] 1 WLR 1489, was a decision in the terrorism context relating to statutory notices compelling disclosure of (computer) encryption keys. Lord Judge CJ, at [25], put the matter straightforwardly: was the interference with the privilege "proportionate and permissible"?

125. *(3) Engagement of Art. 6?:* Having regard to Lord Hope's observations in *Ambrose v Harris (supra)*, albeit (strictly speaking) directed to a different point, we approach the question of whether Art. 6 was engaged at all as a matter of substance rather than form. Having done so, at least on the facts of this case – we need not and do not go any wider - we are persuaded that the Schedule 7 examination of the Appellant did not engage Art. 6. The logic or rationale underlying the engagement of Art. 6 before an individual is formally charged is that statements, silence, acts or omissions at a preliminary stage may have importance in subsequent contemplated criminal proceedings. Conversely, concerns as to the privilege against self-incrimination are inapplicable where the compulsory powers in question are exercised other than as part of a pre-trial stage in criminal proceedings destined to culminate in a subsequent criminal trial. As in *McVeigh (supra)*, we do not think that there was here any "sufficiently firm suspicion or intention to institute criminal proceedings" for the examination of the Appellant to engage her Art. 6 rights. Our reasons follow.

126. At the outset, we make it plain that we do not downplay the seriousness of the situation faced by the Appellant. The context related to terrorism. As set out in the Case (*supra*), she was stopped and told that the police needed to speak to her to establish "if she may be a person concerned in the commission, preparation or instigation of acts of terrorism". There is no basis whatever for doubting that this was the purpose of the stop and the examination and, indeed, it is only on such a footing

that the Schedule 7 powers could properly be invoked (see the discussion above). The police were involved; the Appellant was "stopped" (to put the matter neutrally) for some two hours overall; she was served with a TACT 1 Notice. As previously observed, given the Appellant's background and circumstances, the inference must be that this was a targeted stop.

127. All that said, on the facts in the Case, it is incontrovertible that the Appellant was not under suspicion of being a terrorist and was told so. Likewise, it is beyond dispute that the Appellant was not arrested. Those facts preclude the conclusion that the Appellant ever became a suspect and thus address Lord Hope's observations in *Ambrose v Harris (supra)* in that regard.

128. It seems clear that the examination was not carried out for the purpose of obtaining admissions or evidence for use in criminal proceedings, though we cannot of course exclude the possibility that the answers might have yielded information potentially of evidential value. On the authorities, however, that possibility does not of itself suffice to result in the engagement of Art. 6: see, *Saunders, Green* and *Allen* (all *supra*). We are unable to accept Mr. Ryder's submission, advanced in argument, that those authorities are distinguishable as relating to subject-matter that was of a different and less serious nature. The individuals in *Saunders* and *Allen* faced an underlying risk of substantial terms of imprisonment. The maximum term of imprisonment in *Green* for non-compliance (two years) was itself significantly longer than the maximum penalty under para. 18(2)(a) of Schedule 7 (three months). At most the difference in gravity by reason of the difference between concerns as to terrorism and the subject-matter of these other authorities is a difference of degree rather than kind and insufficient to make out a good ground of distinction.

129. Overall, as a matter of reality, the examination of the Appellant under Schedule 7 was not an inquiry preparatory to criminal proceedings. This examination was in no sense part of the scheme under PACE. It was instead an inquiry relating to border control with the specific public interest of safeguarding society from the risk of terrorism. The purpose of the exercise of these Schedule 7 powers of examination is separate and distinct from that relating to the instigation of criminal proceedings. Moreover, this view does not in any way depend on what in fact happened; it is founded instead on what was always envisaged. We reiterate that this is a conclusion of substance not form.

130. In our judgment, this conclusion is firmly supported by both domestic and Strasbourg jurisprudence. Apart from *McVeigh (supra)*, already highlighted, we rely on the clear distinction drawn in *Saunders (supra)* and *Green (supra)* between extrajudicial inquiries themselves and the use of the material thereby obtained in a subsequent criminal prosecution.

131. We return, finally, to *Saunders*. The applicant there successfully complained that his Art. 6 rights were violated and that he was denied a fair hearing because of the use at his criminal trial of statements obtained from him by Department of Trade and Industry ("DTI") Inspectors in the exercise of their statutory powers of compulsion. Crucially, however, for present purposes, the *ratio* for that decision lay in the use made by the prosecution at the criminal trial of the material thus obtained by the Inspectors. The Court, in terms (at [67]), disclaimed the notion that Art. 6.1 was applicable to the proceedings conducted by the Inspectors. While it is fair to underline

that it had not been suggested in the pleadings in *Saunders* that Art. 6.1 was so applicable, the Strasbourg Court was emphatic in its conclusion (*loc cit*):

> " …a requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in Article 6(1) would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities."

132. In our judgment, those observations in *Saunders* are, *mutatis mutandis*, applicable here; if anything, they apply *a fortiori* to the present case. Not only is there a most powerful public interest in guarding against terrorism but there is also the clear separation between an examination under Schedule 7 relating to border control and the PACE scheme for the questioning and detention of suspects.

133. Accordingly, we conclude that the Appellant's Art. 6 rights were not engaged by the Schedule 7 examination. This conclusion is itself fatal to the Appellant's appeal under Art. 6; if her rights under Art. 6 were not engaged they could not have been violated. It follows that the Appellant's appeal under Art. 6 must be dismissed.

134. *(4) Violation of Art. 6 rights?* Nonetheless, we do not leave matters there and go on to consider, *de bene esse*, whether the Appellant's rights under Art. 6 were violated – on the assumption, contrary to our primary view, that those rights were engaged.

135. Starting with the first limb of the *O'Halloran* test (*supra*), it must be acknowledged that there was here a serious degree of compulsion. The Appellant was stopped and examined under threat of a criminal sanction (including imprisonment) if she failed to answer. Having regard to the Appellant's FOM rights and notwithstanding the observations in *Gillan (Strasbourg)* at [64], concerns as to compulsion are not or not significantly allayed by the fact that the Appellant was only subject to the examination because she had chosen to travel and hence enter the location in question.

136. We turn next to the second limb of the *O'Halloran* test, namely the question of "any relevant safeguards in the procedure". We accept that there are in-built safeguards, comprising or including the explanation given to the Appellant by way of the TACT 1 form and the ability to consult her solicitor over the telephone. A telephone consultation with a solicitor cannot, however, be regarded as the equivalent of the presence of a solicitor during the examination - although it is fair to acknowledge that given the compulsion to answer the questions put, the role of a solicitor is necessarily more limited than would be the case when a suspect was questioned under PACE: see, *CC v The Commissioner of Police of the Metropolis* [2011] EWHC 3316 (Admin), at [39].

137. It is not, however, these safeguards, welcome though they are, which go to the heart of the issue. The real question concerns the likelihood that admissions obtained by way of a Schedule 7 examination could be adduced in evidence in criminal proceedings. This question leads at once to a consideration of s.78 (1) of PACE, which provides as follows:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears

> to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

138. It is common ground that there is (currently) no specific statutory bar precluding the introduction in evidence in subsequent criminal proceedings of admissions obtained pursuant to a Schedule 7 examination. But, in our judgment, it is fanciful to suppose that permission would be granted in criminal proceedings for such admissions to be adduced in evidence.

    i) First, we incline very strongly to the view that – even apart from Art. 6 – admissions obtained pursuant to a Schedule 7 examination would fall foul of the s.78 discretion properly exercised: see, for instance, *S(F) (supra)*, at [22]. The Appellant was not cautioned; the questioning took place under compulsion; no legal representative was present.

    ii) Secondly, any doubts in this regard are put to rest by the requirement that the Court exercising its discretion under s.78 must do so compatibly with Art. 6. As it seems to us, if it be assumed that Art. 6 is engaged, a Schedule 7 examination would violate the privilege against self-incrimination, for reasons already apparent.

    iii) Thirdly, we are fortified in this view by the observations of the Independent Reviewer in the 2012 Report. Thus, at para. 9.44 (noted earlier), the Independent Reviewer said that because of the element of compulsion, answers given in a Schedule 7 interview would "almost certainly be inadmissible in any criminal trial". At para. 9.64(b), the Independent Reviewer reiterated that it was "practically inconceivable that anything said in interview would be admissible as evidence in a criminal trial".

139. On this footing, we are satisfied that the safeguard provided by s.78 is sufficient to prevent a violation of the Appellant's Art. 6 rights.

140. Mr. Ryder sought to resist this conclusion by reference to *Saunders (supra)* and *Shannon (supra)*, submitting that the safeguard furnished by s.78 was insufficient to prevent a violation of the Appellant's Art. 6 rights. We are not persuaded that these authorities advance Mr. Ryder's submissions in the present case. In *Saunders*, the vice was that the relevant statutory provision (as it then stood) precluded the exercise of the s.78 discretion to exclude the evidence merely on the ground that it had been obtained under compulsion: see, *Green (supra)*, at p.380. *Saunders* is thus a very different case. *Shannon* too is distinguishable and plainly so. There, the applicant had been required to answer questions in connection with events in respect of which he had already been charged with criminal offences.

141. It remains to mention one further aspect of s.78(1) of PACE: namely, that it only applies when the *prosecution* seeks to adduce evidence, not when a defendant or co-defendant seeks to do so. Mr. Ryder sought to capitalise on this feature, submitting that, if a co-defendant sought to adduce in evidence admissions made in a Schedule 7 interview, the Judge would have no discretion to exclude them. Furthermore, Mr.

Ryder emphasised the reluctance of Mr. Mably, on instructions, when the matter was probed by the Court, to give a blanket undertaking that the CPS would never seek to adduce Schedule 7 material in evidence in subsequent criminal proceedings. Upon reflection, there is, however, less to this than meets the eye.

i) First, we regard the reluctance of the CPS to give a blanket undertaking as understandable given the absence of a specific statutory bar. "Never" is perhaps a word best avoided. The reality, however, is better illustrated by other answers given by Mr. Mably, noted earlier.

ii) Secondly, on instructions, Mr. Mably informed us that so far as could be ascertained, the CPS had only once, over the long history of these provisions and their predecessors, adduced Schedule 7 material in evidence. On that occasion it had done so at the request of the defendant. Plainly, where material is introduced as evidence at the request of the defendant, the safeguard otherwise provided by s.78 is not weakened.

iii) Thirdly, neither Mr. Mably nor (again on instructions) the CPS could postulate a hypothetical example where Schedule 7 admissions could be adduced in evidence despite the s.78 discretion. We have no reason to doubt this answer which we found telling.

iv) Fourthly, we have not overlooked the position of a co-defendant, who, we accept, would not be precluded by s.78 from seeking the introduction of Schedule 7 admissions as part (for example) of a cut-throat defence in a joint trial. To begin with, this seems to us a somewhat remote risk. Should, however, a realistic risk of this nature arise, there is a simple answer: the Court has ample power to order separate trials, absent any other means of avoiding prejudice to a defendant. That the solution of separate trials may be less than ideal is neither here nor there. It is illustrative of the reality that s.78 is sufficient to guard against the violation of a defendant's Art. 6 rights in the generality of situations arising from Schedule 7 interviews and, to the extent that there are risks outside its scope, the Court has ample powers to protect a defendant from prejudice.

142. In the light of the safeguards already discussed, we do not think that the third limb of the *O'Halloran* test (as to the use to which the material is put) advances the argument either way; we therefore say no more of it.

143. For the reasons given, we therefore conclude that, even if engaged, the Appellant's Art. 6 rights were not violated by the Schedule 7 powers of examination. Essentially, analysed in terms of the *O'Halloran* test, the safeguard furnished by s.78, PACE is sufficient. Likewise and against this background, the interference with the privilege flowing from the Schedule 7 powers is "proportionate and permissible", to apply the language of Lord Judge in *S(F) (supra)*. There is a most important public interest in combating terrorism and there are adequate safeguards protecting a defendant from prejudice in any subsequent criminal trial.

144. *(5) Conclusion:* It follows that on this ground too (if it arises) we dismiss the Appellant's appeal under Art. 6. Accordingly, the Appellant's appeal must be dismissed.

145. In the light of our conclusions on the principal Issues, there has been no need to re-list the matter so that Mr. Nicholls QC (for the SSHD) could be heard.

146. Before parting from this chapter of the case, we add this. It is one thing to conclude that the Schedule 7 powers of examination neither engage nor violate a defendant's Art. 6 rights; it is another to conclude that there is no room for improvement. For our part, we would urge those concerned to consider a legislative amendment, introducing a statutory bar to the introduction of Schedule 7 admissions in a subsequent criminal trial. The terms of any such legislation would require careful reflection, having regard to the legitimate interests of all parties but, given the sensitivities to which the Schedule 7 powers give rise, there would be at least apparent attraction in clarifying legislation putting the matter beyond doubt.

POSTSCRIPT

147. For the reasons given, we have concluded that the Schedule 7 powers of examination survive the challenges advanced before us. In short, the balance struck between individual rights and the public interest in protection against terrorism does not violate the fundamental human rights in question. As already touched upon in the context of Art. 6, it does not follow that there is no room for improvement.

148. Against this background, we are fortified by the 2013 Report of the Independent Reviewer ("the 2013 Report"), published subsequent to the hearing. In broad outline, first, the Independent Reviewer has highlighted a number of welcome signs as to the improved operation of those powers. Secondly, he has helpfully summarised a number of recommendations made by Government in its Response to the Public Consultation, for which Mr. Anderson had himself pressed ("the Response"), aimed at further improving the operation of Schedule 7; these recommendations are now contained in the Anti-Social Behaviour, Crime and Policing Bill, introduced in May 2013 ("the ASBCP Bill"). Thirdly, the Independent Reviewer reiterated his views as to the utility of the Schedule 7 powers of examination.

149. By way of the briefest elaboration, as to welcome signs of improved operation, the Independent Reviewer has drawn attention (at paras. 10.8 and following) to the reduction in the numbers of people examined under Schedule 7; the 2012/13 total was 12% down on the previous year and 30% down on 2009/10. Further and as to ethnicity, the figures lent (para. 10.16) "no support to the idea that persons of Asian appearance are more likely to be stopped under Schedule 7 than they are to be stopped under a suspicion-based power, arrested on suspicion of committing a terrorist offence or charged with terrorism." While this remained a "very sensitive subject" (para. 10.17), police were "entitled and ….required to exercise their Schedule 7 power in a manner aligned to the terrorist threat."

150. As to Government's recommendations in the Response, now contained in the ASBCP Bill, these are helpfully summarised in the 2013 Report, at paras. 10.42 and following. Though not matters for us, such refinements to the operation of the Schedule 7 powers are to be welcomed – and, from the observations in the 2013 Report, we understand the Independent Reviewer to be of a like mind.

151. Finally, although the Independent Reviewer has drawn attention to the increase in litigation concerning the Schedule 7 powers, he has reiterated the utility of these

powers as an "essential tool" in the fight against terrorism: see, for instance, paras. 10.35 and 10.63. At para. 10.91, the 2013 Report says this:

> " The power remains of unquestioned utility; and as I have recorded in previous years, examinations are for the most part exercised with good humour, good judgment and restraint. The decreasing use of Schedule 7 in recent years contrasts markedly with the explosion in the use of section 44 during the second half of the last decade. Senior ports officers are well aware not only of the value of the power, but of the fact that like all valuable things, it needs careful handling."