



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law 226

February 2019

Beghal v. the United Kingdom - 4755/16

Judgment 28.2.2019 [Section I]

Article 8

Article 8-1

Respect for private life

Power of border control officials to stop and question without suspicion or access to lawyer: *violation*

Facts – The applicant, a French national, was ordinarily resident in the United Kingdom. Her husband, also a French national, was in custody in France in relation to terrorist offences. Following a visit to her husband, the applicant was stopped at East Midlands airport and questioned under Schedule 7 to the Terrorism Act 2000. She and her luggage were searched. The applicant refused to answer most of the questions put to her. The applicant was subsequently charged with, among other things, wilfully failing to comply with a duty under Schedule 7.

Schedule 7 empowered police, immigration officers and designated customs officers to stop, examine and search passengers at ports, airports and international rail terminals. Questioning had to be for the purpose of determining whether the person appeared to be concerned or to have been concerned in the commission, preparation or instigation of acts of terrorism. No prior authorisation was required and the power to stop and question could be exercised without suspicion of involvement in terrorism.

Law – Article 8: The principal question was whether the safeguards provided by domestic law sufficiently curtailed the powers under Schedule 7 so as to offer the applicant adequate protection against arbitrary interference with her right to respect for her private life.

(a) *The geographic and temporal scope of the powers* – Schedule 7 powers were wide in scope, having permanent application at all ports and border controls. That did not, in itself, run contrary to the principle of legality. Ports and border controls would inevitably provide a crucial focal point for detecting and preventing the movement of terrorists and/or foiling terrorist attacks. Indeed, all States operated systems of immigration and customs control at their ports and borders, and while those controls were different in nature to the Schedule 7 powers, it was nevertheless the case that all persons crossing international borders could expect to be subject to a certain level of scrutiny.

(b) *The discretion afforded to the authorities in deciding if and when to exercise the powers* – Examining officers enjoyed a very broad discretion, since “terrorism” was widely defined and the Schedule 7 powers could be exercised whether or not he or she had objective or subjective grounds for suspicion. A requirement of reasonable suspicion was an important consideration in assessing the lawfulness of a power to stop and question or search a person; however, there was nothing to suggest that the existence

of reasonable suspicion was, in itself, necessary to avoid arbitrariness. Rather, that was an assessment to be made having regard to the operation of the scheme as a whole and the absence of a requirement of reasonable suspicion by itself did not render the exercise of the power in the applicant's case unlawful.

There was clear evidence that the Schedule 7 powers had been of real value in protecting national security. Were "reasonable suspicion" to be required, terrorists could avoid the deterrent threat of Schedule 7 by using people who had not previously attracted the attention of the police; and the mere fact of a stop could alert a person to the existence of surveillance.

It was important to distinguish between the two distinct Schedule 7 powers, being the power to question and search a person; and the power to detain a person. As the applicant had not been formally detained, the Court's examination was limited to the lawfulness of the power to question and search. It was relevant that the Schedule 7 power – and in particular the power to question and search – was a preliminary power of inquiry expressly provided in order to assist officers stationed at ports and borders to make counterterrorism inquiries of any person entering or leaving the country. While there was no requirement of "reasonable suspicion", guidance was nevertheless provided to examining officers. The decision to exercise Schedule 7 powers had to be based on the threat posed by the various active terrorist groups and be based on a number of other considerations, such as, for example, known or suspected sources of terrorism and possible current, emerging and future terrorist activity.

(c) *Any curtailment on the interference occasioned by the exercise of the powers* – At the time the applicant had been examined, Schedule 7 had provided that a person detained under that power had to be released not later than the end of a period of nine hours from the beginning of the examination. At the beginning of the examination, the examining officer had to explain to the person concerned either verbally or in writing that he or she was being examined under Schedule 7 and that officers had the power to detain him or her should he or she refuse to co-operate and insist on leaving. A record had to be kept of the examination; at the port, if the examination lasted less than one hour, or centrally, if it lasted longer. However, despite the fact that persons being examined were compelled to answer the questions asked, neither the Terrorism Act nor the Code of Practice in force at the relevant time made any provision for a person being examined (who was not detained) to have a solicitor in attendance. Consequently, persons could be subjected to examination for up to nine hours, without any requirement of reasonable suspicion, without being formally detained, and without having access to a lawyer.

(d) *The possibility of judicial review of the exercise of the powers* – While it was possible to seek judicial review of the exercise of the Schedule 7 powers, it appeared from domestic cases that the absence of any obligation on the part of the examining officer to show "reasonable suspicion" had made it difficult for people to have the lawfulness of the decision to exercise the power judicially reviewed.

(e) *Any independent oversight of the use of the powers* – The use of the powers was subject to independent oversight by the Independent Reviewer of Terrorism Legislation. The significance of the role lay in its complete independence from government, coupled with access based on a very high degree of clearance to secret and sensitive national security information and personnel. Nevertheless, his reviews were invariably *ad hoc* and insofar as he was able to review a selection of examination records, he would not be in a position to assess the lawfulness of the purpose for the stop. Moreover, while his reports had been scrutinised at the highest level, a number of important recommendations had not been implemented. In particular, the Independent Reviewer had repeatedly called for the introduction of a suspicion requirement for the exercise of certain Schedule 7 powers, including the power to detain and to download the contents of a phone or

laptop; and criticised the fact that answers given under compulsion were not expressly rendered inadmissible in criminal proceedings. Therefore, while of considerable value, the oversight of the Independent Reviewer was not capable of compensating for the otherwise insufficient safeguards applicable to the operation of the Schedule 7 regime.

(f) *Conclusion* – At the time the applicant had been stopped, the power to examine persons under Schedule 7 had been neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. While the absence of any requirement of “reasonable suspicion” alone was not fatal to the lawfulness of the regime, when considered together with the fact that the examination could continue for up to nine hours, during which time the person would be compelled to answer questions without any right to have a lawyer present, and the possibility of judicially reviewing the exercise of the power was limited, the Schedule 7 powers were not “in accordance with the law”.

The Court did not consider the amendments which flowed from the Anti-Social Behaviour, Crime and Policing Act 2014 and the updated Code of Practice; nor did it consider the power to detain under Schedule 7, which had the potential to result in a much more significant interference with a person’s rights under the Convention.

Conclusion: violation (unanimously).

Article 41: finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

(See also *Gillan and Quinton v. the United Kingdom*, 4158/05, 12 January 2010, [Information Note 126](#))

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