



22 July 2015

PRESS SUMMARY

Beghal (Appellant) v Director of Public Prosecutions (Respondent) [2015] UKSC 49 on appeal from [2013] EWHC 2573 (Admin)

JUSTICES: Lord Neuberger (President), Lord Kerr, Lord Dyson, Lord Hughes and Lord Hodge

BACKGROUND TO THE APPEAL

On 4 January 2011, Mrs Sylvie Beghal passed through East Midlands Airport with her three children on returning from visiting her husband in Paris, a French national in custody on terrorist offences. She was stopped by police and, although not formally detained, arrested or suspected of being a terrorist, was told they needed to speak to her to establish whether she was involved in terrorist acts.

The police did this exercising the power under Paragraph 2 of Schedule 7 of the Terrorism Act 2000, which deals with questioning individuals at ports or borders “*for the purpose of determining whether he appears to be [or to have been concerned in the commission, preparation or instigation of acts of terrorism]*”. No reasonable suspicion of a past or future offence is needed. Under other provisions of Schedule 7, officers may also: require the production of documents carried; copy and retain material; and, search and detain (currently for a maximum of 6 hours) individuals. By way of sanction, Paragraph 18 of Schedule 7 of the Terrorism Act 2000 makes it a criminal offence, on pain of fine and/or imprisonment, wilfully to fail to comply with such requirements. A Code of Practice exists for officers exercising these powers.

Mrs Beghal sent her two eldest children to the arrivals gate, asked for a lawyer (with whom she spoke on the phone) and requested – and was granted – an opportunity to pray. She was searched and in the absence of the lawyer was asked, amongst other questions, about her relationship with her husband, her reasons for travel, where she had stayed and whether she had travelled beyond France. She refused to answer most of the questions and was charged with the offence of wilful failure to comply with the requirement to answer questions. The questions and reporting her for failure to answer them lasted under half an hour. She later pleaded guilty to this offence and her sentence was a conditional discharge.

Mrs Beghal brought proceedings arguing that the Schedule 7 powers breached her Article 5 (right to liberty), Article 6 (privilege against self-incrimination) and Article 8 (right to respect for private and family life) rights under the European Convention on Human Rights (“ECHR”). The Divisional Court dismissed her claims.

JUDGMENT

The Supreme Court dismisses the appeal by a majority of 4-1 (Lord Kerr dissenting). Lord Hughes delivers the lead judgment. Lord Neuberger and Lord Dyson give a joint concurring opinion.

REASONS FOR THE JUDGMENT

Powers of questioning and search and inspecting, copying and retaining data on electronic devices - Article 8 ECHR

Questioning and search under compulsion undoubtedly constitutes an interference with Article 8(1) ECHR [28]. As to justification under Article 8(2) ECHR, it is “in accordance with the law” as there are sufficient safeguards and controls against overbroad and arbitrary use of this power [45]. These include, for example, the restrictions on the location, duration and type of questioning and search, the requirement to permit consultation with a solicitor, the availability of judicial review and the supervision

of the Independent Reviewer of terrorism legislation [43]. The fact that questioning does not require objective grounds for suspicion does not by itself mean that the safeguards are inadequate [44].

The power is also proportionate: (i) questioning and search at ports is rationally connected to the proper objective of Schedule 7, which is preventing and detecting terrorism [47]; (ii) to require reasonable suspicion before using the power would not achieve anything like the same utility in fighting the threat of terrorism [49]; and, (iii) it also represents a fair balance between the rights of individuals and the interests of community at large; the level of intrusion is comparatively light and not beyond the reasonable expectations of international travellers and the importance of preventing and detecting acts of terrorism can scarcely be overstated [48, 51]. There is also no substantial risk of these powers being used on a racially discriminatory basis. The statistics show that the exercise of Schedule 7 powers is proportionate to the terrorist population, considering the sources of the terrorist threat, that travels through UK ports [50].

Retaining electronic data is a considerable intrusion into the private life of an individual [57]. It may well be that retention longer than an initial inspection for a reasonable period can only be justified if there exist objectively established grounds for suspicion [58]. This power, however, was not used in the case of Mrs Beghal.

Power to detain - Article 5 ECHR

The power to detain for six hours falls within Article 5(1)(b) ECHR and involves a greater level of intrusion than questioning and search [52]. Nonetheless, restricting an individual's movement in order to exercise the questioning and search power, and for no more than is necessary, will either not be a deprivation of liberty or will be justified [54]. The better view is that detention beyond what is necessary to complete the process of questioning and search – for example, for six hours – can only be justified by objectively demonstrated suspicion [55]. However, in this case any deprivation of Mrs Beghal's liberty was for no longer than was necessary for the completion of the process [56].

Privilege against self-incrimination - Article 6 ECHR

Schedule 7 excludes privilege against self-incrimination as it is by necessary inference abrogated by the words of the statute [64]. Moreover, the risk of prosecution based on answers to Schedule 7 is not a real and appreciable one; in practice section 78 of the Police and Criminal Evidence Act 1984 ("PACE") would inevitably render such evidence inadmissible. Article 6 ECHR would also compel the same result [65-66]. As port questioning and search is not part of a criminal investigation, the individual is not a person charged for the purposes of Article 6 ECHR so that Article 6 ECHR has no application [69].

Lord Kerr (dissenting) would find that the Schedule 7 powers are incompatible with Articles 5, 6 and 8 ECHR: (i) they are not "in accordance with the law". The potential for arbitrary or discriminatory exercise of the powers is apparent from the Code of Practice [103-104]. Moreover, a crucial element of this requirement is to make it possible to examine whether the powers have been used proportionately. Where the Schedule 7 powers can be exercised without any suspicion whatsoever there is simply no material to judge whether they are being used proportionately [106]; (ii) the powers are greater than necessary to accomplish the aims; there is no evidence that such suspicion-less powers are the only way to achieve the goal of combatting terrorism and no reasoned justification has been given for granting examining officers such powers [122, 124]; (iii) a proper balance has not been struck between the rights of the individual and the interests of the community [126-127]. Lord Kerr further finds that the requirement to answer questions breaches an individual's common law privilege against self-incrimination and is incompatible with Article 6 ECHR. There is, inescapably, a real and appreciable risk of prosecution if answers to the questions posed prove to be self-incriminating [115].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.uk/decided-cases/index.html